

MATERIALS ON PROFESSIONAL RESPONSIBILITY

**DEAN SUNI
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INTRODUCTION

These materials are for use in the course on Professional Responsibility. This section is an introduction both to these materials and to the course.

The goals of the course are four-fold:

1. To introduce you to professional responsibility issues and to assist you in recognizing such issues in situations lawyers face in practice,
2. To provide the tools necessary to resolve these issues, which include both knowledge of existing standards and an understanding of the underlying policies and concerns,
3. To assist you in developing your own personal sense of identity and role as an attorney, so that you can resolve "ethical" dilemmas and critically evaluate the standards which have been adopted by the profession, and
4. To prepare you to successfully complete the Multistate Professional Responsibility Exam (MPRE).

The first two goals are similar to the goals in any substantive law school course. Accordingly, parts of this course and these materials will resemble any other course you have taken. But the third goal is somewhat different, because, unlike other courses where you learn material and skills to assist clients in the pursuit of their goals, in this course you must deal with your own goals apart from the client's needs or wishes. It is this difference that causes many students to approach this course with skepticism, assuming that such goals are personal and "ethics" can't be taught. But there is a difference between one's own personal sense of ethics and morality and the professional responsibilities of an attorney. The first chapter focuses on that difference, and what it means for us as attorneys.

The remainder of these materials address issues of professional conduct and regulation. The course focuses on the Model Rules of Professional Conduct to ensure that students have learned the relevant law by the time they have completed the course. A knowledge of these rules alone, however, is not enough. Throughout the course we will discuss how decisions about identity and role, coupled with suggested responses from the Rules and other relevant sources, can lead to resolution of professional responsibility problems that will not only avoid discipline but will also be acceptable to us as individuals and as attorneys. This is a major undertaking, but one of extreme importance.

LEARNING OBJECTIVES

The following, borrowed with minor changes from Professor Glesner Fines, is a good statement of learning objectives for the course:

At the end of the course, students should:

1. Master the law governing lawyers. You should understand the relationship between bar-generated disciplinary codes and other sources of law, such as cases, statutes and regulations. You should be able to identify the core issues and governing law in any troublesome situation and be able analyze complex professional responsibility problems in the core areas of concern for attorneys:

➤ the four C's of the attorney-client relationship
Competence, **C**ommunication, **C**onfidentiality, and **C**onflict-free representation

➤ the three C's of the attorney-court relationship
Candor, **C**ompliance, and **C**ivility

➤ the FAIR rule for the attorney's relationship with everyone else in society
Fairness, **A**ccess, **I**ntegrity, **R**esponsibility

Finally, you should be able to recognize the tensions among these concepts, which are inherent in the regulation of attorneys.

2. Be able to learn more. You will have the skills to research issues of professional responsibility and be aware of sources for additional help.

3. Have a clearer vision of your own professional identity and your stance on critical questions of professional role.

4. Be able to avoid getting yourself, your fellow attorneys, and your clients into trouble, by having learned some practical strategies for avoiding common professional pitfalls.

5. Have the information and skills to pass the MPRE with appropriate preparation.

CHAPTER I
THE LAWYER AS PROFESSIONAL:
CONFLICTING OBLIGATIONS, CONFUSING ROLES

I. THE ROLE OF LAWYER: WHO ARE WE? WHO AM I?

Before reading the following materials, think briefly about why you chose to become a lawyer. What do you want from your professional career? What are your goals and expectations? Then think about what is expected of you. To whom do you have obligations, and what are they? Are all these obligations consistent, or do they conflict? As an attorney, what role do you play vis-a-vis your clients, the courts and the "system"? How will you and your role be perceived by non-lawyers, and are you prepared to deal with that image? Will being a lawyer impact your ability to be the person you want to be?

Consider the following excerpt from Monroe H. Freedman, *Lawyer and Client: Personal Responsibility In a Professional System* (in *Ethics and Advocacy, Final Report of the Earl Warren Conference*, The Roscoe Pound-American Trial Lawyers Foundation [1978], © Roscoe Pound Foundation, reprinted with permission) :

It is a singularly good thing, I think, that law students, and even some lawyers and law professors, are questioning with increasing frequency and intensity whether "professionalism" is incompatible with human decency - asking, that is, whether one can be a good lawyer and a good person at the same time.

Why should this be an issue? What is it about lawyering that might be inconsistent with being a "good" person? What is a good person? What is a good lawyer? These are complicated but important questions.

In his article, Freedman discusses an article by Professor Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, and continues:

Professor Wasserstrom holds that the core of the problem [as to whether one can be a good person and a good lawyer] is professionalism and its concomitant, role-differentiated behavior. Role differentiation refers, in this context, to situations in which one's moral response will vary depending upon whether one is acting in a personal capacity or in a professional, representative one. As Wasserstrom says, the "nature of role-differentiated behavior ... often makes it both appropriate and desirable for the person in a particular role to put to one side considerations of various sorts - and especially various moral considerations - that would otherwise be relevant if not decisive."

An illustration of the "morally relevant considerations" that Wasserstrom has in mind is the case of a client who desires to make a will disinheriting her children because they opposed the war in Vietnam. [This article was written in the 70's. Substitute whatever conflict works best for you.] Professor Wasserstrom suggests that the lawyer should refuse to draft the will because the client's reason is a "bad" one. But is the lawyer's paternalism toward the client preferable - morally or otherwise - to the client's paternalism toward her children?

We might all be better served," says Wasserstrom, "if lawyers were to see themselves less as subject to role-differentiated behavior and more as subject to the demands of *the* moral point of view." Is it really that simple? What, for example, of the lawyer whose moral judgment is that disobedient and unpatriotic children should be disinherited? Should that lawyer refuse to draft a will leaving bequests to children who opposed the war in Vietnam?

If the response is that we would then have a desirable diversity, would it not be better to have that diversity as a reflection of the clients' viewpoints, rather than the lawyers'?

In another illustration, Wasserstrom suggests that a lawyer should refuse to advise a wealthy client of a tax loophole provided by the legislature for only a few wealthy taxpayers. If that case is to be generalized, it seems to mean that the profession can properly regard itself as an oligarchy whose duty is to nullify decisions made by the people's duly elected representatives. That is, if the lawyers believe that particular clients (wealthy or poor) should not have been given certain rights, the lawyers are morally bound to circumvent the legislative process and to forestall the judicial process by the simple device of keeping their clients in ignorance of tempting rights.

Nor is that a caricature of Wasserstrom's position. The role-differentiated amorality of the lawyer is valid, he says, "only if the enormous degree of trust and confidence in the institutions themselves [that is, the legislative and judicial processes] is itself justified." And we are today, he asserts, "certainly entitled to be quite skeptical both of the fairness and of the capacity for self-correction of our larger institutional mechanisms, including the legal system." If that is so, is it not a non sequitur to suggest that we are justified in placing that same trust and confidence in the morality of lawyers, individually or collectively?

There is "something quite seductive," adds Wasserstrom, about being able to turn aside so many ostensibly difficult moral dilemmas with the reply that my job is not to judge my client's cause, but to represent his or her interest.. Surely, however, it is at least as seductive to be able to say, "My moral judgment - or my professional responsibility - requires that I be your master. Therefore, you will conduct yourself as I direct you to."

1. Can a good lawyer be a good person? To what extent can (should) a lawyer put aside his or her own values in representing a client? Should a lawyer decline representation because he or she disagrees with the client? With the client's means? With procedures he or she must use to accomplish either?

Is it OK to be amoral as long as we're not immoral? Is it OK to pursue legal, but in your view immoral, ends of a client? Is there anything wrong in asking people with legal but (arguably) immoral aims to accomplish those aims themselves? Does it (should it) matter that there is likely to be less (or un-) ethical lawyers around to do the client's bidding, and if done by those with a better sense of ethics, at least there is some hope for a better (more just) result?

Are these even appropriate concerns? Should we discuss the morality or "rightness" of goals and means with the client, or are we to address only the legal aspects of a client's affairs? See MR. 2.1.

2. Is there a better way to think about what it means to be a "good lawyer"?

Consider the following:

THE GOOD LAWYER

Kevin F. Ryan, Director of Programs & Publications at the Vermont Bar Association
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Certainly one of the things we would like to imagine ourselves to be is a "good lawyer." But what does it mean to be such a creature? What makes a good lawyer? Surely professional competence constitutes part of the picture - but only a part. One can have all the professional competence in the world and use it for bad ends, use it in a mean-spirited way, or simply be a nasty person while using it. Surely something tells us that such people cannot be "good" lawyers no matter how prodigious their technical talents. So being a good lawyer means something more than simply possessing the requisite skills and knowledge to practice in a particular area of the law.

What is this "something more" that distinguishes the "good" practitioner from the "competent" practitioner? The simple answer, of course, is "ethics." But this apparent simplicity covers enormous complexity. It is not at all clear what one has added to the mix by describing someone as "ethical." For many, an ethical lawyer is simply one who practices within the bounds established by the Rules of Professional Conduct or any similar code. Like many other professions, the practice of law is hedged round by rules of conduct, laid out in officially adopted codes and enforced by professional conduct boards and the courts. But is a lawyer who adheres strictly to a code really anything more than technically competent? Such a lawyer has simply mastered the skills and knowledge required to practice (and continue practicing) in a chosen field of law. Is such a person a "good lawyer"? Not necessarily, for one can stay within the broadly defined and often indistinct boundaries of the Rules without being "good" in the larger sense we are seeking to identify. Narrow-minded, mean-spirited, nasty reprobates can avoid violating disciplinary rules. But we would hesitate to call such persons "good," despite their assiduous rule-following. In other words, following rules bears no necessary relation to being good.

Yet we find it enormously difficult to think of ethics other than in the context of rules specifying right and wrong - and in this we are the products of our age. The great modern ethical thinkers, faced with the observed diversity of views on moral questions, sought to find a solid ground upon which to determine the correct system of morals, or to figure out how to decide what to do in particular circumstances. Theories as diverse (and opposed) as Bentham's utilitarianism and Kant's duty-based ethics sought to establish a methodology for the determination of how to act in particular situations. Centuries of preoccupation with finding the appropriate standards for ethical decision-making have resulted in the common conception that ethics consists of nothing more than finding general principles and applying them to ethical dilemmas.

To frame the subject matter of ethics in this manner is to make it sound very familiar to lawyers. Lawyers are trained - perhaps they are predisposed - to look for general standards to apply to the facts of a particular situation. The study of law involves the mastery of general principles, rules, and the official interpretation of them. It also entails the development of proficiency in the application of those rules to particular situations. Law (including principles and rules, both written and unwritten) establishes the boundaries of behavior. Law tells a person what can and cannot be done, as well as what must be done in order to alter the existing order of things (e.g., contract law, the law of sales, property law). The competent lawyer is the master of these rules (or a specialized subset of them), of their interpretation by the courts, and of their application to the diverse circumstances of modern life.

Given the lawyer's deeply engrained orientation toward the determination of right and wrong by focusing on specific situations and evaluating them using general standards, it is no wonder that when lawyers think of ethics they think of a code of law-like disciplinary rules. The Rules of Professional Conduct (and similar codes in other jurisdictions) share with much of modern ethical thought the assumption that ethical behavior stems from the proper application of general standards to particular circumstances. To a large and discomfiting extent, ethics for lawyers has become what it is for modern ethicists: a matter of general rules and their use to cope with quandaries.

But something has gone wrong here. For one, conduct codes merely set out a "moral baseline," specifying the bare minimum of ethical conduct. To be sure, an attorney who steals a client's funds - or misappropriates those funds to pay for something other than service to the client - is unethical and should lose the privilege of practicing law. But that does not mean that an attorney who avoids stealing or misappropriating client funds is ethical (let alone "good"): such an attorney may be merely wary of the consequences of violating the ethical rules of the profession. Surely ethics cannot be reduced to a "bad man theory" (to adapt a pithy phrase from Justice Holmes). The bad person wants to know what can be gotten away with, and follows the rules only to the extent that their violation will lead to distasteful consequences. The attorney who handles client funds properly because doing otherwise would jeopardize a license seems more bad than good. Adhering to the moral baseline in this manner puts one into a gray area between being unethical (breaking the rules) and being good. Conforming to the bare minimum earns us a passing grade, but hardly makes us excellent.

Further, modern ethical thought, as reflected in professional conduct codes, reduces the realm of ethics to unusual situations in which principles and rules conflict or speak ambiguously. But true predicaments of this sort are rare. A human life involves much more than a series of dilemmas. It involves creating oneself over time; it is a matter of daily living, of how one thinks, speaks, and acts every day. For Socrates the heart of the matter lay in the question "How best is it to live?" The Socratic question suggests a much broader conception of ethics than that found in modern thought. Socrates' question focuses our attention on a whole life rather than a particular moment in life. It asks us to consider how to be, rather than what to do. It prompts us to ponder the conditions of the good life for the human person. Possessing an adequate method for deciding what to do, or even making the right choice, in the occasional quandary does not make a person good. Being good is different from doing right, however the latter is determined.

The Socratic conception of ethics, which is experiencing a renaissance in the academic literature and among thoughtful commentators, pushes us to examine questions of character and the virtues and vices that reveal character.¹ Virtues are character traits that lead us to seek out or admire persons; vices lead us to avoid or disdain persons. Virtues do not occur naturally, but are dispositions to act in certain ways bred by proper training and by exercise. Virtues are habits (as are vices); a person who performs one honest act cannot be said to be honest. The honest person always inclines toward the honest action; one possesses the virtue of honesty if one's whole life reflects an honesty others only manage on rare occasions. But habits are only haphazardly bred by rules, which, as we have seen, establish the minimal requirements of acceptability in exceptional circumstances. Virtues (and vices) inform a whole life in a way that rules never can.

What are the virtues of the good person? Aristotle discussed such traits as bravery, temperance, generosity, magnificence, magnanimity, mildness, friendliness, truthfulness, wit, and justice. Other writers have offered different, often longer lists. But no matter what the contents of the list, the underlying idea is the same: virtues are those characteristics that we esteem; vices are characteristics we scorn.

One of the implications of looking at ethics in this way is that the virtues of the good person and the virtues of the good practitioner are unlikely to conflict. The virtues of the good lawyer may be more detailed, more directed to the specifics of the practice of law, but they are always consistent with the virtues of a good person in general. The good lawyer possesses those virtues of character that we admire in anyone - justice, moderation, honor, and so forth - and lacks those vices that we disdain in others - niggardliness, surliness, selfishness, and so forth. There is no separate morality for lawyers. The ethics of the good practitioner and of the good person are the same. Good lawyers are good persons who practice law.

Do you agree? Are you more comfortable with this formulation? Is it really that simple? Does being a lawyer and having a license to practice give you the right, or perhaps ever require you, to do things "out of character"? Think about circumstances where this might be the case. How do you deal with them? Can you avoid such challenges? If not, how can you (should you) justify them?

Is there intrinsic good in lawyering that justifies actions inconsistent with our normal behavior and character? If so, what is it?

3. Why is there an assault on lawyers? What characteristics, traits, etc. does the public believe about lawyers that causes this? Are they traits that lawyers have as people, or as lawyers? Is there truly no difference? Are these concerns of the public warranted? Can we change them? How?

¹ Popular discussion today often uses the word "character" as a positive trait that some people lack. This seems wrong. We all have a character: some of us a character that, on balance, is good; others, on balance, have a bad character. Perhaps we can even have a weak character. But none of us, at least no adult, is devoid of character. Character develops over time, for it is the product of how we think, speak, and act. It can change, but it is never absent.

4. What are the demands and expectations placed on us as lawyers? Where do they come from? Are they valid? *Make a list of things others want or expect from you as a lawyer (we will further develop this list in class).* How can you respond to these often competing demands in ways that preserve the kind of lawyer and person you want to be? What influences negatively impact on your ability to be the kind of lawyer and person you want to be? How can you respond to these?

5. Has the growth of law as a business undercut the view of lawyers as professionals? Is this desirable? What problems arise from viewing lawyers as business people rather than professionals? What benefits? Is this really an issue of professionalism, and can that be separated fully from the bigger issue of professional identity?

The ABA has been increasingly concerned with these issues, which lie at the core of the future of the Legal Profession. See ABA Commission on Professionalism, *In The Spirit of a Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* (1986). Almost all state bars have created committees or commissions on professionalism, and many groups have adopted "Creeds of Professionalism." One such creed contains thirty-three "credos" aimed at doing away with a "win at any cost" mentality and encouraging fairness in litigation. Another is a twelve statement "pledge of professionalism." Similar tenets of professional courtesy have been adopted by both the Young Lawyers Section of the Missouri Bar and the KCMBA. All of these efforts, however, are only aspirational in nature.

Does the apparent increase in hard-ball tactics and decrease in courtesy and cooperation reflect an increase or a decrease in professionalism? Does it depend on how one defines professionalism? Is courtesy a professional value if it doesn't advance the client's interests? Or is collegiality and trust among lawyers a necessary part of professionalism regardless of the client's interests? Do these apparent changes in behavior on the part of many lawyers reflect changes in the times that are beyond our control as attorneys (and that in fact merely mirror changes in business and personal relationships) or are these matters that the Bar can and should address?

Let's return for a moment to Monroe Freedman, this time in 1991. See Monroe Freedman, *The Lawyer as Professional: The Golden Age of Law That Never Was*, http://www.txethics.org/resources_lawyerprofessional.asp?view=2Freedman. Do you agree with his formulation?

There are obviously no right answers to these difficult questions, but issues of role, identity, professionalism, and acceptance of "the system" will continue to require consideration as we proceed through these materials.

II. PROFESSIONALISM

As we saw in the preceding section, issues of professionalism bear on our sense of who we are as professionals – our personal sense of professional identity. But professionalism is also addressed in the larger context of who we are as a profession.

Although these issues are integrally related, the following article addresses the larger issue.

Rethinking "Professionalism"

Timothy P. Terrell and James H. Wildman, 41 Emory L.J. 403 (1992)

Over the past few years, "professionalism" has been much on the minds of lawyers across the country. It is more than just a topic of conversation, however. "Professionalism" is now the accepted allusion to the Bar's ambitious struggle to reverse a troubling decline in the esteem in which lawyers are held -- not only by the public but also, ironically, by lawyers themselves. Being a lawyer, particularly one engaged in private practice, seems suddenly an embarrassment rather than a source of pride. The Bar's response, unaccustomed as it is to apologizing for its social role, has been predictably defensive and schizophrenic: members are usually reminded by their leaders that, as a group, lawyers really aren't as bad as people seem to think, but they are admonished nevertheless that the profession is threatened by a decline in common decency, attitudes, and standards. Not surprisingly, then, this confused message has led to little progress in reversing whatever negative trends lawyers perceive within the practice.

The legal profession's quandary can be summarized relatively easily: lawyers have sought a cure for a disease before agreeing on its nature, symptoms, and causes. We want to be happy in our professional lives without investigating seriously why many of us are unhappy. We want, in short, to moralize without examining our morals. Explaining this superficiality, however, is more difficult. Perhaps we are afraid of what we will find if we turn over the rock of lawyering and examine what lurks beneath. Or perhaps the problem is not with what we do as lawyers, but with our understanding of "professionalism."

The perspective of this Essay is that the concept of professionalism has become confused and disjointed because it has been diagnosed too hastily. A proper evaluation requires patience. It demands, for example, that we begin with fundamental points like, among others, the contrast between the profession's past and its present, and the changing demands society has placed on the legal system over the last half century. Once we have established a better foundation, the true substance of legal professionalism -- the values that make this nebulous concept worthy of our attention -- becomes much easier to identify. . . .

Part of the problem with the debate about legal professionalism is that the subject is a moving target. Both the legal profession and the law itself have changed dramatically over the past century, suggesting that any attempt to identify a single professional tradition or heritage may be fanciful. But this conclusion is too quick and reflects the kind of cynicism we must avoid. Instead, analyzing the changes in the profession gives us an appropriate and very important historical perspective on the present struggle to define professionalism.

A. The Bar as a "Club"

One lesson that history reveals, not surprisingly, is that some of the cynicism about professionalism is justified. The heritage of Bar associations, like that of all trade organizations, rests initially in self-interest and protectionism rather than any noble spirit of public service. Our medieval predecessors established guilds to control

competition, not to encourage it, and until relatively recently we happily continued that tradition. But before we leap to the conclusion that we should therefore condemn our past, we should realize two things: self-interest can in fact produce public benefits, and our history predicts much of the ambivalence with which we today approach professional ethics and professionalism.

A useful perspective from which to view the growth and popularity of professional associations is that of the economic theory of "clubs." This theory holds that social organizations even this informal do not arise by accident, but because they serve some purpose for their members. It would be a mistake to assume, however, as many do, that those purposes are essentially "negative" -- that is, to control behavior in ways that benefit that group but not the larger community (for example, to stifle competition). To the contrary, social groupings of this kind can in fact originate out of an interest to enhance economic efficiency, not avoid it.

The basic efficiency-enhancing feature that clubs can provide is predictability. In situations of great uncertainty -- where social circumstances are in flux or the nature and quality of a product are not readily apparent -- individuals with similar interests may organize to provide each other with consistent, comprehensible feedback, and to provide outsiders with a standard against which the members of the club might be assessed. The essential function of the group, consequently, is information [T]o serve this information function, club membership must mean something; but to mean something, clubs must in turn be able to exercise serious control over entry into the group and the behavior of their members. The danger here, of course, is that rigor and consistency can devolve into rigidity and stagnation, and the organization can destroy its social usefulness.

Bar associations are excellent examples of all the features economic theory predicts, not only concerning the early structure they exhibited, but also the current challenges they face. Regarding their past, Bar associations exhibited all the classic "negative" features of a closed club:

- * Barriers to entry into the profession were serious. Before the advent of law schools, the only route available was apprenticeship to a current member of the Bar, and there were very few of them. They could in turn exercise idiosyncratic control over those they permitted to work for them [C]riteria could be much more socially and personally detailed, like one's race, class, religion, and so on. Later, once law schools became the principal place of initial legal education, entry was still difficult because of the expense involved

- * Control over the decision to admit new members was tightly held by existing members, so that growth of the organization could be kept small and slow.

- * Competition among members was kept within a very narrow range. Price-fixing, for example, was not only characteristic, it was rigidly enforced. Advertising anything other than club membership was similarly prohibited.

- * Written codes of conduct, on the other hand, were consequently all but unnecessary. Because the members of this club were so similar to each other (virtually all drawn from the same social stratum, often closely interconnected with each other in the community, and so on), they shared very similar personal values concerning ethics and decorum.

The Bar associations of today provide a stark contrast. Indeed, the present struggle over the concept of professionalism is largely a function of the fact that each of these characteristics has not simply changed, it has been reversed:

* The only barriers to entry into the profession are the educational requirements imposed by law schools. An applicant's racial or other social background plays no serious role, and economic background is not nearly as relevant as it once was because of financial aid and low tuitions at state-funded institutions. Competition among law schools has even lowered the educational prerequisites to remarkably low levels.

* Control over admission to the Bar is still held by the Bar itself, but those making the decisions are a relatively small group faced with assessing a very large pool of applicants. Criteria are therefore non-personal and relatively objective: graduating from an accredited law school and passing a local Bar examination. Neither of these criteria, as it turns out, are particularly difficult to meet, and few applicants are therefore excluded because of them. The profession has consequently grown very rapidly.

* Anti-competitive controls, such as those on fees and advertising, are out, and competition is fully in. Legal services are therefore no longer a luxury available only to a small segment of society; such services are now widely available, and at competitively varying cost.

* Lack of limitation on entry has meant that the Bar has grown not only in number but in the diversity of its membership on every dimension: race, religion, gender, and (of specific interest here) sets of moral values. What was once understood or assumed concerning appropriate behavior no longer pertains generally. Instead, the standards that supposedly characterize the practice of law are vague, lack serious moral force, and are constantly being challenged or rethought.

Over the last half century, then, we have witnessed the fundamental transformation not only of the Bar, but concomitantly of the information conveyed by the simple fact of Bar membership. Where membership once signaled a host of impressions or expectations about the lawyer's personality, social background, fees, tasks that would be accepted, and so on, it now indicates much less. In other words, what was once akin to a priesthood may now be little more than a fan club. The question before us now, therefore, is whether this change is significant in any way. Specifically, has it had an impact on the practice of law or the concept of legal professionalism? It has, on both.

B. Five Consequences of the Breakdown of the "Club"

The transformation of the Bar from a close-knit community of colleagues to a large, diverse, competitive service industry has generated five important consequences for the practice of law.

1. Moral Diversity, Codes of Ethics, and Professionalism

In moving from moral clubbishness to moral diversity, Bar membership could have become virtually meaningless. If no particular set of values could be ascribed to lawyers -- indeed, if the public could no longer ascribe any values at all to a lawyer that might limit or channel her conduct -- then being a member of the Bar would say

very little of any significance to anyone. Neither lawyers nor non-lawyers would be able to predict the kind of interaction they would have with each other in professional contexts. This sad state of affairs would then be economically inefficient: without information, everyone would waste much of their time and energy protecting themselves from the unscrupulous, and trying to determine whom they could trust.

This extreme result has been avoided, however, by introduction of the Bar's self-generated and self-imposed codes of "professional ethics." The unique function of these sets of standards is to restore to Bar membership some basic but quite useful "moral information." In other words, despite the Bar's moral diversity and economic competitiveness, the codes announce a purported set of common values held by all Bar members. This in turn produces some level of predictability in one's interactions with lawyers: the public and other lawyers can now expect lawyers to do or not do some things in certain circumstances.

But those things and circumstances remain vague and limited. The rhetoric of these codes is often lofty, but they in fact enforce only minimum standards of behavior: sanctions are imposed only for the most egregious forms of misconduct. Thus, the "moral information" provided by the fact of Bar membership is really very small; indeed, so small as to form the irony underlying all the lawyer jokes currently so popular.

This, then, is where "professionalism" is supposed to enter the picture. Its function is to reach beyond the basic and uninspiring values enforced by the codes, and demonstrate that lawyers share, or ought to share, higher, more ambitious moral aspirations. Professionalism seeks to infuse into Bar membership the important moral information it currently lacks. But herein lies the basic problem that makes all discussions of professionalism so controversial and unsatisfying: in an era characterized by moral diversity and economic competitiveness, it is very difficult to discuss any "shared professional aspirations." The differences that separate us may simply be too vast.

But there is no reason to assume that moral diversity means we are left with moral nihilism. Quite the contrary, it means that the need to identify the essential elements of our shared professional heritage is greater than ever, for that perspective will give us an anchor for the inevitable debate about the profession's appropriate aspirations.

2. Increased Client Control

The effort to identify those aspirations faces another subtle challenge that is an outgrowth of the Bar's new moral diversity and sense of competitiveness. The popular image of the lawyer as an independent and objective counselor to whom a client could turn for dispassionate and, if necessary, unwelcome advice has eroded badly in recent years. . . . The pressure on lawyers today is to portray themselves as "can do" people, dedicated to making every possible effort to achieve the goals set by the client. This pressure has in turn redefined how lawyers relate to each other (and often how they portray each other to clients), and it has significantly altered the way lawyers relate to the legal system. Although legal codes of ethics insist that lawyers owe a loyalty to that system itself, the legal system often seems to be viewed today as simply one more tool to be manipulated as necessary in service to a client.

3. Expansion of "Rights-Consciousness"

The lawyer's changing relationship to the legal system has coincided with the public's changing perception of that system. The law is no longer viewed as a conservative social institution that reveres the past and is suspicious of change. Quite the contrary, the popular image of the law today is that of a dynamic social force that can, and should, vindicate the "rights" of citizens. Lawyers, as "can do" people, have done their part to foster this modern perspective, shifting much of the debate about the proper social role of law into "rights-talk." As a consequence, the client's expectation is that his lawyer will be as creative and dynamic as the new sense of the legal system suggests he should be. And given the transformations occurring within the Bar itself -- its moral diversity and the demands of competition -- there are no traditional conservative forces within the profession to hinder the continuation of this trend.

4. Challenges for the Judiciary

As both the Bar and the public have changed their approach to the legal system, a particularly daunting set of new challenges has arisen for the judiciary. Judges are lawyers with only the legal system itself as a client, and their unique responsibility is therefore to its proper functioning. But that duty can no longer be fulfilled simply by deciding legal issues in the way the public imagines judges do; instead, judges must now act as babysitters of the system's processes as well. Those processes have been strained by the use given the system by eager clients and their equally eager lawyers, and as diversity and competitiveness increase within the Bar, there is little consensus among litigators about limits they should impose on themselves. Judges, therefore, find themselves as the only serious source of guidance on the appropriate use of the courts in the service of clients. . . .

5. Changing Role of Law Schools

Law schools face a related challenge. They too have changed dramatically in both size and composition over the last half century, keeping pace with the increased demand for and interest in legal services. They have therefore been a major force in the move within the Bar toward moral diversity and economic competition, and furthermore, then, in the undermining of traditional impressions of the professional heritage of lawyers. The question, however, is whether law schools consequently have some special responsibility for reinvigorating the discussion of professionalism, and if so, what their effort should look like. It would be very easy for members of the Bar to cast special blame on law schools for the current moral predicament of lawyers -- and they often do -- claiming that the decline of professionalism is a function of a lack of academic interest in it: since it isn't taught early, it is never appreciated properly.

But this view assumes far too much. It assumes either that law professors know what professionalism is, and fail to teach it, or that they too are confused, and therefore avoid the matter. The truth, however, is probably more subtle: law schools do not focus much attention on the ideas that seem to be most popular in the current discussions of professionalism, not because they have failed to see their responsibility in this regard, but generally because they are not much impressed with the nature and substance of those ideas. Instead, by continuing to do what they do best -- focusing on the rigorous examination of legal rules and principles -- law schools are probably doing a good job of teaching (albeit implicitly and accidentally) the basic values that

should be related to professionalism, an argument we will complete in later sections of this Essay. They would do better, however, to acknowledge those values more forthrightly.

C. Minimum Points of "Procedural" Agreement Concerning Professionalism

But for law schools or Bar associations or anyone else to acknowledge and preach the values of professionalism, lawyers must first agree on the nature and substance of the sermon. This is particularly difficult, as we have seen, in the context of a profession whose heritage has apparently changed significantly over the last half century, and is still evolving. We tackle in the next section of this Essay the task of identifying what we believe are the essential substantive values of legal professionalism; here, however, we seek to identify a few less controversial "procedural" aspects of professionalism with which we believe all lawyers, despite much disagreement on substance, would nevertheless agree.

By "procedural" we mean the scope and purposes within the legal profession of the values of professionalism whatever the substance of those values turns out to be. We believe there are three such propositions that lie behind all discussions of professionalism: the universality of its values, its relevance to the practice of law, and certain general functions it performs within the Bar.

1. Universality

We would argue that all lawyers believe that, if "professionalism" exists, then it applies to all lawyers and all areas of the practice of law, not to some smaller group within the Bar. . . .

2. Relevance

As a second point of "procedural" agreement, we believe all lawyers accept the idea that some set of special demands is made on them -- which we now characterize as "ethics" and "professionalism" -- even if their substance remains controversial. . . .

3. Functions

Despite an inevitable focus on actions rather than attitudes, the demands of professionalism, whatever they may be in detail, serve two functions that can have an impact on attitudes. First, if it were well-defined, professionalism would help the Bar attract people to the profession who already have the values we hope will continue within it. This could in turn have both positive and negative effects: on the one hand, it would allow experienced lawyers to save the time involved in preaching those values to new entrants; on the other, that "saved" time would be a loss to the profession's sense of its heritage, and therefore to professionalism. Second, again if it were well-defined, professionalism would announce to all new entrants into the profession that the Bar's contemporary moral diversity and competitiveness, while consistent with the minimal standards of the Model Code and Model Rules, nevertheless have their limits. In other words, some aspirational, professional values would be expected to be held by each lawyer regardless of his or her personal proclivities or desires.

The central issue in the professionalism debate, then, becomes: What are those values or aspirations that we must all share?

* * * * *

The authors of this article suggest some answers to their questions of shared values of professionalism. *Try your hand at answering this question for yourself. What are some of the basic values that all attorneys must or should share? Make a list to discuss in class.*

CHAPTER II

PROFESSIONAL REGULATION

As we have seen in Chapter I, lawyers, by virtue of their position, may be entitled (and perhaps required) to act for clients in ways which might not be acceptable if not acting in such capacity. How far, however, can lawyers go? How far should they go? The possible answers deriving from perceptions of role were addressed in Chapter I. This Chapter will address the more formal constraints on attorney conduct.

There are many sources of "law" governing conduct by attorneys. As citizens, attorneys are subject to the "positive" law of the jurisdictions in which they practice. Thus, in some instances, criminal statutes relating to perjury, conflict of interest and related matters must be consulted. Court and agency rules of practice, procedure and evidence may provide guidance as well. In addition, some guidance may be found in court decisions in malpractice, disqualification, and ineffective-assistance-of-counsel cases.

The primary source of guidance for attorneys, however, is found in the rules developed by the Bar. Those rules are currently embodied in the Model Rules of Professional Conduct. The Model Rules were initially adopted by the ABA in 1983 to supersede the Code of Professional Responsibility, which had been adopted in some form in 49 states. The Model Rules have been adopted in the large majority of states (although a few states have explicitly rejected them). The Rules were adopted in Missouri (effective January 1, 1986) and Kansas (effective March 1, 1988). The Missouri and Kansas rules are available on the disk that accompanies the Standards Supplement.

The Code was written by the American Bar Association in 1969 to replace the then-existing Canons of Professional Ethics. The Code, in effect from 1969 through 1983, was divided into three parts: Canons, Disciplinary Rules and Ethical Considerations. The Rules rejected this 3-part approach and contain instead "black letter" rules and commentary. Neither the Rules nor the Code provide sanctions for violation of its proscriptions. These are left to the courts which supervise enforcement.

In the late 1990's, a Commission (commonly called Ethics 2000) completed study of possible revisions to the Model Rules and recommended numerous changes to those Rules. The ABA House of Delegates adopted some of the changes at its midyear meeting in February 2002. Additional changes were adopted in 2003. We will be studying the current ABA Rules (which can be found in the Standards Supplement), but we will also be referring to the Missouri and Kansas versions of the rules, which have yet to be revised to reflect the 2002 and 2003 ABA changes. Committees in both Missouri and Kansas have recommended some changes in the Rules based on the ABA revisions, but those recommendations are still pending in the state Supreme Courts.

At this point, *read through the Model Rules to get a sense of their structure and approach.* It may also be desirable to compare the structure of the Rules to that of the

Code.

The Code was heavily criticized on many grounds, among them its failure to set out guiding principles, its inability to provide any real guidance to lawyers in making difficult decisions, its failure to take into account the realities of present day law practice, and its over-protectiveness of lawyers. The Model Rules were drafted in an attempt to meet these criticisms, but, partly as a function of compromises during the adoption process, there is some question as to whether this effort was successful. The most recent changes reflect changes in practice as well as a response to corporate crises such as Enron. Although major overhaul of the Rules was considered, in most areas, amendments were more in the nature of tinkering rather than major structural change.

1. Why should we have a code of professional conduct? What purposes should it serve? Whose interests should it protect? What principles should be reflected, and how should these be prioritized? What are the priorities reflected in the current Rules? Have they changed in the last few years? Can you identify the prioritization of principles? Is it consistent? If not, why not? How should it be changed?

2. Who should regulate lawyers? The profession? The state? The judiciary? Consumers of legal services? Some combination of the above? Who regulates other trades and professions? Is there anything unique about law which requires a particular form of regulation?

3. Whose values should a professional code reflect? Can a code of conduct be ethically neutral? Should it? If not, whose ethics and values should be embodied therein? Can one code of conduct govern the practice of law in diverse settings by diverse groups of professionals? If it must, must we insure representation by the many factions within the Bar in the drafting of such a code? Is a code drafted by the organized Bar necessarily a "political" document?

4. How specific should a code be? Should it be a collection of "do's" and "don't's" or a document to "sensitize lawyers to the scope, depth and complexity of the commitments that they have undertaken in entering the profession" and to act as "a catalyst for a continuing discourse on the profession's *raison d'être*?" See Frankel, *Book Review, Code of Professional Responsibility*, 43 U. Chi. L. Rev. 874 (1976). Should it be a document reflecting and rationalizing the underlying principles of the profession? Should it be aspirational, or merely set lower limits of conduct? What are the costs and benefits of either approach?

5. Where can attorneys go for guidance if the Code or Rules are not crystal clear in their resolution of a professional responsibility problem? There are several sources of help for attorneys with professional responsibility problems, although a necessary first step is consulting the Code or Rules.

As noted, the Code or Rules are not applicable in a jurisdiction until adopted by the appropriate governmental body. They are generally adopted by the highest court in

a state as a court rule (in Missouri, as Rule 4 of the Rules Governing The Missouri Bar and the Judiciary, and in Kansas, as Rule 226, Rules for Discipline of Attorneys), and decided cases can be found through the annotated rules. These cases may provide more definitive interpretations of the relevant rules and generally have precedential value.

The American Bar Association and local bar committees issue opinions which are advisory only and are not binding on the courts. They are often referred to and relied on in court opinions, however. The ABA Standing Committee on Ethics and Professional Responsibility will respond to requests for interpretations of the Rules in formal or informal ethical opinions. Formal opinions are issued on questions of wide significance, whereas informal opinions tend to respond to more specific problems. Both formal and informal opinions of the ABA committee are published. The ABA opinions and those of many states and local bars are available in the ABA/BNA Manual, and many are available on-line. In addition, summaries of recent formal ethics opinions can be found at <http://www.abanet.org/cpr/ethicopinions.html>. Missouri Informal Opinions are available on-line in searchable format at <http://www.mobar.net/opinions/index.htm>.

In Missouri, Supreme Court Rule 5.30 provides as follows:

OPINIONS AND REGULATIONS BY ADVISORY COMMITTEE

(a) The advisory committee may give formal opinions as to the interpretations of Rules 4, 5, and 6, and the amendments or additions thereto and may make regulations consistent therewith for the administration of Rules 4, 5, and 6. Formal opinions and regulations of the advisory committee shall be published in the Journal of The Missouri Bar after adoption thereof.

(b) The chief disciplinary counsel or any member of the bar who is substantially and individually aggrieved by any formal opinion of the advisory committee may petition this Court for review of the opinion. The Court in its discretion may direct that the petition be briefed and argued as though a petition for an original remedial writ has been sustained, may sustain, modify or vacate the opinion, or may dismiss the petition.

(c) The ethics counsel on behalf of the advisory committee on request may give a member of the bar an informal opinion on matters of special concern to the lawyer. Informal opinions are not binding. Written summaries of informal opinions may be published for informational purposes as determined by the advisory committee.

(Adopted June 1995; amended September 2002, effective Jan. 1, 2003)

In addition to Ethical opinions and decided cases, attorneys with professional responsibility problems should determine whether guiding rules (either mandatory or advisory) exist for the particular type or area of practice in which they are involved. See, e.g., ABA Standards Relating to the Administration of Criminal Justice: Prosecution and Defense Functions (guidelines); American Academy of Matrimonial

Lawyers, *Bounds* of
Advocacy(2000)(<http://www.aaml.org/Bounds%20of%20Advocacy/Bounds%20of%20Advocacy.htm>)(guidelines); S.E.C. Rule of Practice 2(e), 17 C.F.R. §201.102(e) (mandatory rule) and Standards for Professional Conduct of Attorneys, 17 C.F.R. §205 (adopted in response to the Sarbanes-Oxley Act). Samples of some of these specialized rules are found in the Standards Supplement.

An important resource for researching and resolving professional responsibility issues is the Restatement of the Law Governing Lawyers, which was adopted by the American Law Institute. The Restatement is becoming an important source of guidance for lawyers. It can be found in the Standards Supplement and should be consulted regularly as part of your reading for the course. In addition, relevant cases and articles can be found using the ABA/BNA Manual on Lawyer's Professional Conduct and the ABA's Annotated Model Rules of Professional Conduct. Much helpful information can also be found on the ABA's Center for Professional Responsibility website, which can be accessed at <http://www.abanet.org/cpr>. Finally, assistance in researching professional responsibility issues can be obtained from Professor Glesner Fines' website at <http://www.law.umkc.edu/faculty/profiles/glesnerfines/bqf-13.htm>.

If research efforts fail and an advisory opinion is impracticable, an attorney should discuss the problem with other reputable lawyers (taking care, of course, to preserve confidentiality [see Model Rules (2003), Rule 1.6(b)(2)]). In addition to hopefully getting sound advice, this will help to establish a good faith attempt at proper resolution of the problem should disciplinary action ultimately ensue.

CHAPTER III ADMISSION AND DISCIPLINE

I. ADMISSION

A. Introduction

The power to grant admission to the practice of law is an inherent judicial power. “Only the judicial department of government has power to license persons to practice law.” *Hulse v. Criger*, 363 Mo. 26, 147 S.W.2d 855, 857 (en banc. 1952).

Admission to practice is governed by the highest court in each state and by the various federal courts. The courts generally establish standards for admission by court rule, and delegate to a Board of Law Examiners the power to administer the rules and promulgate regulations consistent therewith. In Missouri, the rules are found in Supreme Court Rule 8. A comprehensive guide to bar admissions in all states is available at the National Conference of Bar Examiners website and can be accessed and downloaded at <http://www.ncbex.org/comprehensive-guide-to-bar-admissions/>.

The states have broad powers to establish rules for admission, subject to Fourteenth Amendment constraints.

Schwabe v. Board of Bar Examiners, 353 U.S. 232 (1951):

A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. . . . A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. . . . Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.

In *In re Alexander*, 807 S.W.2d 70, *cert. denied*, 502 U.S. 885 (1991), the only reported case in Missouri addressing law student registration, the Court stated:

The purpose of Rule 8 is to exclude from the practice of law those persons possessing traits that are likely to result in injury to future clients, obstruction of the administration of justice, or a violation of the ethical standards established for members of the bar. [One] must possess good moral character to be admitted to the Bar and must qualify himself by the long preparation and study prescribed. He must demonstrate his qualifications by passing strict tests. To properly do his part as an officer of the court in the administration of justice, his conduct must conform to a high standard of ethics. Anything less than these standards may bring disrepute upon the legal profession, impair the standing of the courts and impede the administration of justice.

B. Requirements for Admission

Typically, states require a showing of proficiency in the law, normally through the passage of a bar examination. See, e.g., Missouri Supreme Court Rule 8.08. In addition, they require that the applicant for admission be "of good moral character." See Missouri Rule 8.05. Missouri Supreme Court Rule 8.14 states:

The practice of law in this state is a privilege. The burden of demonstrating that the requirements of this Rule 8 have been met shall be upon the applicants.

While the United States Supreme Court has been unwilling to "enter into a discussion whether the practice of law is a "right" or "privilege", *Schwartz v. Board of Bar Examiners*, 353 U.S. at 239, n.5, it has upheld placing the burden of proving compliance with necessary requirements on the applicant. *Konigsberg v. State Bar of California*, 353 U.S. 252 (1961).

1. Proficiency

There have been many challenges to the denial of admission based on failure of the bar examination, but these have not fared well in the courts. Illustrative is *Harper v. District of Columbia Committee on Admissions*, 375 A.2d 25 (D.C. 1977):

Next, we consider the contention that there is no valid relationship between the examination and the practice of law within the District of Columbia. Such a challenge has been raised in various states and uniformly rejected by the reviewing courts. The Fifth Circuit quoted *Banks v. Miller* as follows: The relevant question must then be whether the passing of an examination made up of subjective essay-type questions has a rational connection with the applicant's ability to practice law in the State of Georgia. It is beyond question that it does. While plaintiff would apparently favor a more objective type of examination, much of an attorney's actual work once admitted into practice involves the analysis of complicated fact situations and the application thereto of abstract legal principles. Both in legal practice and with these essay-type questions, recognition of the legal problem presented and well-reasoned explication of the relevant considerations is of utmost importance. We have no hesitation in concluding that the Committee's essay examination has a rational relationship to the practice of law in the District of Columbia and hence is a valid prerequisite to admission to the Bar.

Challenges based on objective questions have fared no better. See, e.g., *In re Revision of the Montana Bar Exam*, 720 P.2d 285 (1986) (rejecting challenge to use of the Multistate Bar Exam).

What is proficiency? What level of performance on the bar exam is sufficient to demonstrate proficiency? While the Missouri Supreme Court recently reduced the passing score for Missouri, that decision bucks the national trend. Many jurisdictions have increased their minimum passing scores. How should a jurisdiction determine its passing score? See *Amendments to Rules of the Supreme Court Relating to*

Admissions to the Bar, 843 So.2d 245 (Fla. 2003), where the Court relied on an expert to determine the appropriate score to assess proficiency. What considerations should go into setting the pass rate?

Of equal or greater importance, does the bar exam adequately test the characteristics necessary for good lawyering? If not, how else could bar authorities determine proficiency? The bar exam has come under fire in recent years. Consider the following:

Society of American Law Teachers Statement on the Bar Exam
52 J. Leg. Ed. 446 (2002) (<http://www.saltlaw.org/positionbarexam.htm>)
(footnotes omitted)

Summary:

Bar examinations, as currently administered,

- fail to adequately measure professional competence to practice law,
- negatively impact law school curricular development and the law school admission process, and
- are a significant barrier to achieving a more diverse bench and bar.

Recent efforts in some states to raise the requisite passing scores only serve to aggravate these problems. In response to these and other concerns outlined below, the Society of American Law Teachers (SALT), the largest membership organization of law professors in the nation, strongly urges states to consider alternative ways to measure professional competence and license new attorneys.

The Current Bar Exam Inaccurately Measures Professional Competence to Practice Law

Although the history of the bar examination extends back to the mid-1800s, when law school attendance was not a prerequisite for a law license, the present bar examination format – a 200 question, multiple choice, multi-state exam (the MBE), combined with a set of essay questions on state law – dates only from the early 1970s. In creating the MBE, the National Conference of Bar Examiners was responding to states' desires to find a time- and cost-efficient alternative to administering their own comprehensive essay exams. More recently, some states have adopted a "written performance" test in addition to the MBE, state essay exam questions, and the multiple choice ethics exam (MPRE).

The stated purpose of the bar examination is to ensure that new lawyers are minimally competent to practice law. There are many reasons why the current bar examination fails to achieve its purpose. First, despite the inclusion of multiple sections, the exam only attempts to measure a few of the many skills new lawyers must possess in order to competently practice law. A blue ribbon commission of lawyers, judges and academics issued a report (The MacCrate Report) detailing the skills and values that competent lawyers should

possess. The bar examination does not even attempt to screen for many of the skills identified in the MacCrate Report, including key skills such as the ability to perform legal research, conduct factual investigations, communicate orally, counsel clients and negotiate. Nor does it attempt to measure other qualities important to the profession, such as empathy for the client, problem-solving skills, the bar applicant's commitment to public service work or the likelihood that the applicant will work with underserved communities.

Second, the examination overemphasizes the importance of memorizing legal doctrine. Memorizing legal rules in order to pass the bar examination does not guarantee that what is memorized will actually be retained for any length of time after the exam. Memorization of legal principles so that one can answer multiple-choice questions or spot issues on an essay exam does not mean that one actually understands the law, its intricacies and nuances. In fact, practicing lawyers who rely upon their memory of the law, rather than upon legal research, may be subjected to judicial sanctions and malpractice claims. Yet, a large part of successfully taking the bar examination depends upon the bar applicant's ability to memorize hundreds of legal rules. The ability to memorize the law in order to pass the bar examination is simply not a measure of one's ability to practice law.

Third, the exam assesses bar applicants' ability to apply the law in artificial ways that are unrelated to the practice of law. In most states, up to one half of the total bar examination score is based upon the Multi-State Bar Exam (MBE). This six-hour, 200-question, multiple-choice test covers the majority/minority rules in six complex, substantive legal areas. In answering the questions, the examinee must choose the "most correct", or in some cases, the "least wrong" of four answers. No practicing lawyer is faced with the need to apply a memorized legal principle to a set of facts she has never seen before and then choose, in 1.8 minutes, the "most correct" of four given answers. No lawyer can competently make decisions without more context for the case and without the opportunity to ask more questions or to clarify issues. Yet, if a bar applicant cannot successfully take multiple-choice tests, the applicant may never have the opportunity to practice law.

Fourth, a substantial portion of the examination does not test the law of the administering state. The MBE questions are based upon the majority/minority rules of law that may, or may not, be the same as the law in the administering state. In addition, many states have now adopted the Multi-State Essay Exam (MEE), which is also based upon majority rules rather than the administering state's law. In all states, up to one-half of the examination is not based upon the administering state's own laws; in some states, the entire examination requires no knowledge of the particular administering state's governing law. Thus, even if one believes that memorizing the law equates to "knowing" the law, the existing examination does not test how well the applicant knows the law which he or she will actually use in practice.

Fifth, the examination covers a very wide range of substantive areas, thus failing to recognize that today's practitioners are, by and large, specialists not generalists. Although some basic knowledge of a broad range of fields is important, the current examination does not test for basic knowledge, but instead often tests relatively obscure rules of law. In the modern legal world, it is virtually impossible, even for the most diligent, skilled and experienced

lawyer, to truly remain current in more than one or two related fields. The examination thus fails to test for competence as it is really reflected in today's market - a market in which lawyers need expertise in their specific area of practice, rather than a broad but shallow knowledge of a wide range of legal rules.

Sixth, most law students take a ten-week bar review course, and some take an additional course on essay writing or on how to take multiple-choice questions, in order to pass the bar examination. These review courses, which may cost as much as \$3,000, drill bar applicants on the black letter law and "tricks" to answering bar examination questions. They are not geared toward fostering an in-depth understanding of important legal concepts, nor do they focus on synthesizing rules from various substantive areas. The content of the review courses, and the necessity of taking the courses in order to pass, belie the argument that the bar examination is geared toward testing professional competence or aptitude in any meaningful way.

The Current Bar Exam has a Negative Impact on Law School Curricular Development and the Law School Admission Process

In addition to failing to measure professional competence in any meaningful way, the bar examination has a pernicious effect on both law school curricular development and on the law school admission process. From the moment they enter law school through graduation, law students realize that unless they pass the bar examination, their substantial financial commitment and their years of hard work will be wasted. As a result, many students concentrate on learning primarily what they need to know in order to pass the bar examination, which often translates into high student attendance in courses that address the substantive law tested on the bar examination and reduced participation in clinical courses – the courses designed to introduce students to the skills required for the actual practice of law – and in courses such as environmental law, poverty law, civil rights litigation, law and economics, and race and the law. As a result, the students fail to fully engage in a law school experience that will give them both the practical skills and the jurisprudential perspective that will make them better lawyers.

In addition to being a driving force in the law school curriculum, the bar examination inevitably influences law school admission decisions. Schools want to admit students who will pass the bar examination. A high bar pass rate bodes well for alumni contributions, is perceived to play an important role in U.S. News and World Report rankings, brings a sense of satisfaction to the faculty, eases students' fears about their own ability to pass the examination, and makes it easier to attract new students. Since there is some correlation between LSAT scores and bar examination passing scores, law school admission officers may be overly reliant on LSAT scores in admitting students. As Dean Kristin Glen notes, "If you take students who know how to take a test almost exactly like the bar examination and know how to take it successfully, as the LSAC study tells us is the case with the LSAT, you don't actually have to do much with those students in law school to assure their success on the bar examination." Thus, many schools may over-emphasize the value of the LSAT, at the expense of admitting students who will bring a broader perspective into the student body, into law school classes, and ultimately, into practice.

Finally, the bar examination has a negative impact on how law schools assess students. Like the bar examination, most law school grades are based upon a one-time “make it or break it” examination that focuses on only a very few of the many skills that competent lawyers need. If the bar examination assessed a broader range of skills, or assessed skills in various ways, law schools might also adjust their assessment modalities so that they were not all geared toward rewarding just one type of skill or intelligence. In sum, from the admission process, through curriculum choices and law school assessment modalities, the bar examination has a far-reaching negative pedagogical effect.

The Current Bar Exam Negatively Affects States’ Ability to Create a More Diverse Bench and Bar

In the 1980s and 1990s, many states and federal circuits established commissions on racial and gender equality. After extensive study, many of these commissions concluded that people of color were under-represented in the legal profession on both a state and national level, that there is a perception of racial and ethnic bias in the court system, and that there is evidence that the perception is based upon reality. To begin to achieve a more racially and ethnically balanced justice system, many commissions recommended that states take affirmative steps to increase minority representation in the bench and bar.

There are many reasons for states to want a more diverse bench and bar. A diverse bench and bar improves public perceptions about the justice system. It also positively impacts the availability of legal services for underserved segments of our population. Additionally, a more diverse bar is likely to be a more publicly-minded bar. A University of Michigan study found that among graduates who enter private practice, “minority alumni tend to do more pro bono work, sit on the boards of more community organizations, and do more mentoring of younger attorneys than white alumni do.”

The failure of the current bench and bar to be as diverse as it could be is partly attributable to the existing bar examination. The current examination disproportionately delays entry of people of color into, or excludes them from, the practice of law. A six-year study commissioned by the Law School Admission Council (LSAC) indicates that first-time bar examination pass rates are 92% for whites, 61% for African Americans, 66% for Native Americans, 75% for Latino/Latina and 81% for Asian Americans. Although the disparity between pass rates narrowed when applicants re-took the bar examination, a substantial number of applicants who failed on the first attempt did not re-take the exam. And for those who did re-take the examination, the psychological and financial cost of doing so was extremely high.

Despite the disparate impact that the bar examination has on people of color, numerous states have raised, or are considering raising, the passing scores on their bar examinations. Many states have hired Stephen Klein, Ph.D., the National Conference of Bar Examiners’ chief psychometric consultant, to help them set a new passing score and to help them determine the effect of the higher score on minority passing rates. Klein has concluded that raising the passing score on the bar examination will not disproportionately affect minority bar applicants. Serious flaws appear to exist both in the

methodology Klein uses to set new passing scores and in his contention that higher passing scores will not disproportionately impact people of color. In fact, one commentator has found that not only will raising the passing score have a disparate impact on the bar passage rate for people of color, the decision to raise bar passing scores also correlates with admission officers putting more weight on the LSAT, rather than on undergraduate GPAs, thereby widening the law school admission gap between white students and students of color.

Even if the bar examination were a valid screening device, one would have to ask whether its disproportionate impact on people of color could be justified. Given that the bar examination is not a good measure for determining professional competency, it is simply wrong to retain it without trying to find a better assessment tool.

Alternatives

We cannot hope to exhaust all the possible alternatives to the bar exam in this brief document. But preliminarily, SALT recommends that states begin to explore one or more of the following alternatives:

1. The Diploma Privilege. This method of licensure, currently used in Wisconsin, grants a law license to all graduates of the state's ABA accredited law schools.

2. A Practical Skills Teaching Term. Using this method of licensure, states could require satisfactory completion of a ten-week teaching term, similar to one phase of the licensing requirements in some Canadian provinces. During the Canadian teaching term, bar applicants must pass two, three-hour tests which assess their knowledge of basic principles in ten substantive areas. They also receive training and must receive a passing grade on assessments in interviewing, advocacy, legal writing and legal drafting skills.

3. The Public Service Alternative to the Bar Exam (PSABE). States could adopt the pilot project proposed by Dean Kristin Glen, in which bar applicants are given the option of either taking the existing bar exam or working for 350 hours over ten weeks within the court system and satisfactorily completing a variety of assignments in which competence on all of the MacCrate Report skills are evaluated by trained court personnel and law school clinical teachers.

4. Computer-Based Testing. States also should begin exploring the use of computer based testing as another potential way to assess a broader range of skills and to measure the skills in ways that better reflect the practice of law.

These alternatives, and others that might be developed, can provide states with options other than the current examination to measure the competence of nascent lawyers. SALT recommends that states begin to study and experiment with these and other alternatives to the existing bar exam so as to ameliorate the pernicious effects of the existing examination structure.

Conclusion

The bar examination, by testing a narrow range of skills, and testing

them in a way unrelated to the practice of law, fails to measure in any meaningful way whether those who pass the examination will be competent lawyers. In addition to not measuring what it purports to measure, the examination negatively impacts the law school admission process, as well as course curriculum and content, and impedes the attainment of a more diverse bench and bar. Raising the passing score on the bar examination exacerbates these negative effects. Thus, SALT strongly opposes the move to increase the passing score on the bar examination. Maintaining the status quo is not enough. SALT recommends that states make a concerted, systematic effort to explore better ways of measuring lawyer competency without perpetuating the negative effects elaborated above.

Do you agree with the criticisms expressed? What about the proposed alternatives? Do you think such alternatives are feasible? Desirable? Why or why not?

Can you structure a better bar admissions process? What would it look like? What are the impediments to adopting such a system?

2. *Good Moral Character*

The more common legal challenges arise where the Board finds that an applicant has failed to meet his or her burden of proof on the issue of good moral character and denies admission accordingly. Good moral character is a difficult term to define. It had, in the past, been used to keep out, or at least subject to close scrutiny, those who were not viewed to be in the mainstream. There are those who think it still does. As you read the following, think about what ought to constitute “good moral character” and what characteristics reflect absence of that character. Think also about the costs and benefits of character screening. Does such screening go too far, or not far enough?

In re Eimers, 358 So. 2d 7 (Fla. 1978):

The Florida Board of Bar Examiners (the Board) has requested certain information for its guidance in determining the admissibility of an applicant to The Florida Bar.

The question which has been submitted by the Board with request for this Court's answer is:

Whether an applicant with an admitted homosexual orientation who is fully qualified for admission to The Florida Bar in all other respects can qualify for admission under the provisions of Article IV, Section 19, of the Rules of the Supreme Court of Florida Relating to Admission to the Bar, which section places a strict prohibition against any recommendation by the Board to the Supreme Court for admission to The Florida Bar for a person not determined to be of good moral character.

We answer this question in the affirmative, noting that our response is limited to situations in which the applicant's sexual orientation or preference is at issue. This opinion, then, does not address itself to the circumstance where evidence establishes that an individual has actually engaged in homosexual acts.

The applicant in the instant case is a graduate of an accredited law school, is certified for admission to the Pennsylvania Bar, and has passed all parts of The Florida Bar examination. The Florida Board of Bar Examiners has found him qualified for admission to The Florida Bar in all respects with the possible exception that he may fail to meet the "good moral character" standard for admission due to his homosexual preference.

The applicant admitted his homosexual preference in response to inquiry made at a hearing before the Board. He was not questioned about what sexual acts he may have engaged in. Further, no evidence was presented indicating that the applicant has acted or plans to act on his sexual preferences.

The United States Supreme Court described the term "good moral character" as "unusually ambiguous":

The term "good moral character" has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law. (Footnotes omitted)

Konigsberg v. State Bar of California, 353 U.S. 252, 262-263 (1957).

Wary of the state's capacity to arbitrarily deny an applicant admission to a state bar, the Supreme Court recognized as early as 1866 that the reasons for denying admission should be related to the purposes for exclusion. *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866) (test oath required of all candidates for admission to the bar bore no relation to the qualifications necessary for the profession); cf. *In re Rouss*, 221 N.Y. 81, 85, 116 N.E. 782, 783 (1917). However, as long as there was a rational connection between the qualification and the applicant's ability to practice law, courts could exclude incompetent and iniquitous persons from the legal profession to protect clients and to assure a credible bar.

Elucidating upon these principles in the landmark case of *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957), the Supreme Court held that:

A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. . . . A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. (Emphasis added)

Id. at 238-239.

Thus, in determining fitness for admission to the bar, state courts must now meet the standard imposed by the due process clause found in the Fourteenth Amendment. In the instant case, the issue which must be resolved is whether there is a rational connection between homosexual orientation and fitness to practice law.

In assessing the reasonableness of the relation between homosexual orientation and moral unfitness to be an attorney, we must make reference to the purposes promoted by ostracizing the morally unfit. The layman must have confidence that he has employed an attorney who will protect his interests. See Drinker, *Legal Ethics*, p. 89-188 (1953). Further, society must be guaranteed that the applicant will not thwart the administration of justice. These exigencies arise because the technical nature of law provides the unscrupulous attorney with a frequent vehicle to defraud a client. Further, the lawyer can obstruct the judicial process in numerous ways, e. g., by recommending perjury, misrepresenting case holdings, or attempting to bribe judges or jurors. Consequently, if an applicant has committed certain illegal acts in the past, he may represent a future peril to society which would justify denying the applicant admission.

In the instant case, however, we cannot believe that the candidate's mere preference for homosexuality threatens these societal exigencies. In a related context, we note that former Justice Ervin in *The Florida Bar v. Kay*, 232 So.2d 378 (Fla.1970) (Ervin, C. J., specially concurring)* observed:

While Respondent's act definitely affronts public conventions, I am concerned as to the extent of the authority of the Board of Governors of The Florida Bar under controlling concepts of due process to continue the discipline of Respondent since there is no showing in the record of a substantial nexus between his antisocial act, or its notoriety, or place of commission, and a manifest permanent inability on Respondent's part to live up to the professional responsibility and conduct required of an attorney. . . .

The present record contains no evidence scientific, medical, pathological or otherwise suggesting homosexual behavior among consenting adults is so indicative of character baseness as to warrant a condemnation per se of a participant's ability ever to live up to and perform other societal duties, including professional duties and responsibilities assigned to members of The Bar. . . .

Since it is held in Florida that The Bar has jurisdiction to discipline Florida Bar members concerning their personal or private morals, it would appear appropriate to require that such discipline be subject to a

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In *The Florida Bar v. Kay*, supra, this Court considered the propriety of permanently disbarring an attorney who was convicted of indecent exposure after being observed engaging in a he Bar indicated that no permanent disbarment was intended and he was subsequently readmitted to practice. While we find the following language persuasive, we do not mean to imply that we are not unmindful of the differing standards to be met for admissions to The Bar as compared to disciplinary or disbarment proceedings.

showing originally or when reinstatement is sought that there is a substantial connection between a member's antisocial behavior and his ability to otherwise carry out his professional responsibilities as an attorney. Otherwise, The Bar will be virtually unfettered in its power to censor the private morals of Florida Bar members, regardless of any nexus between the behavior and the ability to responsibly perform as an attorney. Governmental regulation in the area of private morality is generally considered anachronistic in the absence of a clear and convincing showing there is a substantial connection between the private acts regulated and public interests and welfare. (Emphasis added) Id. at 379-381.

Accordingly, we find that the applicant in the instant case is qualified for admission to The Florida Bar under the provisions of Article IV, Section 19, of the Rules of the Supreme Court of Florida Relating to Admission to The Florida Bar.

It is so ordered.

BOYD, Justice, dissenting.

Applicant admits he is a homosexual. Before a finding on the issue of his fitness to practice law I would remand this cause to the Board of Bar Examiners for an inquiry into whether he has committed homosexual acts of the kind criminally outlawed by Section 800.02, Florida Statutes. There should not be admitted to The Florida Bar anyone whose sexual life style contemplates routine violation of a criminal statute.

What, if any, types of sexual conduct are appropriate factors in determining admission to the Bar? See generally *Sexual Conduct or Orientation as Grounds for Denial of Admission to the Bar*, 105 A.L.R.5th 217.

Is the good moral character standard clear enough to avoid improper discretion by bar examiners and courts? Does it provide meaningful standards or reflect a professional consensus, and if not, is its use likely to be “inconsistent, idiosyncratic, and needlessly intrusive.” See Deborah Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985). What actions of an applicant will be sufficient to prevent a finding of good moral character?

a. As late as 1979, a trial judge in Virginia refused to issue a certificate of good moral character to a woman who was living with a man to whom she was not married. The Virginia Supreme Court disagreed, stating:

While [applicant's] living arrangement may be unorthodox and unacceptable to some segments of society, this conduct bears no rational connection to her fitness to practice law. It cannot, therefore, serve to deny her the certificate required by [Virginia Code].

Cord v. Gibb. 254 S.E.2d 71, 73 (Va. 1979). To what extent, if at all, should life-style issues affect admission to the Bar? If they are to have an effect, who is to determine

what is “unorthodox” or appropriate? What consequences are there to such an approach?

b. Does failure to meet one’s obligations constitute lack of good moral character? Several courts have said yes. See *Board of Law Examiners v. Stevens*, 868 S.W.2d 773 (Tex. 1994) (unsatisfied judgments); *In re Beasley*, 243 Ga. 1344, 253 S.E.2d 615, 617 (1979) (failure to honor child support obligations and URESA orders); *In re Heller*, 333 A.2d 401 (D.C.), *cert. denied*, 423 U.S. 840 (1975).

Even where there may be no legal obligation (as where a debt has been discharged in bankruptcy), the facts surrounding the discharge of the debt may evidence a lack of good moral character.

Application of Gahan, 279 N.W.2d 826, 831 (Minn. 1979):

The issue on appeal is whether, in view of the facts of this case and the applicable Federal rights protecting those who elect to file voluntary bankruptcy, the applicant to the Minnesota bar was properly denied admission on the grounds of insufficient moral character. . . .

Initially, we observe that persons discharging their debts in bankruptcy are afforded certain rights under Federal law. The fact of filing bankruptcy or the refusal to reinstate obligations discharged in bankruptcy cannot be a basis for denial of admission to the bar of the State of Minnesota. Any refusal so grounded would violate the Supremacy Clause of the United States Constitution since applicable Federal law clearly prohibits such a result.

However, these constitutional limitations do not preclude a court from inquiring into the bar applicant's responsibility or moral character in financial matters. The inquiry is impermissible only when the fact of bankruptcy is labeled "immoral" or "irresponsible," and admission is denied for that reason. In other words, we cannot declare bankruptcy a wrong when Federal law has declared it a right.

Thus, in the present case, Gahan's conduct prior to bankruptcy surrounding his financial responsibility and his default on the student loans may be considered to judge his moral character. However, the fact of his bankruptcy may not be considered, nor may his present willingness or ability to pay the loans be considered because under Federal bankruptcy law, he now has a right to not pay the loans.

2. Applicant's Moral Character.

. . . We hold that applicants who flagrantly disregard the rights of others and default on serious financial obligations, such as student loans, are lacking in good moral character if the default is neglectful, irresponsible, and cannot be excused by a compelling hardship that is reasonably beyond the control of the applicant. Such hardships might include an unusual misfortune, a catastrophe, an overriding financial obligation, or unavoidable unemployment.

We are, under the Minnesota Constitution, entrusted with the exclusive duty to assure the high moral standards of the Minnesota bar. We have no

difficulty in concluding that Federal law does not preclude us from evaluating the responsibility of a bar applicant in satisfying his or her financial obligations. This is particularly true where, as here, the obligation has the significance of \$14,000 in Federally insured student loans. A student loan is entrusted to a person, and is to be repaid to creditors upon graduation when and if financially able. Moreover, repayment provides stability to the student loan program and guarantees the continuance of the program for future student needs. A flagrant disregard of this repayment responsibility by the loan recipient indicates to us a lack of moral commitment to the rights of other students and particularly the rights of creditors. Such flagrant financial irresponsibility reflects adversely on an applicant's ability to manage financial matters and reflects adversely on his commitment to the rights of others, thereby reflecting adversely on his fitness for the practice of law. It is appropriate to prevent problems from such irresponsibility by denying admission, rather than seek to remedy the problem after it occurs and victimizes a client.

Applying the above principles to this case, we conclude that Gahan's failure to satisfy his obligations on the student loans cannot be excused for some compelling hardship reasonably beyond his control. During the period prior to bankruptcy, he was employed for most of the time at an annual salary of \$15,000 and then \$18,000. Monthly, he grossed from \$1,250 to \$1,500, and he accounted for monthly expenses of approximately \$500. The record indicates that his monthly payments on the loans would be approximately \$175. He was healthy, single, and not subject to any unusual hardship. He was reasonably able to satisfy his legal and moral obligation to prepare for repayment and continue repayment of his student loans. His failure to do so demonstrates lack of good moral character and reflects adversely on his ability to perform the duties of a lawyer.

Compare *Florida Board of Bar Examiners re: G.W.L.*, 364 So.2d 454 (Fla. 1978) (facts surrounding applicant's declaration and discharge in bankruptcy raised substantial doubts about his honesty, fairness and respect for rights of others and for law of state and nation; application denied) with *Florida Board of Bar Examiners re: Groot*, 365 So.2d 164 (Fla. 1978) (facts surrounding discharge indicate conduct not morally reprehensible in circumstances; application granted). See also *In re W.D.P.*, 91 P.3d 1078, 1088-91 (Haw. 2004) (pattern of financial irresponsibility and credit history inconsistent with good moral character); *In re Perry*, 827 So.2d 1144 (La. 2002) (where applicant is making a good faith effort to comply with Chapter 13 Bankruptcy Plan, conditional admission appropriate); *Application of Scallon*, 956 P.2d 982 (Or. 1998) (allowing conditional admission after bankruptcy and fiscal irresponsibility a "close call").

c. Will prior criminal convictions prevent a finding of good moral character? Not necessarily, although in Missouri, a person who has been convicted of or pleaded guilty to a felony "shall not be eligible to apply for admission to the Bar until five years after" the conviction or completion of sentence, whichever is later. Mo. Sup. Ct. Rule 8.05(b).

Since present good moral character is the test, past criminal conduct may be instructive, but is not necessarily controlling. Courts consider a variety of factors relating to the conviction itself and the applicant's conduct since conviction. See. e.g.,

In re McMillian, 557 S.E.2d 319, 322 (WV 2001) (considering eleven factors). Illustrative is *Application of A.T.*, 286 Md. 507, 408 A.2d 1023 (1979), where the applicant had several prior convictions for drug charges and drug related thefts and had served forty-four months in prison:

Rule 2d of the Rules Governing Admission to the Bar of Maryland provides that the applicant "shall at all times have the burden of proving his good moral character before the Character Committee, the Board and the Court" We have said that no litmus test exists for determining whether an applicant for admission to the Bar possesses good moral character. In *Allan S.*, the Court set forth the controlling principles for determining whether an applicant with a criminal record has the requisite present moral character fitness to be admitted to the Bar. We said that where, as here, an applicant for admission to the Bar is shown to have committed a crime, the nature of the offense must be taken into consideration in determining whether his present moral character is good. We said that although a prior conviction is not conclusive of a lack of present good moral character, particularly where the offense occurred a number of years previous to the applicant's request for admission, it adds to his burden of establishing present good character by requiring convincing proof of his full and complete rehabilitation. Thus, we observed that a prior conviction must be taken into account in the overall measurement of character and considered in connection with other evidence of subsequent rehabilitation and present moral character. We said that the ultimate test of present moral character, applicable to original admissions to the Bar, is whether, viewing the applicant's character in the period subsequent to his misconduct, he has so convincingly rehabilitated himself that it is proper that he become a member of a profession which must stand free from all suspicion. Finally, we noted the cardinal principle governing applications for original admission to the Bar is that the absence of good moral character in the past is secondary to the existence of good moral character in the present.

* * *

Applying the principles articulated in *Allan S.* to the present case, we note, in considering the nature of the applicant's offenses, that all were directly related to his drug addiction. Furthermore, as pointed out by the Character Committee, the applicant was a user and not a dealer in drugs. In addition to the nature of the criminal offenses, we must consider the length of time that has elapsed since the criminal conduct occurred. In this case, the passage of time has been significant and substantial. The applicant's last offense occurred more than thirteen years before the Board hearing in October of 1979. Furthermore, the applicant has not used illicit drugs since August of 1967, a period of time spanning approximately twelve years. Finally, the applicant has been completely detoxified from methadone for more than six years.

As pointed out in *Allan S.*, the crucial matter upon which we must focus is the applicant's present moral character fitness, as evidenced by the convincing record of his rehabilitation. The record wholly supports the conclusions of the Character Committee and the Board that the applicant is fully rehabilitated from his prior illegal activity. In undertaking to prove his present good moral character the applicant not only presented convincing medical evidence of his rehabilitation from drug use, but also produced character witnesses who gave particularly strong endorsements of his present good moral character. He also introduced into the record letters of

recommendation from members of the legal and lay community. These letters attested to the applicant's present good character and are entitled to respectful consideration by the Court.

Giving due consideration to the nature of the applicant's offenses, the time of their commission, the circumstances involved, the fact that the burden rests upon the applicant to prove his good moral character, and most importantly, the convincing evidence of the applicant's rehabilitation, we think that he has established the requisite present moral character fitness that justifies his admission to the Bar of Maryland.

IT IS SO ORDERED.

SMITH, Judge, dissenting.

It is with regret that I once again dissent from the admission of an individual to practice before this Court.

Part of the problem apparently is a difference between my colleagues and me as to what constitutes good moral character. They seem to be of the belief that one can be said to possess good moral character if he has not violated the law lately. I do not see it that way. Thomas Paine, the political pamphleteer of the American Revolution, observed in *The American Crisis* No. XXIII (1783), "Character is much easier kept than recovered." I agree.

The Random House Dictionary of the English Language (unabridged ed. 1967) defines "character" in pertinent part:

1. the aggregate of features and traits that form the apparent individual nature of some person or thing. 2. one such feature or trait; characteristic. 3. moral or ethical quality 4. qualities of honesty, courage, or the like; integrity 5. reputation 6. good repute. . . . (Id. at 247.)

Webster's Third New International Dictionary (unabridged ed. 1961) states in pertinent part on this subject:

1 : . . . 9 : reputation esp. when good 10 : a composite of good moral qualities typically of moral excellence and firmness blended with resolution, self-discipline, high ethics, force, and judgment (Id. at 376.)

The American Heritage Dictionary of the English Language (New College ed. 1976) defines the term in pertinent part:

1. . . . 3. The combined moral or ethical structure of a person 4. Moral or ethical strength; integrity; fortitude. 5. Reputation: 10. A description of a person's attributes, traits, or abilities. . . . (Id. at 226.)

In *World v. State*, 50 Md. 49 (1878), Judge Grason said for the Court:

It was further contended that the evidence of the police officer was inadmissible, because it related to the Character of the accused, instead

of being confined to his Reputation. Character and reputation are synonymous terms, and we can see no objection to the evidence introduced, that the character and reputation of the accused was that of a "common thief" during the time the witness knew him. (Id. at 56 (emphasis in original).)

Black's Law Dictionary (5th ed. 1979) states relative to character:

The aggregate of the moral qualities which belong to and distinguish an individual person; the general result of the one's distinguishing attributes. That moral predisposition or habit, or aggregate of ethical qualities, which is believed to attach to a person, on the strength of the common opinion and report concerning him. A person's fixed disposition or tendency, as evidenced to others by his habits of life, through the manifestation of which his general reputation for the possession of a character, good or otherwise, is obtained. The estimate attached to an individual or thing in the community. The opinion generally entertained of a person derived from the common report of the people who are acquainted with him. Although "character" and "reputation" are often used synonymously, the terms are distinguishable. "Character" is what a man is, and "reputation" is what he is supposed to be in what people say he is. "Character" depends on attributes possessed, and "reputation" on attributes which others believe one to possess. The former signifies reality and the latter merely what is accepted to be reality at present. (Id. at 211.) As to good character it says: Sum or totality of virtues of a person which generally forms the basis for one's reputation in the community, though his reputation is distinct from his character. (Id. at 623.)

If this young man has in fact reformed from his earlier drug habit and stealing, I am delighted. The fact that it is believed by some that he will not revert to his former habits, however, does not in my view automatically establish good moral character. Where would the majority draw the line? As judges and prior experienced practitioners of the law they know that many homicides are a once in a lifetime proposition in which there will be no recurrence of the circumstances giving rise to the homicide. Thus, in the absence of evidence of other violations of law, one could say that the person has reformed. Do my colleagues propose permitting convicted murderers to become Maryland lawyers since they have not killed anyone lately?

* * *

Our requirement that a candidate show himself to be possessed of good moral character is for the purpose of protecting the public. In the same manner we have said that the imposition of a sanction on an erring attorney is not for purposes of punishment of the individual lawyer but for the protection of the public. The practice of law often involves handling the funds of clients running into tens of thousands and even hundreds of thousands of dollars. This can and does present a temptation to some individuals, as experience has amply demonstrated. Therefore, I regard honesty as one of the most important traits of character which should be required of a prospective lawyer. He should be forthright and honest in all of his dealings, but particularly where the funds and property of others are concerned. When a person is admitted to the Bar he becomes an officer of this Court. When we admit him we are in effect certifying

to the general public that he is a person to whom the affairs of others may safely be entrusted. I am not prepared at this time to say that this young man is possessed of good moral character and thus is a proper person to be an officer of this Court.

See also *In re Sobin*, 649 A.2d 589 (D.C. 1994) (felony conviction for conspiracy to manufacture controlled substances and aiding and abetting prostitution and racketeering not sufficient to deny admission where offenses occurred a substantial time in the past and the applicant had a strong record since that time). See generally, Annot., 88 A.L.R.3d 192 (1978). It is frequently the facts surrounding the offense, and not the offense itself, which warrants denial of admission. Even where a conviction is reversed, the facts underlying the offense may be the basis for denial of admission. See *In re W.D.P.*, 91 P.3d 1078, 1083 (Haw. 2004).

Should certain offenses bar admission forever? If so, which ones? Should a murderer ever be allowed admission to the Bar? That issue has arisen recently in Arizona. See the articles at <http://www.cbsnews.com/stories/2004/10/13/6011/main649084.shtml> and <http://www.eastvalleytribune.com/index.php?sty=23496>. The Arizona Supreme Court recently denied admission in this case. See *In re Hamm*, 136 P.3d 652 (Ariz. 2005), where the court held that, although persons convicted of extremely serious crimes such as first-degree murder are not automatically excluded from becoming members of the bar, they must make an “extraordinary showing of rehabilitation and present good moral character to be admitted to the practice of law.” The court found that Hamm had not made the requisite showing. See also *In re King*, 136 P.3d 878 (Ariz. 2006) (same with regard to an applicant who was convicted of attempted murder). Compare *In re Dortch*, 860 A.2d 346 (D.C. 2004) (refusing to find that applicant had made a clear and convincing showing of good moral character where he had been convicted of second-degree murder and was still on parole) with *In re Manville*, 538 A.2d 1128 (DC 1988) (en banc) (allowing admission to one previously convicted of murder under a preponderance standard). See also *In re Hinson-Lyles*, 864 So.2d 108 (La. 2003), where a sharply divided court refused to allow admission to a former schoolteacher who had been convicted of sexual relations with a fourteen-year old student.

What about relatively minor offenses? Should they be relevant to a finding of good moral character? What if such offenses, although minor, are repeated? What about traffic violations? While generally offenses that are minor will not prevent a finding of good moral character unless they bear directly on honesty or fitness to practice, at least one court has found that repeated violation of traffic laws, including speeding and reckless driving, that led to license revocation were sufficient to warrant denial of admission to practice. See *In re Kapel*, 72 Ohio St. 3d 532, 651 N.E.2d 955 (1995).

d. Other than that already discussed, what kind of activity or behavior is likely to prevent a finding of good moral character? What about applicants who are obnoxious, rude, bizarre or offensive? See, e.g., *Lane v. Nebraska State Bar Ass’n*, 249 Neb. 499, 544 N.W.2d 367 (1996). Should law schools screen applicants on the basis of moral character? Why or why not? For a discussion of this and related issues, see Elizabeth Gepford McCulley, *School of Sharks? Bar Fitness Requirements*

of Good Moral Character and the Role of Law Schools, 14 Geo. J. L. Ethics 839 (2001).

Surprisingly, one relatively common basis for denial of admission is engaging in the unauthorized practice of law. This is particularly true where one holds him or herself out as an attorney. See, e.g., *In re Lee*, 571 S.E.2d 720 (Ga. 2002); *In re Craig*, 190 Wis. 2d 494, 526 N.W.2d 261 (1995).

Lack of candor or misstatements on bar applications are frequently grounds for failure to find good moral character. See, e.g., *In re Heckman*, 556 N.W.2d 746 (Wis. 1996); *In re Beasley*, 243 Ga. 134, 252 S.E.2d 615, 617 (1979) (false, misleading or evasive answers may be grounds for finding lack of requisite good moral character). Lack of candor can lead to denial of admission or to discipline once admitted. M.R. 8.1(a)(b). See *In re Moore*, 812 N.E.2d 1197 (Mass. 2004), where the Court ordered a two-year suspension for lack of candor on Respondent's bar application. The Court rejected Respondent's claim of literal accuracy and his contention that the questions were ambiguous, finding he had the requisite intent to deceive and mislead. The Court stated:

Whether an individual is of good moral character and fit to practice law in the Commonwealth is a most serious issue. Questions exploring this issue are not to be answered by gamesmanship. Bar applicants should always err on the side of full disclosure. If the meaning or scope of a particular bar application question is unclear to them, they should contact the Board of Bar Examiners to ascertain exactly what information is being sought in response to that question.

The Court went on to add:

"in the future, we intend to impose much harsher sanctions, including disbarment, "to address the seriousness of the misconduct, to reassure the bar and the public that such conduct is completely contrary to the oath of office taken by every lawyer, and to underscore that, when it is uncovered, such conduct will be treated with the utmost severity." *Matter of Foley*, 439 Mass. 324, 339, 787 N.E.2d 561 (2003).

812 N.E.2d at 1205. See also *In re Stamps*, 874 So.2d 113 (La. 2004), where a couple was disbarred for failure to disclose unauthorized practice of law in North Carolina on their bar application in Louisiana.

Lack of candor can also lead to revocation of a conditional admission. See *Character and Fitness Committee Office of Bar Admissions v. Jones*, 62 S.W.3d 28 (Ky. 2001), where the court found Respondent's dishonest statements reflected a lack of candor and found his "cunning word games" and "bald-faced attempts to exploit . . . semantic flaws" in his conditional admission agreement cast the profession in a bad light and served as a basis to deny admission.

What about a failure or refusal to answer questions? Although an applicant may not be penalized for refusing to answer questions that request constitutionally protected information, see, e.g., *Carfagno v. Harris*, 470 F. Supp. 219 (E.D. Ark. 1979) (protected associational activity), failure to provide requested information without such basis may well lead to denial. The right of bar examiners to ask a broad range of questions has been recognized, see e.g., *In re Roots*, 762 A.2d 1161, 1166 (RI 2000)(holding the requirement to list all traffic violations not “superfluous nor a mere incursion into the applicant’s privacy”), although there are limits. An issue of concern is the extent to which the Americans with Disabilities Act (ADA) imposes limits on the bar’s ability to ask questions regarding previous drug abuse or mental health problems and treatment. See, e.g., *In re Petition and Questionnaire for Admission to the Rhode Island Bar*, 683 A.2d 1333 (R.I. 1996).

3. Ties to the Jurisdiction

Historically, many state and federal courts required residency in the local jurisdiction as a pre-condition to bar admission. In three cases, however, the Supreme Court held that such residency requirements violate the Privileges and Immunities Clause of the United States Constitution and are therefore unconstitutional. In *Piper v. New Hampshire Supreme Court*, 470 U.S. 274 (1985), the court invalidated a simple residency requirement that mandated residency at the date of admission. In *Virginia Supreme Court v. Friedman*, 487 U.S. 59 (1988), the Court applied Piper to invalidate a provision requiring nonresident attorneys to take a bar exam for admission but allowing resident attorneys to “waive into” the bar without examination. Finally, in *Barnard v. Thorstenn*, 489 U.S. 546 (1989), the Court invalidated a Virgin island requirement that applicants have previously resided for a year and intend to reside in the future.

In each of these cases, the Court rejected various justifications asserted for the residency requirement at issue, finding them to be insubstantial. Thus, the Court found that fears that non-resident lawyers would not be abreast of local rules and procedures, would behave unethically, would be unavailable for court appearances, and would decline pro bono work were unwarranted. Moreover, the Court found that a state's desire to protect its own lawyers from competition was not a substantial justification, but rather was precisely the type of “economic protectionism” that the Clause was designed to prevent.

Many states, in an effort to foster protectionism without running afoul of the Privileges and Immunities clause, established requirements that attorneys maintain an office for full-time practice of law in the jurisdiction in order to obtain admission. Others did away with admission without examination, although a counter-trend toward reestablishing such admission has emerged. Kansas recently adopted a rule that allows reciprocal admission to the Kansas Bar without examination under certain circumstances.

With the increase in national and international practice and use of the multistate bar exam, are we likely to move toward national standards for admission, or in fact toward national bar admission? What resistance is there likely to be? What consequences might such a development have on the structure of law practice? Is this

desirable? The ABA has been studying these issues and the Report of its Commission on Multijurisdictional Practice has recently been adopted by the ABA House of Delegates. While reaffirming the principle of state regulation of the practice of law, the recommendations include clarifying when attorneys may engage in temporary practice in jurisdictions in which they are not admitted and make admission on motion more available. Look at the Introduction and Overview available online at <http://www.abanet.org/cpr/mjp/home.html>. Do you think these recommendations go too far? Not far enough? With the growth of the Internet and globalization, these issues, including transnational practice, will continue to be important.

II. DISCIPLINE

A. Introduction

The discipline of lawyers has been a subject of concern and discussion for many years among lawyers and non-lawyers alike. More than twenty years ago, in an article entitled *Why Crooked Lawyers Go Free*, Readers Digest brought this problem to the public, documenting problems with the attorney discipline system including the large number of complaints compared to the small incidence of actual discipline, secrecy in the disciplinary process, the ability of disciplined lawyers to practice law in other jurisdictions, cronyism and failure of lawyers and judges to report other lawyers for known violations. The article quoted a Wall Street attorney who chaired a New York Commission studying lawyer discipline as follows:

“It is little wonder that some attorneys do not feel impelled to be responsible to the disciplinary system. A system that moves in secret, then winds up disciplining a minuscule percent of those whose conduct is complained about, can neither be effective nor credible.”

Although things have changed for the better in the more than twenty years since this article was written, some of the same concerns exist. The ABA Standards for Lawyer Disciplinary Enforcement address many of these issues, and jurisdictions around the country have revised their disciplinary procedures with assistance from the ABA. Most jurisdictions now have professional staffs to administer their discipline systems, although most still use volunteer attorneys as well. Most states have added lay members to their disciplinary panels, and a national clearinghouse to share information among states about disciplined lawyers is in operation. Concern still exists regarding the degree of secrecy in the system, although some states have made changes in this area as well. The problem of attorneys and judges not making complaints about other attorneys still exists, and, although the incidence of discipline has increased, there are still concerns regarding the effectiveness of the disciplinary system as a source of control over lawyer conduct. It is likely that these issues will continue to exist and be debated well into the future.

Finally, the overall issue of lawyer self-regulation continues to be the subject of debate. As many begin to view law as more of a business than a profession, the question whether the degree of self-regulation now afforded the legal profession is

appropriate takes on increasing focus. These issues are not likely to go away in the foreseeable future.

B. Purpose of Discipline

The original commentary to 1.1 of *The A.B.A. Standards for Lawyer Discipline and Disability Proceedings* reads as follows (citations omitted):

. . . Disciplinary proceedings are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. They are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministrations of persons unfit to practice. Thus the real question at issue in a disbarment proceeding is the public interest and the attorney's right to continue to practice a profession imbued with public trust.'

The lawyer's license proclaims to the public that the holder has been found qualified to practice law in accordance with standards imposed by the court, and that potential clients may therefore entrust their legal problems to him. The public has no adequate independent means by which to determine the lawyer's trustworthiness, and must rely upon the certification inherent in the license.

If there is evidence indicating that the lawyer is no longer meeting minimum standards, the court, on behalf of the public, is obligated to ensure an inquiry, or to provide a means of instituting an inquiry, to determine whether the license and the certification inherent therein should be revoked. The discipline and disability system is the structure established for that purpose.

'A court has the duty, since attorneys are its officers, to insist upon the maintenance of the integrity of the bar and to prevent the transgressions of an individual lawyer from bringing its image into disrepute. Disciplinary procedures have been established for this purpose, not for punishment, but rather as a catharsis for the profession and a prophylactic for the public.'

Missouri is in accord with the *Standards* in this regard.

In the Matter of Bear, 578 S.W.2d 928 (Mo. banc 1979):

The main purpose of a disciplinary proceeding is to inquire into the fitness of an attorney to continue in the practice of law. The objective is not to punish the attorney but to protect the public and to protect the integrity of the profession and the courts.

See also *In re Snyder*, 35 S.W.3d 380, 384 (Mo banc. 2000); *Matter of Dorsey*, 731 S.W.2d 252, 253 (Mo. banc 1987).

But see In re Ruffalo, 390 U.S. 544, 550 (1968):

Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer [and therefore due process principles apply].

Eric Steele and Raymond Nimmer, in a comprehensive article entitled *Lawyers, Clients and Professional Regulation*, 1976 A.B.F. Res. J. 919, 999 state:

The current policy goals of professional self-regulation may be expressed analytically in terms of three functions: (1) to identify and remove from the profession all seriously deviant members (the “cleansing” function), (2) to deter normative deviance and maximize compliance with norms among attorneys (the deterrence function), and (3) to maintain a level of response to deviance sufficient to forestall public dissatisfaction (the public image function).

This formulation is similar to that expressed by the Missouri Supreme Court in *In re Staab*, 785 S.W.2d 551 (Mo. banc 1990):

The purpose of attorney discipline is to protect the public and maintain the integrity of the legal profession. The discipline must be designed to correct any antisocial tendency on the part of the attorney as well as to deter others who might tend to engage in similar violations

See also ABA Standards for Imposing Lawyer Sanctions, Commentary to Standard 1.1. To what extent are these functions appropriate goals of a lawyer disciplinary system, and if appropriate, to what extent are they served by disciplinary rules and procedures currently in use? As we examine instances of discipline, consider which functions are being served and whether they are being served effectively.

Note that the disciplinary process deals only with lawyers who fall below the minimally acceptable standards. It does nothing to encourage best practices or professionalism. Additionally, discipline may remove the offending attorney from practice and, at least theoretically, may give notice of the attorney’s infraction to the public, but it has no direct remedial effect. Clients and others harmed by attorney conduct are, for the most part, left to civil remedies (i.e., malpractice). Some states have, however, created client security funds to provide reimbursement to clients, but they are usually limited to intentional misappropriation of funds. See Steele and Nimmer, at 1007-1014.

A recent development in attorney discipline is the arrival of alternative dispute resolution. For example, in Missouri, pursuant to Rule 5.10, appropriate complaints may be referred for mediation rather than formal disciplinary proceedings. This may allow for greater involvement by the complainant and a more satisfactory resolution of the matter.

C. Grounds for Discipline

Pursuant to the Model Rules, “[f]ailure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.” Scope Note, § 5. In Missouri, disciplinary counsel is authorized to investigate “any matter of professional misconduct.” Mo. Sup. Ct. R. 5.08. Rule 8.4 (found in Missouri in

Supreme Court Rule 4) defines professional misconduct. “It is professional misconduct for a lawyer to violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another.” 8.4(a). Rule 8.4(a) essentially incorporates violations or attempts to violate other model rules, and thus a violation of a substantive rule “conclusively establishes that respondent violated Rule 8.4(a).” *In re Oberhellmann*, 873 S.W.2d 851 (Mo. banc 1994). The remainder of Rule 8.4 sets out other forms of professional misconduct that are independent of the substantive rules.

Rule 8.4(b) makes it misconduct for an attorney to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” The prior version (under the Code) focused on crimes of moral turpitude, but the Rules chose to avoid use of that potentially vague term. It is not necessary that the attorney be convicted of a crime for this provision to apply as long as the conduct violates the criminal law. See Wolfram, MODERN LEGAL ETHICS ¶ 3.3.2 at 91 (1986). Moreover, “a criminal acquittal does not bar subsequent disciplinary action.” *In re Stormont*, 873 S.W.2d 227, 229 (Mo. banc 1994).

Where an attorney has been convicted of a serious crime, discipline will frequently follow. See, e.g., *In re Kazanas*, 96 S.W.3d 803 (Mo banc. 2003). In Missouri, proceedings under Missouri Supreme Court Rule 5.21 permit suspension of an attorney upon conviction of or plea to a felony or a misdemeanor involving moral turpitude. *Id.* at 808. Once such conviction is final, discipline may be imposed by the Court based on motion of disciplinary counsel and a certified copy of the judgment without further proceedings. Rule 5.21(c). This section has been used to impose discipline on attorneys convicted of felonies as well as various misdemeanor offenses. The Court has found failure to pay income taxes, *In re Duncan*, 844 S.W.2d 443 (Mo. banc 1993); failure to pay child support, *In re Warren*, 888 S.W.2d 334 (Mo. banc 1994); and possession of cocaine, *In re Shunk*, 847 S.W.2d 789 (Mo. banc 1993), all to be offenses involving moral turpitude.

Rule 8.4(c) makes it misconduct to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” This provision is related to and overlaps with other provisions of the rules, including 8.4(b). See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (5th. ed. 2003) at 608. This Rule covers a broad variety of conduct, including forging a name on a client’s check, *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994); lying to opposing counsel as to availability for trial, *in re Stricker*, 808 S.W.2d 356 (Mo. banc 1991); and converting client funds. *In re Phillips*, 767 S.W.2d 16 (Mo. banc 1989). “[I]t is not necessary to the exercise of the disciplinary powers of th[e] Court that the fraud committed by a lawyer be committed in his capacity as a lawyer” *In re Kirtz*, 494 S.W.2d 324,328 (Mo. banc 1973). See also *In re Paneck*, 585 S.W.2d 477 (Mo. banc 1979). *In re Smith*, 749 S.W.2d 408, 413 (Mo. banc 1988) As the Court noted in *In re Disney*, 922 S.W.2d 12, 15 (Mo. banc 1996):

Discipline for violation of this rule does not depend on the existence of an attorney-client relationship. . . . Questions of honesty go to the heart of fitness to practice law. . . . Misconduct involving subterfuge, failing to keep promises, and untrustworthiness undermine public confidence in not only the individual but in the bar.

Rule 8.4(d) makes it misconduct to “engage in conduct that is prejudicial to the administration of justice.” This provision is used in a wide variety of contexts and overlaps with other provisions. See, e.g., *In re Westfall*, 808 S.W.2d 829 (Mo. banc 1991) (reckless accusations against judge); *In re Vails*, 768 S.W.2d 78 (Mo. banc 1989) (failure to cooperate with disciplinary investigation); *In re Bear*, 578 S.W.2d 928 (Mo. banc 1979) (tampering with evidence by erasing a tape that, although inadmissible, was part of an ongoing investigation). Since this provision is generally used in conjunction with other Rules, the potential vagueness of this term has not been as problematic as it might be. It has, however, been challenged on occasion, although to date without success. See ANNOTATED RULES, at 614-16.

Although subsections (b) through (d) of Rule 8.4 provide for discipline in a broad range of circumstances, their use is not unlimited. In *In re Mills*, 462 S.W.2d 700, 701 (Mo. banc 1971), the Court stated (under similar provisions of the Code) that in Missouri, discipline is not appropriate for conduct “in the nature of bad taste and bad manners” if the attorney’s “honesty, integrity and moral character remain uncompromised.” See *Maryland Grievance Com’n. v. Link*, 844 A.2d 1197 (Md. 2004) (Rude, boorish, insensitive and insulting conduct, while inappropriate and unfortunate, is not subject to discipline unless criminal or arising within the legal process itself. While civility and professionalism are very important, “it is neither feasible nor desirable that every social interaction between a lawyer and a non-lawyer be regulated . . .”).

Rule 8.4(e) prohibits an attorney from stating or implying an ability to influence a government agency or official (and, in the current version, to achieve results by means that violate the Rules or other law) and (f) prohibits knowingly assisting a judge in violating the judicial code. For situations involving these rules, see ANNOTATED RULES, at 619-20.

The ABA proposed an addition to Rule 8.4 of a section addressing bias and prejudice. The proposal was withdrawn and language was added to paragraph 3 of the Comment indicating that manifestation of bias or prejudice violates Rule 8.4 where “such actions are prejudicial to the administration of justice.” A rule was adopted in Missouri in 1995 that makes it professional misconduct to:

manifest by words or conduct, in representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, or age. This Rule 4-8.4(g) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, or age, or other similar factors, are issues.

Mo. Sup. Ct. Rule 4-8.4(g). The Rule only applies to attorneys in the course of representing a client, and difficult questions remain regarding the scope of the “legitimate advocacy” exception. There is strong reason to believe the Rule is designed more to make a statement than as a likely basis for discipline except in egregious cases.

D. Procedure

Missouri's disciplinary procedures have gone through major revision several times in recent years. They are now fairly consistent with the ABA Standards for disciplinary proceedings and with practice around the country. The relevant rules are found in Missouri Supreme Court Rule 5. See <http://www.mochiefcounsel.org/> (explanation of disciplinary system for the public by the Office of Disciplinary Counsel); <http://www.mobar.org/pamphlet/discip.htm> (explanation of disciplinary system for the public by the Missouri Bar).

The disciplinary system is administered by the Office of Disciplinary Counsel. Complaints are filed with that Office. The Office of Disciplinary Counsel can either investigate the complaint itself or refer it to a circuit bar committee for investigation. Investigations can be initiated by disciplinary counsel even without a formal complaint. 5.08. In cases where it is believed a complaint can appropriately be resolved through mediation, counsel may refer the complaint to the Bar Complaint Resolution Program for resolution. 5.10. If a complaint is not so referred or if it cannot be satisfactorily resolved through mediation, an investigation ensues. If, after investigation, probable cause is found, counsel or the appropriate committee may offer an admonition, if appropriate. The respondent attorney then has 15 days to accept or reject the admonition. 5.11(a)(b). If an admonition is not appropriate, or if one that is offered is rejected, an information shall be drafted and served on the respondent. 5.11(c). If no probable cause is found, the complainant shall be notified within 10 days. The complainant can then seek Advisory Committee review of the determination of no probable cause. 5.12.

Once an information has been filed, respondent is to file an answer or risk default. 5.13. Respondent can request a hearing before a disciplinary hearing panel. If no hearing is requested, the information is to be filed in the Supreme Court. 5.14. Where a hearing is requested, it is prosecuted by disciplinary counsel or a designee. The hearing must determine whether the respondent is guilty of professional misconduct, and the burden of proof on disciplinary counsel is to establish a violation of Rule 4 by a preponderance of the evidence. Hearings are conducted in accordance with normal rules of court, except that discovery is more limited. 5.15. Within thirty days of completion of the hearing, the panel shall render a written decision including findings regarding each alleged act of misconduct and recommendations for discipline if violations are found. 5.18.

After hearing, the panel may find that the information should be dismissed, that a written admonition is appropriate, or that further proceedings are warranted. If an admonition is offered, the respondent has fifteen days to accept or reject it. If the panel recommends discipline, it shall file its report with the Supreme Court. If the parties concur in the written decision, they may stipulate to the report. If the Court concurs with the stipulation, discipline is imposed without further proceedings. If the parties do not concur, or if the Court does not accept the stipulation, disciplinary counsel must file the complete record before the panel with the Court. The matter is then briefed and argued by the parties. If the Court finds for the respondent, it shall dismiss the information, If the Court finds the misconduct charged, it shall impose appropriate discipline. 5.19.

The Rules also provide for proceedings where an attorney is incapacitated or disabled, 5.23, and for interim suspension for threat of harm. 5.24. In addition, an attorney may voluntarily surrender his or her license upon application to the Court, although the Court is not required to accept surrender and may require disciplinary counsel to proceed under the Rules. 5.25. See *In re Kazanas*, 96 S.W.3d 803 (Mo. banc 2003) (court refused surrender, disbarment ordered after proceedings completed).

E. Sanctions

The original ABA Standards for Lawyers Discipline addressed the issue of sanctions as follows:

DISCIPLINE TO BE IMPOSED IN A PARTICULAR CASE

7.1 Factors to be Considered. The discipline to be imposed should depend upon the specific facts and circumstances of the case, should be fashioned in light of the purpose of lawyer discipline, and may take into account aggravating or mitigating circumstances.

COMMENTARY

The nature and degree of discipline to be imposed should be determined on a case by case basis, after consideration of all relevant factors. . . The court should avoid adoption of rules that mandate dispositions for certain forms of misconduct. Fixed penalties limit the court's ability to deal with the complexity and variety of circumstances involved in each matter.

In determining the nature and extent of the discipline the court should consider (a) the seriousness and circumstances of the offense, (b) avoidance of repetition (c) deterrent effect upon others, (d) maintenance of respect for the honor and dignity of the legal profession, and (e) assurance that those who seek legal service will be insulated from unprofessional conduct.

The respondent's lack of remorse, his failure to cooperate with the agency in its investigation, his failure to voluntarily make restitution to those injured by his misconduct, his failure to acknowledge and recognize the seriousness of his violation, the extent of his breach of trust, and his record of prior discipline, are factors which have been viewed as 'aggravating.' The courts have imposed more severe discipline when such factors have been present than when they are absent.

Sometimes circumstances present in a case will cause the court to be lenient. A willingness to rectify the damage caused by the misconduct, contrition, inexperience, temporary mental aberrations for which the respondent has sought treatment, and restitution prior to the filing of a grievance, have been relied upon by courts as mitigating factors warranting lesser discipline.

The current standards are found at §3.0. See ABA Standards for Imposing Lawyer Sanctions at http://www.abanet.org/cpr/regulation/standards_sanctions.pdf, Do either of these formulations adequately address the issues at stake?

Following adoption of the ABA Standards for Lawyer Discipline, which did not attempt to recommend particular types of discipline for particular cases, the ABA became concerned that there was widespread inconsistency in sanctions and that this was undesirable. As a result, it formed a Joint Committee on Professional Sanctions, whose mandate was to formulate standards for the imposition of appropriate sanctions. The House of Delegates approved their proposed Standards in February 1986. These are not binding, but provide guidance in the imposition of sanction and are considered by some courts. Missouri relies heavily on the Standards in imposing discipline. See, e.g., *In re Crews*, 159 S.W.3d 355 (Mo. banc 2005).

Standards 2.2-2.8 contain the available sanctions, including disbarment, suspension, reprimand, admonition, probation, and restitution. Standard 3.0 describes the factors to be considered in imposing sanctions, and Standards 4.0 - 8.0 detail what sanctions are appropriate for particular types and degrees of misconduct.

In Missouri, Rule 5.16 provides:

The recommended discipline may include a public reprimand, suspension or disbarment, or a combination of the above. If a recommendation for suspension or disbarment is included, it may suggest a length of time that must elapse before the respondent is eligible to apply for reinstatement and may include other conditions precedent to consideration of an application for reinstatement.

While this rule might appear to limit the Court's authority to impose discipline, Rule 5.33 provides "[n]othing in this Rule 5 shall be construed as a limitation upon the powers of this Court to govern the conduct of its officers This Rule 5 shall not constitute an exclusive method for regulating the practice of law" A predecessor provision in Rule 5.27 was interpreted by the Missouri Supreme Court as giving it the "inherent power. . . to tailor and shape its judgment to fit the nature, character, gravity and effect of professional misconduct" Pursuant thereto, the Court developed the sanction of probation in conjunction with public reprimand, with reservation of jurisdiction if more severe disciplinary action is later deemed appropriate. *In re Miller*, 568 S.W.2d 246 (Mo. banc 1978) (prohibiting respondent from acting as a fiduciary for two years); *In re Schiff*, 542 S.W.2d 771 (Mo. banc 1976) (requiring that respondent read Code and periodically report compliance to Court during two year period). Additionally, the Court has required completion of CLE courses (in bankruptcy and ethics) as a condition of reinstatement after suspension. *In re Snyder*, 35 S.W.3d 380, 385 (2000). Recently, the Court codified the probation sanction. See Rule 5.225. In *In re Wiles*, 107 S.W.3d 228 (Mo. banc 2003), the rule was used to place the attorney on probation for one year under the supervision of Chief Disciplinary Counsel.

Other jurisdictions utilize the sanction of probation with conditions where a reprimand is insufficient but suspension is unwarranted. A particularly interesting case is *In re Greene*, 276 Or. 1117, 557 P.2d 644 (1977) where the Court found that the accused attorney "was deficient in some elementary probate procedures" and failed to recognize a conflict of interest. Accordingly, it placed the attorney on probation "until he furnishes evidence that he successfully passed, with a grade of no less than B or its

equivalent, courses at a law school of this state in Professional Responsibility and the Administration of Estates. The attorney was given twenty months to do so.

In Missouri, as in other jurisdictions, disbarment is reserved for the most serious misconduct. The purpose of attorney discipline is to protect the public and maintain the integrity of the legal profession. *In re Littleton*, 719 S.W.2d 772, 777 (Mo. banc 1986). This Court has reserved disbarment for persons clearly unfit to practice law and used reprimands for isolated acts not involving dishonest, fraudulent, or deceitful conduct. *Id.*

The intermediate sanction of suspension is appropriate considering the circumstances of this case, where respondent violated his duty to the public to maintain personal integrity, but the conduct does not rise to a level indicating respondent is clearly unfit to practice law. See ABA Standards for Imposing Lawyer Sanctions Rule 5.0 (1986). Brief suspension should be sufficient to protect the public.

In re Disney, 922 S.W.2d at 15-16.

In many jurisdictions, disbarment is permanent and no reinstatement is possible. In others, reinstatement is permitted but generally requires a showing of rehabilitation and current fitness to practice. In most jurisdictions where a respondent is disbarred for conviction of crime, he or she must also show "repentance", which requires an admission of guilt. *But see In re Hiss*, 368 Mass. 447, 333 N.E.2d 428 (1975). In Missouri, reinstatement is permitted and is governed by Rule 5.28. Pursuant to that rule, an attorney who has been disbarred or suspended may be reinstated if the conditions set out in the Rule have been met and the Court, after reviewing a report by disciplinary counsel, finds that the applicant's license should be restored. Among the requirements for reinstatement are that the cause for disbarment or suspension has abated, all persons injured by the lawyer's conduct have received restitution or have been notified of the application, all special conditions imposed at the time the right to practice was lost have been met, a specified amount of CLE has been completed, the person has passed the MPRE within two years preceding reinstatement, and the person is of good moral character and the best interests of the public will be served by reinstatement.

Sanctions less than disbarment and suspension are also available and are used where interruption of a lawyer's practice is not warranted. Reprimands are often imposed where the conduct is negligent or where there is an isolated act of misconduct that is not serious enough to warrant suspension. Absent aggravating or mitigating circumstances, a reprimand is generally the appropriate sanction where a lawyer has previously received an admonition. See *In re Frank*, 885 S.W.2d 328, 333 (Mo. banc 1994).

An attorney who has been disciplined in one jurisdiction is normally required to show cause why he or she should not be disciplined in other states in which he or she is licensed to practice law. See Rule 5.20. Since discipline in another jurisdiction is to be afforded full faith and credit, the other state's proceedings may be attacked only for

lack of jurisdiction, improper notice or fraud. *In re Storment*, 873 S.W.2d 227, 230 (Mo. banc 1994).

However, according the [other state's] order full faith and credit does not require discipline in Missouri. *In re Weiner*, 530 S.W.2d 222, 224 (Mo. banc 1975). [The] Rule contemplates that this Court may choose not to discipline a lawyer disciplined by another state. *Id.* For example, the attorney's conduct may not be a ground for discipline in Missouri. *In re Veach*, 287 S.W.2d at 759. This Court makes its own independent judgment as to the fitness of the members of its bar. *Id.* at 755; *Weiner*, 530 S.W.2d at 224.

Storment, 873 S.W.2d at 230. In doing so, the burden of proof is on the attorney to show why the other state's disciplinary order "should not be conclusive of misconduct for the purpose of discipline" by the Court. *Id.* at 230-31. If the Court accepts the finding of misconduct, it makes its own independent determination of sanction. *Id.* Where two jurisdictions both conduct an investigation of an attorney, each can reach its own independent conclusion and impose appropriate discipline even though inconsistent. See *In re Rokahr*, 681 N.W.2d 100 (SD 2004) (Finding of intentional misconduct led to suspension in Nebraska; finding of inadvertent misconduct led to reprimand in South Dakota).

Recent amendments to Model Rule 8.5 (recently adopted in Missouri) permit discipline of lawyers in jurisdictions in which they are not admitted if they offer or provide services in that jurisdiction. In addition, the Rule clarifies choice of law principles relating to discipline of attorneys who are admitted in multiple jurisdictions. Read Rule 8.5.

F. Reporting Misconduct

M.R. 8.3 requires an attorney who has knowledge that another lawyer has committed a violation of the rules to report such knowledge to the relevant professional authority where the violation is one that raises a substantial question regarding the lawyer's honesty, trustworthiness or fitness to practice. Reporting is required regardless of whether the misconduct occurred in the practice of law. ABA Formal Op. 04-433 (2004). There is no obligation if the information providing such knowledge is governed by the confidentiality requirements of Rule 1.6 or if the lawyer with knowledge gained the information while serving in an approved lawyer assistance program. Knowledge in this context means actual knowledge or a substantial basis for believing a serious violation exists. See N.M. Bar Adv. Opin. 1988-8.

Very few lawyers have been disciplined for violation of these "whistle-blowing" provisions, and generally such discipline has been minor. As a result, the reporting requirements have been largely ignored. There was some indication that courts were beginning to take these provisions more seriously when a lawyer was suspended for one year for failing to report misconduct and using such failure to report as leverage in obtaining a settlement. *In re Himmel*, 125 Ill. 2d 531, 533 N.E.2d 790 (1988). The incidence of lawyer reporting increased in the months following *Himmel*, but subsequently declined as it appeared that that case was an isolated instance of discipline rather than the beginning of a trend.

The reporting requirements are controversial and are almost universally disliked by lawyers. As noted in the Readers Digest article, however, this failure of lawyers to report each other is a source of serious concern with the general public.

CHAPTER IV THE ATTORNEY-CLIENT RELATIONSHIP

I. NATURE OF THE ATTORNEY-CLIENT RELATIONSHIP

The attorney-client relationship is composed of many elements and has a complex of values and theoretical bases underpinning it. The relationship is based on contract, agency and fiduciary principles, but cannot solely be characterized as a contractual, agency or fiduciary relationship. In fact, the most appropriate response to the question “what is the nature of the attorney-client relationship” (as well as the question whether such a relationship exists in any given situation) is likely to be “why do you ask?”

Courts frequently refer to this complex of values in discussing the attorney-client relationship, and Missouri is no exception:

In general principle, the relationship of lawyer and client is contractual. . . . It is also a relation of agency, and its general contours are governed by the same rules. . . . It is, nevertheless, distinguished from other types of agency by its highly fiduciary quality and by the limit of its scope

Jarnagin v. Terry, 807 S.W.2d 190, 193-94 (Mo. App. 1991). In other cases, however, the courts will focus on a particular characterization of the relationship that is most relevant or appropriate to the issue at hand. See, e.g., *Baker v. Whitaker*, 887 S.W.2d 664, 669 (Mo. App. 1994) (“An agreement between an attorney and client should be construed under the same rules that apply to other contracts”); *Resolution Trust Company v. Gibson*, 829 F. Supp. 1121 (W.D. Mo. 1993) (“Under Missouri law, the attorney-client relationship is an agency relationship governed by the same law as that which applies to agency relationships generally”); *Kline v. Board of Parks and Recreation Com’rs*, 73 S.W.3d 63, 67 (Mo. App. 2002)(same); *Macke Laundry Service Limited Partnership v. Jetz Service Co.*, 931 S.W.2d 166 (Mo. App.1996) (The attorney-client relationship is one of agency.); *Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus*, 824 S.W.2d 92, 98 (Mo. App. 1992) (“Admittedly, an attorney hired by a client is . . . an agent with the normal fiduciary duties imposed by law and with specific ethical duties imposed as a condition of the privilege to practice law.”); *Williams v. Preman*, 911 S.W.2d 288, 301 (Mo. App. 1995) (“The relation between attorney and client is fiduciary and binds the attorney to a scrupulous fidelity to the cause of the client which precludes the attorney from any personal advantage from the abuse of that reposed confidence. . . . As a fiduciary, an attorney owes his client the greatest degree of loyalty, good faith and faithfulness.”); *In re Howard*, 912 S.W.2d 61 (Mo. banc 1995) (“The relation between attorney and client is highly fiduciary and of a very delicate, exacting and confidential character, requiring a very high degree of fidelity and good faith on attorney's part”).

Each characterization brings with it certain rights, duties and responsibilities. In any case where the existence or nature of the relationship is seriously in issue, it is necessary to look to these background principles for guidance.

II. WHEN DOES THE ATTORNEY-CLIENT RELATIONSHIP BEGIN?

“A fundamental distinction is involved between clients, to whom lawyers owe many duties, and non-clients, to whom lawyers owe few duties. It therefore may be vital to know when someone is a client and when not.” RESTATEMENT OF THE LAW GOVERNING LAWYERS, Topic 1 Introductory Note (before § 14). Generally, there is no question regarding whether an attorney-client relationship has been created. Where a client seeks out an attorney in his or her office, requests representation and agrees to pay a fee, and the attorney agrees to undertake that representation, the relationship has clearly been established. But frequently, one or more of these factors are missing, and the question to be addressed is whether, despite this, an attorney-client relationship exists.

The Model Rules do not directly address when an attorney-client relationship is created. In fact, the Scope Note to the Rules explicitly negates any role for the Rules in this regard. Paragraph 3 states, “for purposes of determining the lawyer’s authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists.” The same paragraph does acknowledge that whether such a “relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.”

The Restatement addresses the issue in § 14 as follows:

Formation of the Client-Lawyer Relationship

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or should know that the person reasonably relies on the lawyer to provide the services; or

(2) a tribunal with power to do so appoints the lawyer to provide the services.

The Restatement recognizes that, while this is the general rule for establishment of the attorney-client relationship, aspects of that relationship can be created at different times in different manners. Comment to § 14. The greater the duty to the client that is being asserted, and the more likely recognition of the relationship will “compel a lawyer to provide onerous services,” the less likely a full attorney-client relationship will be found. RESTATEMENT, Comment to § 14. Courts are loathe to impose fiduciary duties on attorneys where the lawyer has not agreed to enter into a relationship of that nature.

Missouri law on the subject was set out in *Resolution Trust Company v. Gibson*,

829 F. Supp. 1121, 1127 (W.D. Mo. 1993):

Under Missouri law, the attorney-client relationship is an agency relationship governed by the same law as that which applies to agency relationships generally. . . . An agency relationship results from “the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” *Leidy v. Taliaferro*, 260 S.W.2d 504, 505 (Mo.1953); *Groh v. Shelton*, 428 S.W.2d 911, 916 (Mo. App.1968); *Dillard v. Rowland*, 520 S.W.2d 81, 90 (Mo.App.1974). An agency relationship may be established by consent manifested in words and conduct. *Groh*, 428 S.W.2d at 916. Neither a contract nor an express appointment and acceptance is essential to the formation of an agency relationship. *Id.* Furthermore, in Missouri, “[t]he creation of the attorney- client relationship ‘is sufficiently established when the advice and assistance of the attorney are sought and received in matters pertinent to his profession.’ ” *Erickson v. Civic Plaza Nat. Bank of Kansas City*, 422 S.W.2d 373, 378 (Mo.App.1967). See also *State v. Longo*, 789 S.W.2d 812, 815 (Mo.App.1990) (citing *Erickson* for the same proposition).

Where parties can prove that they “sought and received legal advice and assistance and that [the lawyer] intended to undertake to give such advice and assistance on their behalf . . . , the attorney-client relationship may be found to exist.” *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624, 626 (Mo. banc 1995). However, “reliance alone upon the advice or conduct of a lawyer does not create an attorney-client relationship.” *Id.*, citing Ronald E. Mallin and Jeffrey M. Smith, LEGAL MALPRACTICE ¶ 8.2, at 96 (3rd. ed. Supp. 1993). “It is the client’s reasonable belief that an attorney is representing him” that provides the basis for recognizing the existence of the relationship. *Longo*, 789 S.W.2d at 816 (in the context of the attorney-client privilege).

In any case where the existence of an attorney-client relationship is in issue, it will be necessary to identify the nature of the duties and responsibilities that are at issue and to determine the existence of the relationship in that context. There is a tension between protecting legitimate interests of prospective clients, who are not in the best position to judge whether the relationship has been created, and the right of an attorney to freely choose whether to enter into such a relationship. Many courts now err on the side of the client where the lawyer could have clarified the matter and did not. It is therefore a good idea for an attorney who does not undertake to represent a potential client after an initial consultation (or what could be reasonably construed as one) to send a non-engagement letter to that individual. For further discussion of these issues, see RESTATEMENT, Comment and Reporter’s Note to § 14; ABA/BNA LAWYER’S MANUAL ON PROFESSIONAL CONDUCT, 31:101-106.

III. ESSENTIAL REQUISITES OF THE ATTORNEY-CLIENT RELATIONSHIP

A. The Lawyer’s Duties to the Client

The Restatement addresses the basic requisites of the attorney-client relationship in § 16 as follows:

To the extent consistent with the lawyer's other legal duties and subject to the other provisions of this Restatement, a lawyer must, in matters within the scope of the representation:

(1) proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation;

(2) act with reasonable competence and diligence;

(3) comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client; and

(4) fulfill valid contractual obligations to the client.

Where in the Model Rules is each of these duties addressed? What is the source of each of these obligations (contract, agency or fiduciary duty), and how does that source impact on the definition and scope of the duty? As we address each of these obligations individually throughout the semester, we will address these and other questions regarding each of these duties.

Some duties may arise even before representation is undertaken or even if no relationship ever materializes. Section 15 of the Restatement sets out the duties a lawyer owes to a prospective client. These duties are significantly less than the duties owed once a relationship ensues.

Note that a lawyer's duties to his or her client may be limited by an agreement between the lawyer and the client, RESTATEMENT §18,19. Pursuant to the Model Rules, a lawyer may limit the objectives of a representation if the client consents after consultation. M.R. 1.2(c).

B. Decision-Making Within the Attorney-Client Relationship

Within the attorney-client relationship, the attorney and client may allocate decision-making authority by agreement. RESTATEMENT § 21. Absent such agreement, a lawyer shall abide by a client's decisions regarding objectives and shall consult with the client regarding means. M.R. 1.2(a); see also RESTATEMENT §§ 22,23. The attorney has a duty to communicate with the client to the extent necessary to effectuate this decision-making authority. M.R. 1.4; RESTATEMENT § 20.

To a large extent, concepts of agency govern issues of decision-making and authority within the attorney-client relationship. Thus, courts generally look to agency concepts in resolving questions regarding the authority of the attorney to bind the client. See *Rosenblum v. Jacks or Better of America*, 745 S.W.2d 754, 760-61 (Mo. App. 1988). Because of the fiduciary nature of the relationship and the professional role of the attorney, however, these concepts are instructive, but are not conclusive, in determining these issues. See generally LAWYER'S MANUAL at 31:301-304. This is especially true where settlement of litigation is involved.

Who should “control” aspects of the attorney-client relationship? Does it (should it) matter, as the Rules appear to instruct, whether objectives or means are involved? Why or why not? Is the line between objectives and means always that clear? Can you imagine a situation in which a client might be more concerned with means than with ultimate ends?

There are several theories that address authority and control within the attorney-client relationship. The standard conception, based on client autonomy, is a client-centered approach. Under this theory, it is not for the lawyer to judge the client’s objectives or means, nor is the lawyer accountable for them, at least once representation has been undertaken. The lawyer’s job is to advance the client’s interests, as defined by the client. Doing so advances the autonomy of the client, and is supported by principles of partisanship and neutrality. Those who favor this view characterize it as non-judgmental; those who disparage this concept of lawyering characterize the lawyer who plays this role as a “hired gun.”

A second view is sometimes termed the moral activist or directive approach. Proponents of this theory reject the extreme role-differentiation they perceive under the standard conception, and believe that lawyers must take a broader view of their obligation to influence clients to make what the lawyer believes to be the morally appropriate choices. Where the lawyer has discretion, he or she is to act in ways that are likely to promote justice. Critics of this approach question why the lawyer’s view of morality or justice should control over the client’s interests.

A third approach, based on practical rather than theoretical considerations, is more in the nature of the business model. The lawyer asks what actions and approaches will best advance good client relations and make the client happy and acts in accordance with the answers to those questions. Moral issues are relevant only to the extent the client makes them so.

A final approach that has been suggested is a collaborative model, in which the lawyer and client resolve issues together through moral discourse. It is urged that this is the best approach. In this model, the client makes the ultimate decision, but the lawyer is actively involved in the process of determining what course should be chosen. The lawyer does not impose his or her moral views on the client, but works with the client to help the client articulate his or her own moral position. While this model works well in theory, it is harder to make work in practice.

What are the pros and cons of each approach? Which is more consistent with your own views of lawyering and legal practice?

Finally, an important emerging dimension of the lawyer-client relationship relates to cultural competence. As our society becomes more diverse, an attorney needs to be sensitive not only to the stated objectives of the client, but to the cultural context in which the attorney-client relationship exists. It is important for lawyers to be cognizant of the extent to which their own cultural context influences their understanding and expectations of their clients and to be aware of the extent to which

cultural differences can impact the attorney-client relationship. Among the issues attorneys must pay attention to are perception and use of interpersonal space, body language, time and priority considerations, narrative preferences, individual vs. collective orientation and scientific orientation. To be sensitive and effective in this regard, lawyers should cultivate their own cultural identities, acknowledging biases and oppression that their culture contains. See generally, Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 *Clinical L. Rev.* 373, 385-414 (2002); Michelle Jacobs, *People from the Footnotes: The Missing Element of Client-Centered Counseling*, 27 *Golden Gate U. L. Rev.* 345, 400-401 (1997); Susan Bryant, *The Five Habits: Building Cross Cultural Competence in Lawyering*, 8 *Clinical L. Rev.* 33 (2001).

IV. THE FINANCIAL ASPECTS OF THE ATTORNEY-CLIENT RELATIONSHIP

Except in cases of pro bono representation, the client will generally have a financial relationship with the attorney as part of the attorney-client relationship. What is appropriate with regard to fees?

Model Rule 1.5 governs attorneys' fees. M.R. 1.5 (a) prohibits the charging of unreasonable fees or expenses. See also RESTATEMENT §34. The Rule sets out factors that are to be considered in determining reasonableness, but does not prioritize among those factors. In general, where a fee is negotiated at arms' length between a lawyer and client with generally equal bargaining power, it will rarely be second-guessed. Lawyers must communicate the scope of the representation and the basis or rate of the fee to be charged early in the representation, preferably in writing. M.R. 1.5(b).

There are many types of fees, including hourly fees, flat fees, contingent fees and hybrids. Special rules govern the use of contingency fees. See RESTATEMENT §35. They are prohibited in criminal and domestic cases, M.R. 1.5 (d), and, where an alternative fee would better serve the client's interests, that alternative should be offered to the client. See Comment, ¶3. Additionally, special rules require that contingent fees be in writing. See M.R. 1.5(c) for these requirements.

Lawyer-client fee contracts are not directly addressed by the rules, but guidance is provided in the Restatement. See RESTATEMENT § 38. Splitting of fees is addressed in the Rules, however. Lawyers not in the same firm can only split fees under limited circumstances, see M.R. 1.5(e) and RESTATEMENT § 47, and lawyers may not split fees with non-lawyers. See M.R. 5.4.

V. TERMINATING THE ATTORNEY-CLIENT RELATIONSHIP

Generally, an attorney is expected to continue representation of a client until the matter for which the attorney has been retained has been completed. In some situations, either the attorney or the client will want to end the relationship prematurely. Model Rule 1.16 governs the termination of the attorney-client relationship. That Rule makes withdrawal mandatory in certain circumstances (see 1.16(a)) and permits withdrawal in others. (See 1.16(b)). Read Rule 1.16. Generally, the Restatement is in

accord with the Rules. See RESTATEMENT § 32. Termination of the relationship ordinarily ends the attorney's authority to act on behalf of the client. See RESTATEMENT § 31. With regard to withdrawal, see generally LAWYER'S MANUAL at 31:1001-1212.

Whenever an attorney withdraws from representation, the attorney has an obligation to take reasonable steps to protect the client's interests. This may include giving reasonable notice of the intent to withdraw, surrendering property and papers of the client and refunding any unearned fees. See M.R. 1.16(d); RESTATEMENT § 33. Where litigation is involved, the attorney may need permission of the court to withdraw. See M.R. 1.16(c)(2002).

CHAPTER V CONFIDENTIALITY AND ZEAL

I. INTRODUCTION

Both preserving a client's confidences and representing a client zealously are viewed as fundamental duties of an attorney. What is the source of these duties? What is there about the role an attorney plays which requires these obligations?

While there is no serious dispute that confidentiality and zeal are desirable attributes of an attorney in representing a client, at some point, preserving a client's confidences or secrets may inhibit the truthfinding function of the adversary system or may prevent the just resolution of a dispute between parties. And at some point, zeal on the part of a client may infringe upon the rights of others and may lead the attorney to violations of law. How much impairment of the truth-finding function or infringement on the rights of others do the concepts of confidentiality and zeal allow? At what point must these concepts give way? Commentators have been debating these questions for some time, but have produced less than satisfying answers. This section will identify the competing interests at stake and examine attempts to resolve these issues taken by the Model Rules, the courts and the bar.

II. CONFIDENTIALITY

A. Attorney-Client Privilege

The attorney-client privilege prevents attorneys from being compelled to disclose the confidences of their clients. It is an evidentiary privilege and has no application outside of the courtroom. In addition, its scope is normally quite narrow. Although, as the case below demonstrates, Missouri takes a broad view of the privilege, it is still available only in limited circumstances as defined by statute and common law.

State ex rel. Great American Insur. Co. v. Smith, 574 S.W.2d 379 (Mo. banc 1978):

[Respondent Judge ordered relators (fire insurers being sued for failure to pay) to turn over letters from their attorney written during the course of investigation of a fire and providing advice regarding whether to pay the claim. Relators brought a proceeding in prohibition to avoid turning over the letters on the grounds they were protected from disclosure by the attorney-client privilege embodied in RSMo. § 491.060. The Court rejected a narrow interpretation of the privilege it had taken in an earlier version of these proceedings (563 S.W.2d 62 [Mo. banc 1978]) and made permanent its ruling in prohibition, thereby prohibiting disclosure of the letters by the attorney.]

The attorney-client privilege dates from the reign of Elizabeth I of England. See 8 J. Wigmore, *supra*, § 2290. In recognition of that common law privilege, the legislature has enacted a statute, §. 491.060, which provides, in part:

The following persons shall be incompetent to testify:

- (3) An attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the consent of such client;

The foregoing section has been held in a court of appeals opinion to be declaratory of the common law rule. . . .We agree that it should be so construed. The statute does not limit or diminish the common law rule.

There are two prevailing views as to the scope of the attorney-client privilege, following an emphasis on two different fundamental policies. Dean Wigmore emphasized the fundamental societal need to have all evidence having rational probative value placed before the trier of facts in a lawsuit. While he argued against Jeremy Bentham's suggestion that the attorney-client privilege be abolished, he regarded it as an exception to what he considered to be the more fundamental rule, and one which "ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." 8 J. Wigmore, *supra*, § 2291 at 554.

A different fundamental policy is emphasized by Sedler & Simeone in "Privileges in the Law of Evidence: The Realities of Attorney-Client Confidences," 24 OHIO ST.L.J. 1 (1963). While the authors acknowledge Wigmore's view of attorney-client privilege as an exception to the policy of disclosure of all evidence, they view confidentiality of communications between attorney and client as the more fundamental policy, to which disclosure is the exception. This view is based in part on the duty of a lawyer to preserve a client's confidences, subject to a very limited privilege of disclosure, which is imposed by the Canons of Professional Ethics. The greater societal need for confidentiality is attributed to the relationship of lawyer to client in giving advice, a relationship in which secrecy has always been considered important. In support of a broad attorney-client privilege, the article states at p. 3:

As long as our society recognizes that advice as to matters relating to the law should be given by persons trained in the law, that is, by lawyers, anything that materially interferes with that relationship must be restricted or eliminated, and anything that fosters the success of that relationship must be retained and strengthened. The relationship and the continued existence of the giving of legal advice by persons accurately and effectively trained in the law is of greater societal value, it is submitted, than the admissibility of a given piece of evidence in a particular lawsuit. Contrary to the implied assertions of the evidence authorities, the heavens will not fall if all relevant and competent evidence cannot be admitted.

We find this analysis of the fundamental policy underlying attorney-client privilege to be preferable to that of Wigmore. There clearly is a societal need for persons to be able to employ and consult with persons trained in the law for advice and guidance as to legal matters. As recognized by Sedler & Simeone, confidentiality of the communications between client and attorney is essential for such relationships to be fostered and to be effective. It was so considered at common law as shown by the following from the case of *Annesley v. Earl of Anglesea*, 17 How.St.Tr. 1139 (Ex. 1743), in which the

Honourable Mr. Baron Mounteney said at 1241:

(A)n increase of legal business, and the inability of parties to transact that business themselves, made it necessary for them to employ . . . other persons who might transact that business for them. That this necessity introduced with it the necessity of what the law hath very justly established, an inviolable secrecy to be observed by attorneys, in order to render it safe for clients to communicate to their attorneys, all proper instruction for the carrying on those causes which they found themselves under a necessity of intrusting to their care.

The nature and complexity of our present system of justice and the relationships among people and between the people and their government make the preservation and protection of the attorney-client privilege even more essential. If this is to be accomplished, when one undertakes to confer in confidence with an attorney whom he employs in connection with the particular matter at hand, it is vital that all of what the client says to the lawyer *and* what the lawyer says to the client to be treated as confidential and protected by the attorney-client privilege. This is what a client expects. A rule of attorney-client privilege broad enough in scope to achieve this goal was adopted by the influential American Law Institute. ALI Model Code of Evidence, Rule 209(d) (1942) provides:

As used in Rules 210 to 213:

(d) 'confidential communication between client and lawyer' means information transmitted by a voluntary act of disclosure between a client and his lawyer in confidence and by a means which, so far as the client is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it was transmitted. . . .

Comment on Clause (d): A communication means information transmitted voluntarily by any means; to be confidential it must be transmitted in confidence and in such a way that it will not, to the knowledge of the client, be disclosed to third persons to whom disclosure is not reasonably necessary to make the communication effective or to accomplish its purpose. Communication between client and lawyer includes not only a communication from client to lawyer but also a communication from lawyer to client.

The Wigmore approach, adopted in our decision reported at 563 S.W.2d 62, is narrower than that of the ALI Model Code of Evidence. It would protect the confidentiality of all of what the client says to the lawyer but would not protect all of what the lawyer says to the client. Of the lawyer's statements to his client, it would protect only (1) advice by the attorney concerning a communication to him by his client, (2) anything the lawyer said which could be an admission of his client, or (3) anything said by the lawyer that would lead to inferences concerning the tenor of what the client had said to him.

We are of the opinion that the Wigmore approach does not provide enough protection for the confidentiality of attorney-client communications to accomplish the objective for which the privilege was created and now exists.

Under the Wigmore approach, not all of a lawyer's advice is confidential, and statements by the lawyer which are not in the nature of advice are totally unprotected, except to the extent that they disclose what the client has said. . . . In other words, anything said by the attorney to his clients about the matter he was handling for them would not be treated as confidential unless it was advice on information actually conveyed by the clients to the attorney or what was said would disclose what the clients had told the attorney. All other consultation, opinion and advice is not protected under the Wigmore view.

When a client goes to an attorney and asks him to represent him on a claim which he believes he has against someone or which is being asserted against him, even if he as yet has no knowledge or information about the claim, subsequent communications by the attorney to the client should be privileged. Some of the advice given by the attorney may be based on information obtained from sources other than the client. Some of what the attorney says will not actually be advice as to a course of conduct to be followed. Part may be analysis of what is known to date of the situation. Part may be a discussion of additional avenues to be pursued. Part may be keeping the client advised of things done or opinions formed to date. All of these communications, not just the advice, are essential elements of attorney-client consultation. All should be protected.²

This does not mean that discoverable factual information can be made privileged by being recited by the attorney or the client in their confidential communications. Only the actual attorney-client communications are privileged.

The scope of discovery under existing rules and decisions is sufficiently comprehensive to afford parties to litigation ample means of securing factual and other data needed for preparation and trial of a case.³

² Judge Seiler's dissent speaks of efforts to protect the "preserve" of lawyers and suggests at least inferentially that this is the purpose of protecting all of what the lawyer says to the client as well as what the client says to the lawyer. That is not the objective of the privilege or of this opinion. Instead, as the opinion states, it is to make it possible for people to employ and confer with one trained in the law and to do so in confidence. The privilege is for the benefit of the client, not the lawyer. The dissent also states that this opinion will greatly expand the attorney-client privilege as it has existed in Missouri for one hundred years. No authority is cited to support that contention and none exists. As a matter of fact, this opinion does not broaden the scope of the attorney-client privilege as it has existed and been applied in Missouri.

³ Judge Seiler's dissent argues that "(t)he broadened scope of attorney-client privilege established by the proposed opinion will dismantle a good part of the scope of Missouri discovery" and that factual material obtained by the attorney and reported to his client "would become privileged and not discoverable." It concludes that "(l)awyers are being presented with a legitimate way to avoid disclosing what has up till now been discoverable facts." Such contention shows a misreading of this opinion. The privilege is limited to protecting attorney-client Communications. For example, the copy of a letter from the FBI to the chief of police, which copy was obtained by Risjord, was not protected by the privilege and was discoverable. If Risjord had obtained names of witnesses or taken statements which were furnished to the client, the names and the statements themselves would not be protected by the attorney-client privilege nor insulated by this opinion.

In this case, it is clear that Risjord was employed to represent relators in the handling and defense of the claims of Cannova and Mid-Continent arising out of the December 24, 1973 fire. There is no question but that the three letters Risjord wrote to relators pertained to these matters in which he had been employed. Risjord so stated and the court's findings as set out in the letter of April 21, 1977, so show. If this were not so, we would direct the court to conduct a hearing and examine representatives of relators or Risjord or both to determine whether at the time the letters were written, the relation of attorney and client regarding the insurance claims existed, and whether the letters pertained to the matters for which Risjord had been employed. If either answer were in the negative, the privilege would not apply.

This procedure would be in harmony with *Bussen v. Del Commune*, 239 Mo. App. 859, 199 S.W.2d 13 (1947), in which the court discussed the propriety of the trial court's action in admitting into evidence a lawyer's testimony concerning a note which had been addressed to him by the late husband of defendant. In upholding the admission of that note into evidence, the court said:

Our statute, which is declaratory of the common-law rule, provides that an attorney shall be incompetent to testify concerning any communication made to him by his client in that relation, or his advice thereon, without the consent of such client. "It is thus to be observed that for the rule of privilege to apply, the relation of attorney and client must have actually existed between the parties at the time the communication was made or the advice given. Moreover, such relation must have existed as to the subject matter of the communication or advice; and the communication, if it is to be privileged, must have been made to the attorney in his professional capacity, and on account of the relation of attorney and client. If such relation existed, the privilege is not confined to communications or advice in connection with pending or anticipated litigation, but it extends to all matters where the attorney was consulted by his client for professional advice or service in the course of the employment. "The question of whether the note was a privileged communication was one of law for the court; and to enable it to rule upon the question, the court proceeded to examine Mr. Boverie in regard to his relations with Del Commune, and the circumstances under which the note had come into his possession.

It should be noted that the inquiry was not directed to whether part or all of the note might be admissible in spite of the attorney-client privilege by reason of the nature of its content. Instead, the determinative issue was whether the relationship of attorney and client existed between the parties at the time of the communication with reference to the subject matter of the communication. The court concluded from the evidence, based on the finding of the trial court, that the note had not been communicated as a part of an attorney-client relationship. Consequently, it was not a privileged communication.

We recognize that in some of the federal cases cited by Cannova the court has approved the utilization of an in camera examination by the court of attorney-client communications to determine how much, if any, thereof shall be made discoverable under the Wigmore approach. However, no state court

decision approving or adopting that procedure has been cited, and we have found none. We have concluded that we should not adopt such a rule in this case. The harm to the traditional attorney-client relationship which could result from permitting a trial judge to interrogate a lawyer or his client to learn what the attorney said in their conferences, or to examine the lawyer's letters to ascertain what he said to the client therein, in order to determine what portions thereof could be made available to the other parties under the Wigmore test could, and we believe would, be considerable. It should not be permitted.

DONNELLY, Judge, dissenting.

In my view, the primary concern of the judicial process is that we seek the truth and then do justice. Deviations from this goal should not constitute "the more fundamental policy." The principal opinion makes paramount the protection from disclosure of what an attorney says to his client. I cannot agree.

SEILER, Judge, dissenting.

In almost every instance, in my view, were a lawyer asked to disclose what advice he gave his client, a Missouri trial judge would sustain the objection to the question, based on privilege. I believe law practice has been conducted on this basis in Missouri for years, and I see nothing in *State ex rel. Great American Insurance Company v. Smith*, 563 S.W.2d 62 (Mo. banc 1978) which will, as a practical matter, change the situation.

But there are a few situations where a lawyer's advice is not privileged unless it fits the limitations of the statute, § 491.060, exactly. One such situation is where the insured is suing on the policy, as here, and is claiming damages for vexatious refusal to pay. Suppose, for example, that Mr. Risjord's three letters advised relator not to pay the claim because he mistakenly believed the proof of loss was filed a day late and the insurer acted accordingly. Why shouldn't the insured be able to discover this fact and use it against the insurer? What is there about permitting discovery of this fact which would in any way hinder prospective clients from consulting lawyers and making a complete disclosure of the facts to counsel?

The proposed opinion, however, makes everything that takes place from lawyer to client privileged. All communications, not just advice, are to be protected and privileged.

The proposed opinion cites *Bussen v. Del Commune* as supporting the proposition that the determinative issue with respect to whether or not a communication is privileged is whether the relationship of attorney and client existed between the parties at the time of the communication with reference to its subject matter. Since the relationship did not exist in the *Bussen* case, it was not a privileged communication; ergo, since it does exist in the present case (Risjord concededly was attorney for relators), the communication is privileged.

This view ignores the important fact that the communication under examination in the *Bussen* case and the context, therefore, in which the court's language must be considered, was a communication *from the alleged client to*

the lawyer, which is why, under the statute (then § 1895, RSMo 1939) it would have been privileged had the attorney-client relationship been found to exist. The *Bussen* decision is not authority for the proposition that if the attorney-client relationship exists, any communication by the attorney to the client is privileged The *Bussen* case is authority only for the proposition that if the relationship does exist, then a communication *by the client to the lawyer* is privileged, but that is not what we have before us at the moment.

The proposed opinion also relies heavily on the law review article in 24 Ohio St.L.J. 1, written in 1963, by Professors Sedler and Simeone (now a judge of this court) which frankly states the view that anything that materially interferes with the attorney-client relationship is to be restricted or eliminated and anything that fosters its success is to be retained and strengthened and expresses concern that the "preserve" of lawyers is constantly being entered by other professions. In my opinion, our view as Judges must be broader than the protection of a "preserve". Not long ago this court saw fit to create an "insured-insurer" privilege. . . . Now we are about to expand greatly the attorney- client privilege. We keep making it harder for the facts to be ascertained. We have gotten along all right in Missouri for well over one hundred years with the attorney-client privilege as it was until the present decision. There is no need to broaden it at this late date. It may be, as the above article states, that "the heavens will not fall if all relevant and competent evidence cannot be admitted", *Id.* at 3, but by the same token, people will not stop consulting lawyers if the attorney-client privilege is not broadened, either.

The broadened scope of attorney-client privilege established by the proposed opinion will dismantle a good part of the scope of Missouri discovery. Under rule 56.01(b)(1) discovery is limited to matters "not privileged." . . . Lawyers are being presented with a legitimate way to avoid disclosing what has up till now been discoverable facts.

I am in complete accord with Canon 4 of rule 4 that a lawyer should preserve the confidence and secrets of a client. A client expects a lawyer to keep his affairs in confidence and not to talk or gossip about them. A lawyer with a loose tongue is an abomination. But that is not the problem before us and the fact that the ethical lawyer does not talk about his client's confidences does not answer the present problem. We have here a question of discovery, where the courts are being asked to order production of what may be highly relevant evidence, not heretofore privileged, and which cannot otherwise be brought to light.

It is conceivable that communications or advice from the lawyer to the client might be pieced together to discern communications made by the client to the lawyer. In such a case, the lawyer to client communications would be privileged under the present statute, § 491.060, which forbids disclosure by the attorney of any communications made to him by the client. The statute adequately protects against indirect as well as direct disclosure of the client's communications and there is no need for us, *ex gratia*, to expand the rule so as to cover, *carte blanche*, everything the lawyer passes to the client.

I respectfully dissent.

1. To what extent has the Missouri Supreme Court reached an accommodation between the interests at stake? Is it the appropriate one? Can this accommodation be utilized to resolve broader issues of attorney confidentiality or is it limited to application of the privilege itself?

2. What are the elements of the attorney-client privilege? See RESTATEMENT § 68. When can it be asserted? Confidentiality is key to the privilege, both as a matter of policy and application. See generally RESTATEMENT § 71 and Commentary. Thus, disclosures made in a setting that is not confidential, or in the presence of unnecessary third parties, are not covered by the privilege. See *Shire v. Shire*, 850 S.W.2d 923, 931 (Mo. App. 1993).

3. The privilege belongs to the client, and can be waived. See RESTATEMENT §§ 78-81. Standards for waiver can range from complete waiver whenever confidentiality is breached for any reason (the Wigmore approach) to no waiver unless there is an intentional relinquishment of confidentiality. In Missouri, the privilege is waived by voluntary disclosure. *Smith v. Smith*, 839 S.W.2d 382 (Mo. App. 1992). Where a party places the subject matter of the communication in issue, such that “proof of the party’s claim will necessarily entail proof of the contents of an attorney-client communication,” waiver will be found. *State ex rel. Chase Resorts, Inc. v. Campbell*, 913 S.W.2d 832 (Mo. App. 1996). Where a party relies on an advice-of-counsel defense, the privilege is generally waived. *Williams v. Preman*, 911 S.W.2d 288, 301 (Mo. App. 1995).

Even when the privilege is waived, there may be an issue regarding the scope of the waiver. In some cases, the waiver is limited to the precise information disclosed. In other jurisdictions, the waiver can extend to other communications related to the subject matter. Counsel advising on waiver should explore this issue fully. See generally Restatement § 79, Comment f.

4. There are exceptions to the attorney-client privilege, most notably the crime-fraud exception, found in Restatement § 82. That exception renders the privilege inapplicable to a communication occurring when a client: “(a) consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or (b) regardless of the client’s purpose at the time of consultation, uses the lawyer’s advice or other services to engage or assist a crime or fraud.” The client’s purpose to misuse the attorney-client relationship or the advice obtained therefrom is key to the crime-fraud exception. It is also irrelevant whether or not the lawyer was aware of the crime or fraud. The exception is not applicable, however, where the client consults the attorney for purposes of achieving compliance with the law. See § 82, Comment c.

In Missouri, although the crime-fraud exception has been recognized since 1920 in a criminal context, *Gebhardt v. United Railways Co. of St. Louis*, 220 S.W.2d 677, 679 (Mo. 1920), it is an open question whether it applies in a civil context (where the underlying activity is fraudulent but not criminal). See *State ex. rel. Peabody Coal Co. v. Clark*, 863 S.W.2d 604, 607-608 (Mo. banc 1993) (expressly reserving the question). Where the exception is claimed, the party seeking to raise it has a high

burden. The party seeking to avoid the privilege must meet a two part test. First, the party must make a “prima facie showing that the privileged party has committed a crime or fraud. Second, the seeking party must demonstrate that the privileged information bears a direct and contemporaneous relationship to the crime or fraud alleged.” *Id.* at 608. “Timing is critical, for the prima facie showing requires that the ‘client was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel to further the scheme.’” *Id.*

5. Many jurisdictions also recognize an exception for lawyer self-protection. See, e.g., *In re National Mtge Equity Corp. Mtge Pool Certif. Secur. Litig*, 120 F.R.D. 687 (D.C. Calif. 1988) (law firm may disclose otherwise confidential attorney-client communications over client objections asserting privilege where the firm has been charged as co-defendant in securities fraud and other violations.); see also Restatement § 83. The privilege does not apply “to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding (1) to resolve a dispute with a client concerning compensation reimbursement that the lawyer reasonably claims the client owes the lawyer; or (2) to defend the lawyer against an allegation by any person that the lawyer, an agent of the lawyer, or another person for whose conduct the lawyer is responsible acted wrongfully during the course of representing a client.” This exception is derived from the “breach of duty” exception in evidence codes. See § 83, Reporter’s Notes. Few reported decisions address this exception.

B. Model Rule 1.6

As noted, the attorney-client privilege is limited to situations in which the attorney is called to testify or produce documents. In other situations, attorneys must find guidance in other sources. The primary source of guidance for attorneys regarding their obligation of confidentiality is Model Rule 1.6. Read Rule 1.6 in its entirety.

The basic tenor of the Model Rules is nondisclosure. MR 1.6(a) establishes the general rule that a client’s information should neither be revealed nor used by an attorney. MR 1.6(b) sets out limited exceptions to the confidentiality requirement, but none, by its own terms, makes disclosure mandatory.

1. What is Confidential Information?

Model Rule 1.6 protects “information relating to the representation.” This has been deemed to cover “all information relating to the representation regardless of its source.” citing ABA Formal Op. 94-380 (1994),” see also ANNOTATED RULES at 91. This broad reading of the scope of the confidentiality protection is generally in accord with the Code, which protected “confidences” and “secrets” of the client. D.R. 4-101(A).

The Restatement provides protection to “confidential client information,” and defines it as follows:

Confidential client information consists of information relating to the client, acquired by a lawyer or agent in the course of or as the result of representing the client, other than

information that is generally known.

RESTATEMENT § 59.

2. Disclosure Is Generally Prohibited

As a general rule, an attorney may not reveal protected information to anyone other than as appropriate to advance the client's interests. RESTATEMENT § 61. According to the Model Rules, such disclosures are permitted where "impliedly authorized in order to carry out the representation." MR 1.6(a). Even then, the attorney must exercise care to prevent disclosure beyond that which is needed. See MR 5.3 and the revised Comments to M.R. 1.6, ¶¶16 and 17. See also RESTATEMENT § 60(b) ("lawyer must take reasonable steps in the circumstances to protect confidential client information against impermissible use or disclosure . . ."). Violations are possible not only where attorneys (or their staff) make intended disclosures, but where inadvertent disclosures are made as well. What kinds of situations can lead to inadvertent disclosure? How can such disclosure be avoided? Are there means of communication that are not sufficiently secure for attorney-client communications? What about e-mail? See A.B.A. Formal Op. 99-413. What about cell phones?

Are lawyers permitted to talk to spouses about their cases? To other lawyers? Does it matter whether or not they are in the same firm? See Comment ¶5. What about the use of hypothetical situations? Does this constitute revealing protected information? Should it? See Comment ¶4 (prohibition applies to disclosures by a lawyer that do not themselves reveal protected information but could reasonably lead to the disclosure of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation).

Additionally, an attorney may not use protected information of his or her client, whether to the client's disadvantage, MR 1.8(b), 1.9(c)(1), or the attorney's advantage. RESTATEMENT § 60(2); see *Matter of Miller*, 127 Ariz. 299, 620 P.2d 214 (en banc 1980) (attorney violated Code where he used information regarding value of a business and the existence of an outstanding option to his own advantage: attorney purchased option and diluted interests of former client). This duty arises out of the attorney's fiduciary obligations to the client. These duties of non-disclosure and non-use continue even after the termination of the attorney-client relationship. See Comment to MR 1.6, ¶21 (¶18); see also RESTATEMENT § 60, Comment e.

3. Exceptions

The obligation to preserve client information is not, however, absolute. Six exceptions allow for disclosure of information otherwise protected by Model Rule 1.6(a).

a. Disclosure is Impliedly Authorized or the Client Consents: M.R. 1.6(a)

An attorney may disclose information protected by Rule 1.6 where the representation itself permits disclosure or with the client's consent. Since the purpose of the confidentiality requirement is primarily to protect the client, this provision makes good sense. Where a client has requested services that necessitate disclosure of information, the attorney can make such disclosure based on implied authorization. This provision prevents the attorney having to seek consent where it is clear from the nature of the representation that the client agrees to the disclosure.

The consent exception applies where the nature of the representation itself does not authorize disclosure. Accordingly, some affirmative manifestation of consent is required. Under the 2001 Model Rules, consent must be "after consultation." Consultation was defined in the terminology section of the Model Rules as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." *Terminology* ¶ 3. The 2004 Rules require "informed consent," which is defined in Rule 1.0(e) as "the agreement . . . to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Note that the Missouri Bar Committee recommended against changing from "consent after consultation" to "informed consent." Which formulation do you prefer? Why?

The Restatement requires that the client be "adequately informed concerning the use or disclosure." RESTATEMENT § 62. However the standard is formulated, lawyers must assure that clients "have a full understanding of what they are being asked to consent to" and that "the consent is a completely voluntary matter with [the client], a consent which [the client] can deny without a sense of guilt or embarrassment." Informal Opinion 1287 (June 7, 1974). This is particularly true when dealing with clients who lack education or sophistication and who "might be more likely to be submissive to such requests. . . ." *Id.*

b. Future Death or Substantial Bodily Harm: M.R. 1.6(b)(1)

The Model Rules permit disclosure of otherwise protected information in order to avoid death or serious bodily harm. The circumstances that should permit such disclosure have been the subject of much discussion in recent years. In fact, this is an issue on which the new Model Rules have made significant changes. After reviewing both sets of rules, do you think the change was appropriate? Did it go far enough?

The 2001 version of the Rules permit an attorney to disclose information to the extent necessary to "prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." 1.6(b)(1). The Rules make a clear distinction between past and future crimes. Under the 2001 Rules, no disclosure of past crime is permitted, but disclosure of a client's intent to commit a crime likely to cause death or serious bodily harm in the future is left to the discretion of the attorney. This is somewhat consistent with both the evidentiary and fiduciary views of confidentiality, since intent to commit a crime is an exception to the evidentiary

privilege, and since agents are not privileged to commit crimes on behalf of their principals.

Why shouldn't an attorney be *required* to disclose information when it can prevent imminent death or serious bodily harm? In what situations, if any, should the attorney be allowed to maintain the confidence where such serious consequences are likely to occur? And why shouldn't an attorney be *permitted* to disclose the client's intent to commit a crime likely to cause serious financial hardship to another? Or non-criminal conduct likely to cause significant harm? What values are being protected here, and at what cost? Does this rule go too far, or not far enough?

What about completed crimes or frauds? Completed crimes that have future consequences? Is the lawyer precluded from disclosing as long as no further *conduct* of the client is expected? Consider the attorney who learns his client has planted a bomb and intends to detonate it in several hours. Can the attorney disclose? On what basis? What if the client has set the bomb to go off in several hours with no further action by the client. Can the attorney disclose in this situation? On what basis? If these situations lead to different outcomes, how are they justified? Are you convinced? If not, what should the rule be?

The 2004 Model Rules have attempted to remedy some of these concerns. The Rule now permits disclosure "to prevent reasonably certain death or substantial bodily harm." 1.6(b)(1)(2002). According to the Comments, this exception "recognizes the overriding value of life and physical integrity." Comment ¶6. Does this revision adequately address the concerns with the prior Rule? Why or why not? What constitutes "reasonably certain death or serious bodily harm"? See Comment ¶6. When can disclosure be made? See RESTATEMENT § 117A(2) ("if the client has acted at the time the lawyer learns of the threat of an injury or loss to the victim, use or disclosure is permissible only if the injury or loss has not yet occurred.").

Note that disclosure under either version of this rule is only permitted where death or substantial bodily harm is likely. Is this too narrow? Should the exception apply to serious psychological or emotional harm as well? Why or why not?

c. Substantial Injury to Financial Interests or Property: MR 1.6(b)(2)(3)

One of the most hotly contested issues in the adoption of the Rules relates to disclosures to prevent, mitigate or rectify substantial injury to the financial interests or property of another. The Ethics 2000 Commission proposed a new Rule 1.6(b)(2) which would permit disclosure "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." A similar amendment had been proposed in 1991. These efforts to broaden discretionary disclosure to some situations in which other than physical harm is threatened were initially defeated by the ABA House of Delegates. Why should economic harms be treated differently? Aren't there some situations in which economic harms might be as devastating as physical harm? Post-Enron, the ABA reconsidered its position and the House of Delegates ultimately adopted the current Rule. Note that

it only extends to crimes or frauds in which the lawyer services were used. Why? Does this rule go too far? Not far enough?

What about completed crimes or frauds? Should an attorney be permitted to disclose to rectify or mitigate the consequences of a client's criminal or fraudulent acts that have already occurred, especially if the lawyer's services were unknowingly used in perpetrating the fraud? The Ethics 2000 Commission also proposed a new (b)(3) which would have permitted disclosure to "prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services." A similar exception had been proposed and rejected in 1991. After the House of Delegates defeated proposed (b)(2), the Commission withdrew this provision, realizing it too was doomed to failure. But this provision, too, was subject to reconsideration the following year and was adopted by a close vote. Should such disclosure be permitted? Why or why not? What are the competing considerations? Would you have voted for this amendment?

Where disclosure is permitted, how certain must an attorney be before he or she reveals a client's intent to commit a crime? What factors should an attorney consider in determining whether to exercise discretion in favor of disclosure? See Comments ¶¶14 and 15.

d. Attorney Self Defense: M.R. 1.6(b)(5)

Under Canon 37 as originally adopted, an attorney was allowed to disclose client confidences when he or she was falsely accused of misconduct by a client. The word "falsely" was deleted from Canon 37 in 1937. MR 1.6(b) (5) (formerly (b)(2)) currently governs disclosures in "self defense," and is arguably broader than Canon 37. This provision permits disclosure to the extent the lawyer reasonably believes necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." See also RESTATEMENT §§ 64, 65.

1. It is clear from the rules and their interpretation that the allegation of misconduct need not come from the client in order for the exception to apply. Is this desirable? Doesn't the client in this situation lose all control over disclosure of confidences he or she has entrusted to the attorney? If a client can lose such control without any action on his or her part, will open and free communication between attorney and client be encouraged? Is this an instance of placing the lawyer's interest above those of the client?

2. When does the right to disclose come into play? Must there be a formal accusation (i.e., filing a suit, indictment, etc.) before the right to self defense arises? The court answered "No" in *Application of Friend*, 411 F. Supp. 776 (S.D.N.Y. 1975), where the attorney was being investigated by a grand jury along with his client. The court stated: "Although, as yet, no formal accusation has been made against Mr.

Friend, it would be senseless to require the stigma of an indictment to attach prior to allowing Mr. Friend to invoke the exception of D.R. 4-101(C)(4) in his own defense." *Id.* at 777, fn *. This same view is taken in the Comments. See ¶10.

A charge of ineffective assistance of counsel provides an attorney with the right to use otherwise protected information of the client in self defense. See e.g., *State v. King*, 24 Wash. App. 495, 601 P.2d 982, 988 (1979). But care must be taken where the charge comes before trial to insure that the defendant's trial rights are not prejudiced. *Butler v. United States*, 414 A.2d 844 (D.C. en banc 1980). A motion to disqualify an attorney has been held not, by itself, to be an accusation of wrongful conduct sufficient to give the attorney the right to disclose confidences in self defense. "A motion for disqualification is not, by itself, an accusation of misconduct. Disqualification is a prophylactic measure. The court does not inquire into whether there have been actual ethical violations, but only whether they might occur." *Levin v. Ripple Twist Mills, Inc.*, 416 F. Supp. 876, 886 (E.D. Penn. 1976). Accordingly, disclosure pursuant to 4-101(C)(4) [the predecessor to MR 1.6(b)(5)] is inappropriate in that context.

3. How much disclosure is necessary to defend oneself? See *Levin, supra*:

In almost any case when an attorney and a former client are adversaries in the courtroom, there will be a credibility contest between them. This does not entitle the attorney to rummage through every file he has on that particular client (regardless of its relatedness to the subject matter of the present case) and to publicize any confidential communication he comes across which may tend to impeach his former client. At the very least, the word "necessary" in the disciplinary rule requires that the probative value of the disclosed material be great enough to outweigh the potential damage [in matters outside the case in suit] the disclosure will cause to the client and to the legal profession.

See RESTATEMENT § 64, Comment e, requiring "proportionate and restrained use" of such information. In order to properly disclose, "[t]he lawyer must reasonably believe that options short of use or disclosure have been exhausted or will be unavailing or that invoking them will substantially prejudice the lawyer's position in the controversy."

4. Is there a risk that expansive interpretation of MR 1.6(b)(2) could lead to the indiscriminate joining of attorneys in law suits? The Court in *Sullivan v. Chase Investment Services of Boston Inc.*, 434 F. Supp. 171 (N.D. Cal. 1977) thought so. It commented on the possibility that "the prospect of obtaining potentially damaging and otherwise unavailable evidence will encourage plaintiffs to sue defendants' attorneys routinely as aiders and abettors. *Id.* at 188. Is this likely? What can and should be done?

5. Consider the following proposed revision of the attorney self-defense provision suggested by Henry D. Levine in his article *Self Interest or Self Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783 (1977):

Confidences or secrets necessary to establish or collect a reasonable fee, defend against a false accusation of wrongful conduct, or prevent the conviction of one wrongfully accused of crime, when permitted by a Court order confirming the justice and necessity of disclosure.

Disclosure by an attorney on his own behalf under [the preceding section] shall be reviewed by the appropriate bar association to determine its ethical propriety. A final judgment against an attorney claiming compensation or in favor of one accusing an attorney of wrongful conduct shall create a presumption that disclosure was unethical and in violation of the Code.

Does this revision adequately address and solve the problems posed by the current rules? Can you formulate a better rule?

e. Permitted by Rules or Required by Law or Court Order: M.R. 1.6(b)(6)

The Code contained an express provision, DR 4-101(c)(2), that permitted an attorney to disclose confidences or secrets where required by law or allowed by the Code. The 2001 Model Rules do not, within Rule 1.6 itself, contain a similar provision. The Commentary indicates that a “lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client,” ¶19, and that, in addition to specific provisions of the Rules that mandate or permit disclosure, “a lawyer may be obligated or permitted by other provisions of law to give information about a client.” ¶20. The Commentary further adds that “[w]hether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against supersession.” *Id.*

The 2004 Model Rules have reinstated such a provision in the “black letter” rules. M.R. 1.6(b)(6) permits disclosure to the extent reasonably necessary “to comply with other law or a court order.” The new Comments also note that “[w]hether such a law supersedes Rule 1.6 is a question of law beyond the scope” of the Rules, ¶12, and disclosure requires consultation with the client where the issue is not clear. The Comments continue to urge lawyers to assert all non-frivolous claims to protect client information and require consultation with the client regarding whether to appeal if disclosure is ordered. Where no review is sought of a court’s order to disclose, “(b)(6) permits the lawyer to comply with the court’s order.” Comment, ¶13.

Whether the Rules or the policies underlying them would prevent a citation of contempt for failure to comply with a court order is not clear, but the probable answer is no. Nor is it likely that the Rules or their underlying policy of confidentiality would prevent the application of criminal sanctions against an attorney who refused to disclose information required by law. In a case involving an attorney who was charged with a public health violation for failing to disclose the location of a body he learned in a confidential communication from his client (a defendant on trial for murder) and for failing to provide burial, the New York Court dismissed the indictment, finding the confidentiality claim outweighed the “trivia of a pseudo-criminal statute,” *People v. Belge*, 372 N.Y.S.2d 798 (1975). The court speculated, however, that it would have had more difficulty had the charge been obstruction of justice.

The best course of action for an attorney faced with what he or she considers an erroneous, although binding, order to disclose client confidences or produce protected documents would be to attempt to appeal the decision rather than comply. See Note, *Attorney-Client Privilege - Contempt: The Dilemma in Nondisclosure of Possibly Privileged Information*, 45 Wash. L. Rev. 181 (1970); see also ABA Formal Op. 94-385 (1994), which requires a lawyer receiving a subpoena to attempt to limit the request on any legitimate grounds. If the ultimate decision goes against the attorney, however, failure to comply could lead to both contempt and discipline, and compliance at that point is appropriate. See RESTATEMENT § 63, which allows disclosure when required by law “after the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure.”

(f) Seeking Ethical Advice: 1.6(b)(4)

M.R. 1.6(b)(4), as adopted in 2002, explicitly permits a lawyer to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary “to secure legal advice about the lawyer’s compliance with these rules.” While this was not explicit in the earlier version of the Rules, it was generally understood to be permitted. See ABA Formal Op. 98-411, fn. 1.

(g) Mandated disclosure

Note that, while generally the Model Rules do not require disclosure by their own terms, Rule 3.3 directly overrides confidentiality and may require that the lawyer reveal confidential information in some circumstances. Where this rule is involved, disclosure may be mandatory. This Rule will be discussed at length in the next section.

III. CLIENT PERJURY AND FRAUD: CONFIDENTIALITY AND CANDOR IN AN ADVERSARY SYSTEM.

One of the most difficult professional responsibility problems confronting an attorney is dealing with client perjury and fraud. This problem can arise in both counseling and litigation situations and in both criminal and civil cases.

There are many situations in which client perjury or fraud can arise. Consider the following examples: what does the attorney do when confronted with a client who intends to commit perjury? Who the attorney believes will commit perjury or fabricate evidence if given particular information about available defenses, or who reveals that he or she has committed perjury at a prior proceeding? While the incidence of client (or witness) perjury or fraud is hard to ascertain, the issues involved put the competing values of confidentiality and zeal in focus. The next section will address the issues in this area and attempts at their resolution. As you read this material, think about the values at stake. Are the responses clear? Are they correct? What counter-arguments should be made? Are the issues the same in the criminal and civil context? In litigation and non-litigation situations? If not, what differences should there be in required or permitted responses?

Read Model Rule 3.3 and 1.2(d).

A. The Client Who Lies: Reconciling Candor and Confidentiality

Prior to the Model Rules, the prevailing view was that an attorney could not participate in the presentation of false evidence but was generally not to breach client confidences in order to prevent it. Thus, where an attorney discovered that a client intended to commit perjury, he or she was required to remonstrate with the client in an attempt to persuade the client to testify truthfully. If that effort failed, the attorney was to attempt to withdraw. Only if all else failed did some jurisdictions allow disclosure to the court. In some cases, particularly those involving criminal defendants, a middle ground was suggested: allowing the client to testify in a free narrative, without questions from counsel, and prohibiting counsel from arguing the false testimony in summation. These proposed solutions -- withdrawal and free narrative -- removed the *attorney's* involvement in the perjury but did little to effectively solve the underlying problem. These attempted solutions likewise reflected an ambivalence in the prioritization of competing values: candor to the tribunal and loyalty (confidentiality) to the client.

A similar inability to reconcile these competing values was reflected in the solution to the problem of past perjury or fraud. In ABA Formal Opinion 287 (1953), the Committee held that an attorney who discovered that a client had perpetrated a fraud during the attorney's representation of the client should remonstrate with the client and if unsuccessful, should sever the relationship but not disclose. When the Code was adopted, D.R. 7-102(A)(4) and (B)(1) appeared to override Opinion 287 and mandate disclosure, but an amendment to 7-102(B)(1), adopted by the ABA and many jurisdictions, excepted situations in which the attorney knew of the perjury or fraud by means of a "privileged communication." When ABA Formal Opinion 341 (1975) interpreted "privileged communication" to include both confidences and secrets, the disclosure obligation was effectively negated. Many jurisdictions returned to the mandatory withdrawal coupled with non-disclosure required by Opinion 287. Arguably, in this context, loyalty won out over candor.

The adoption of the Model Rules altered this situation dramatically, however, as the following materials indicate.

NIX v. WHITESIDE
475 U.S. 157 (1986)

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Sixth Amendment right of a criminal defendant to assistance of counsel is violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial.

I
A

Whiteside was convicted of second-degree murder by a jury verdict The killing took place on February 8, 1977 Whiteside and two others went to one Calvin Love's apartment late that night, seeking marihuana. Love was in bed when Whiteside and his companions arrived; an argument between

Whiteside and Love over the marihuana ensued. At one point, Love directed his girlfriend to get his "piece," and at another point got up, then returned to his bed. According to Whiteside's testimony, Love then started to reach under his pillow and moved toward Whiteside. Whiteside stabbed Love in the chest, inflicting a fatal wound.

Whiteside was charged with murder, and when counsel was appointed he objected to the lawyer initially appointed, claiming that he felt uncomfortable with a lawyer who had formerly been a prosecutor. Gary L. Robinson was then appointed and immediately began an investigation. Whiteside gave him a statement that he had stabbed Love as the latter "was pulling a pistol from underneath the pillow on the bed." Upon questioning by Robinson, however, Whiteside indicated that he had not actually seen a gun, but that he was convinced that Love had a gun. No pistol was found on the premises; shortly after the police search following the stabbing, which had revealed no weapon, the victim's family had removed all of the victim's possessions from the apartment. Robinson interviewed Whiteside's companions who were present during the stabbing, and none had seen a gun during the incident. Robinson advised Whiteside that the existence of a gun was not necessary to establish the claim of self-defense, and that only a reasonable belief that the victim had a gun nearby was necessary even though no gun was actually present.

Until shortly before trial, Whiteside consistently stated to Robinson that he had not actually seen a gun, but that he was convinced that Love had a gun in his hand. About a week before trial, during preparation for direct examination, Whiteside for the first time told Robinson and his associate Donna Paulsen that he had seen something "metallic" in Love's hand. When asked about this, Whiteside responded: "[I]n Howard Cook's case there was a gun. If I don't say I saw a gun, I'm dead." Robinson told Whiteside that such testimony would be perjury and repeated that it was not necessary to prove that a gun was available but only that Whiteside reasonably believed that he was in danger. On Whiteside's insisting that he would testify that he saw "something metallic" Robinson told him, according to Robinson's testimony:

[W]e could not allow him to [testify falsely] because that would be perjury, and as officers of the court we would be suborning perjury if we allowed him to do it; ... I advised him that if he did do that it would be my duty to advise the Court of what he was doing and that I felt he was committing perjury; also, that I probably would be allowed to attempt to impeach that particular testimony.

Robinson also indicated he would seek to withdraw from the representation if Whiteside insisted on committing perjury.

Whiteside testified in his own defense at trial and stated that he "knew" that Love had a gun and that he believed Love was reaching for a gun and he had acted swiftly in self-defense. On cross-examination, he admitted that he had not actually seen a gun in Love's hand. Robinson presented evidence that Love had been seen with a sawed-off shotgun on other occasions, that the police search of the apartment may have been careless, and that the victim's family had removed everything from the apartment shortly after the crime. Robinson presented this evidence to show a basis for Whiteside's asserted fear that Love had a gun.

The jury returned a verdict of second-degree murder, and Whiteside moved for a new trial, claiming that he had been deprived of a fair trial by Robinson's admonitions not to state that he saw a gun or "something metallic." The trial court held a hearing, heard testimony by Whiteside and Robinson, and denied the motion. The trial court made specific findings that the facts were as related by Robinson.

The Supreme Court of Iowa affirmed respondent's conviction. That court held that the right to have counsel present all appropriate defenses does not extend to using perjury, and that an attorney's duty to a client does not extend to assisting a client in committing perjury. Relying on DR 7-102(A)(4) of the Iowa Code of Professional Responsibility for Lawyers, which expressly prohibits an attorney from using perjured testimony, and Iowa Code § 721.2 (now Iowa Code § 720.3 (1985)), which criminalizes subornation of perjury, the Iowa court concluded that not only were Robinson's actions permissible, but were required. The court commended "both Mr. Robinson and Ms. Paulsen for the high ethical manner in which this matter was handled."

B

Whiteside then petitioned for a writ of habeas corpus In that petition Whiteside alleged that he had been denied effective assistance of counsel and of his right to present a defense by Robinson's refusal to allow him to testify as he had proposed. The District Court denied the writ. Accepting the state trial court's factual finding that Whiteside's intended testimony would have been perjurious, it concluded that there could be no grounds for habeas relief since there is no constitutional right to present a perjured defense.

The United States Court of Appeals for the Eighth Circuit reversed and directed that the writ of habeas corpus be granted. The Court of Appeals accepted the findings of the trial judge, affirmed by the Iowa Supreme Court, that trial counsel believed with good cause that Whiteside would testify falsely and acknowledged that under *Harris v. New York*, a criminal defendant's privilege to testify in his own behalf does not include a right to commit perjury. Nevertheless, the court reasoned that an intent to commit perjury, communicated to counsel, does not alter a defendant's right to effective assistance of counsel and that Robinson's admonition to Whiteside that he would inform the court of Whiteside's perjury constituted a threat to violate the attorney's duty to preserve client confidences. According to the Court of Appeals, this threatened violation of client confidences breached the standards of effective representation set down in *Strickland v. Washington*. The court also concluded that *Strickland*'s prejudice requirement was satisfied by an implication of prejudice from the conflict between Robinson's duty of loyalty to his client and his ethical duties. . . . We granted certiorari and we reverse.

II
* * *

B

In *Strickland v. Washington*, we held that to obtain relief by way of federal habeas corpus on a claim of a deprivation of effective assistance of counsel under the Sixth Amendment, the movant must establish both serious

attorney error and prejudice. To show such error, it must be established that the assistance rendered by counsel was constitutionally deficient in that "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment." To show prejudice, it must be established that the claimed lapses in counsel's performance rendered the trial unfair so as to "undermine confidence in the outcome" of the trial.

In *Strickland*, we acknowledged that the Sixth Amendment does not require any particular response by counsel to a problem that may arise. Rather, the Sixth Amendment inquiry is into whether the attorney's conduct was "reasonably effective." To counteract the natural tendency to fault an unsuccessful defense, a court reviewing a claim of ineffective assistance must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." In giving shape to the perimeters of this range of reasonable professional assistance, *Strickland* mandates that "[p]revailing norms of practice as reflected in American Bar Association Standards and the like, . . . are guides to determining what is reasonable, but they are only guides."

Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel. When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts. In some future case challenging attorney conduct in the course of a state-court trial, we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the state in statutes or professional codes, and the Sixth Amendment in defining the proper scope and limits on that conduct. Here we need not face that question, since virtually all of the sources speak with one voice.

C

We turn next to the question presented: the definition of the range of "reasonable professional" responses to a criminal defendant client who informs counsel that he will perjure himself on the stand. We must determine whether, in this setting, Robinson's conduct fell within the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment.

In *Strickland*, we recognized counsel's duty of loyalty and his "overarching duty to advocate the defendant's cause." *Ibid.* Plainly, that duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. This principle has consistently been recognized in most unequivocal terms by expositors of the norms of professional conduct since the first Canons of Professional Ethics were adopted by the American Bar Association in 1908. The 1908 Canon 32 provided:

No client, corporate or individual, however powerful, nor any cause, civil

or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. . . . He must . . . observe and advise his client to observe the statute law. . . .

Of course, this Canon did no more than articulate centuries of accepted standards of conduct. Similarly, Canon 37, adopted in 1928, explicitly acknowledges as an exception to the attorney's duty of confidentiality a client's announced intention to commit a crime: "The announced intention of a client to commit a crime is not included within the confidences which [the attorney] is bound to respect."

These principles have been carried through to contemporary codifications of an attorney's professional responsibility. Disciplinary Rule 7-102 of the Model Code of Professional Responsibility (1980), entitled "Representing a Client Within the Bounds of the Law," provides:

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

* * *

(4) Knowingly use perjured testimony or false evidence.

* * *

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

This provision has been adopted by Iowa, and is binding on all lawyers who appear in its courts. . . . The more recent Model Rules of Professional Conduct (1983) similarly admonish attorneys to obey all laws in the course of representing a client:

RULE 1.2 Scope of Representation

* * *

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. . . .

Indeed, both the Model Code and the Model Rules do not merely authorize disclosure by counsel of client perjury; they require such disclosure. See Rule 3.3(a)(4); DR 7-102(B)(1).

These standards confirm that the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence. This special duty of an attorney to prevent and disclose frauds upon the court derives from the recognition that perjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice.

* * *

It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct. Model Rules of Professional Conduct, Rule 3.3, Comment; Wolfram, Client Perjury, 50 S.CAL.L.REV. 809, 846 (1977). A statement directly in point is found in the commentary to the Model Rules of Professional Conduct under the heading "False Evidence":

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed." Model Rules of Professional Conduct, Rule 3.3, Comment (1983) (emphasis added).

The commentary thus also suggests that an attorney's revelation of his client's perjury to the court is a professionally responsible and acceptable response to the conduct of a client who has actually given perjured testimony. Similarly, the Model Rules and the commentary, as well as the Code of Professional Responsibility adopted in Iowa, expressly permit withdrawal from representation as an appropriate response of an attorney when the client threatens to commit perjury. . . . Withdrawal of counsel when this situation arises at trial gives rise to many difficult questions including possible mistrial and claims of double jeopardy.

The essence of the brief amicus of the American Bar Association reviewing practices long accepted by ethical lawyers is that under no circumstance may a lawyer either advocate or passively tolerate a client's giving false testimony. This, of course, is consistent with the governance of trial conduct in what we have long called "a search for truth." The suggestion sometimes made that "a lawyer must believe his client, not judge him" in no sense means a lawyer can honorably be a party to or in any way give aid to presenting known perjury.

D

Considering Robinson's representation of respondent in light of these accepted norms of professional conduct, we discern no failure to adhere to reasonable professional standards that would in any sense make out a deprivation of the Sixth Amendment right to counsel. Whether Robinson's conduct is seen as a successful attempt to dissuade his client from committing the crime of perjury, or whether seen as a "threat" to withdraw from representation and disclose the illegal scheme, Robinson's representation of Whiteside falls well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable under *Strickland*.

* * *

Robinson's admonitions to his client can in no sense be said to have forced respondent into an *impermissible* choice between his right to counsel and his right to testify as he proposed for there was no *permissible* choice to testify falsely. For defense counsel to take steps to persuade a criminal defendant to testify truthfully, or to withdraw, deprives the defendant of neither his right to counsel nor the right to testify truthfully. In *United States v. Havens*,

we made clear that "when defendants testify, they must testify truthfully or suffer the consequences." When an accused proposes to resort to perjury or to produce false evidence, one consequence is the risk of withdrawal of counsel.

On this record, the accused enjoyed continued representation within the bounds of reasonable professional conduct and did in fact exercise his right to testify; at most he was denied the right to have the assistance of counsel in the presentation of false testimony. Similarly, we can discern no breach of professional duty in Robinson's admonition to respondent that he would disclose respondent's perjury to the court. The crime of perjury in this setting is indistinguishable in substance from the crime of threatening or tampering with a witness or a juror. A defendant who informed his counsel that he was arranging to bribe or threaten witnesses or members of the jury would have no "right" to insist on counsel's assistance or silence. Counsel would not be limited to advising against that conduct. An attorney's duty of confidentiality, which totally covers the client's admission of guilt, does not extend to a client's announced plans to engage in future criminal conduct. In short, the responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury. No system of justice worthy of the name can tolerate a lesser standard.

The rule adopted by the Court of Appeals, which seemingly would require an attorney to remain silent while his client committed perjury, is wholly incompatible with the established standards of ethical conduct and the laws of Iowa and contrary to professional standards promulgated by that State. The position advocated by petitioner, on the contrary, is wholly consistent with the Iowa standards of professional conduct and law, with the overwhelming majority of courts, and with codes of professional ethics. Since there has been no breach of any recognized professional duty, it follows that there can be no deprivation of the right to assistance of counsel under the *Strickland* standard.

E

We hold that, as a matter of law, counsel's conduct complained of here cannot establish the prejudice required for relief under the second strand of the *Strickland* inquiry. . . . The *Strickland* Court noted that the "benchmark" of an ineffective- assistance claim is the fairness of the adversary proceeding, and that in judging prejudice and the likelihood of a different outcome, "[a] defendant has no entitlement to the luck of a lawless decisionmaker."

Whether he was persuaded or compelled to desist from perjury, Whiteside has no valid claim that confidence in the result of his trial has been diminished by his desisting from the contemplated perjury. Even if we were to assume that the jury might have believed his perjury, it does not follow that Whiteside was prejudiced

In his attempt to evade the prejudice requirement of *Strickland*, Whiteside relies on cases involving conflicting loyalties of counsel. In *Cuyler v. Sullivan*, we held that a defendant could obtain relief without pointing to a specific prejudicial default on the part of his counsel, provided it is established that the attorney was "actively represent[ing] conflicting interests."

Here, there was indeed a "conflict," but of a quite different kind; it was one imposed on the attorney by the client's proposal to commit the crime of fabricating testimony without which, as he put it, "I'm dead." This is not remotely the kind of conflict of interests dealt with in *Cuyler v. Sullivan*. Even in that case we did not suggest that all multiple representations necessarily resulted in an active conflict rendering the representation constitutionally infirm. If a "conflict" between a client's proposal and counsel's ethical obligation gives rise to a presumption that counsel's assistance was prejudicially ineffective, every guilty criminal's conviction would be suspect if the defendant had sought to obtain an acquittal by illegal means. Can anyone doubt what practices and problems would be spawned by such a rule and what volumes of litigation it would generate?

Whiteside's attorney treated Whiteside's proposed perjury in accord with professional standards, and since Whiteside's truthful testimony could not have prejudiced the result of his trial, the Court of Appeals was in error to direct the issuance of a writ of habeas corpus and must be reversed.

Reversed.

Justice BRENNAN, concurring in the judgment.

This Court has no constitutional authority to establish rules of ethical conduct for lawyers practicing in the state courts. Nor does the Court enjoy any statutory grant of jurisdiction over legal ethics.

Accordingly, it is not surprising that the Court emphasizes that it "must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts." I read this as saying in another way that the Court cannot tell the States or the lawyers in the States how to behave in their courts, unless and until federal rights are violated.

Unfortunately, the Court seems unable to resist the temptation of sharing with the legal community its vision of ethical conduct. But let there be no mistake: the Court's essay regarding what constitutes the correct response to a criminal client's suggestion that he will perjure himself is pure discourse without force of law. As Justice BLACKMUN observes, that issue is a thorny one, but it is not an issue presented by this case. Lawyers, judges, bar associations, students, and others should understand that the problem has not now been "decided."

* * *

Justice BLACKMUN, with whom Justice BRENNAN, Justice MARSHALL, and Justice STEVENS join, concurring in the judgment.

How a defense attorney ought to act when faced with a client who intends to commit perjury at trial has long been a controversial issue. But I do not believe that a federal habeas corpus case challenging a state criminal conviction is an appropriate vehicle for attempting to resolve this thorny

problem. When a defendant argues that he was denied effective assistance of counsel because his lawyer dissuaded him from committing perjury, the only question properly presented to this Court is whether the lawyer's actions deprived the defendant of the fair trial which the Sixth Amendment is meant to guarantee. Since I believe that the respondent in this case suffered no injury justifying federal habeas relief, I concur in the Court's judgment.

* * *

The touchstone of a claim of prejudice is an allegation that counsel's behavior did something "to deprive the defendant of a fair trial, a trial whose result is reliable." The only effect Robinson's threat had on Whiteside's trial is that Whiteside did not testify, falsely, that he saw a gun in Love's hand. Thus, this Court must ask whether its confidence in the outcome of Whiteside's trial is in any way undermined by the knowledge that he refrained from presenting false testimony.

This Court long ago noted: "All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial." When the Court has been faced with a claim by a defendant concerning prosecutorial use of such evidence, it has "consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Similarly, the Court has viewed a defendant's use of such testimony as so antithetical to our system of justice that it has permitted the prosecution to introduce otherwise inadmissible evidence to combat it. The proposition that presenting false evidence could contribute to (or that withholding such evidence could detract from) the reliability of a criminal trial is simply untenable.

It is no doubt true that juries sometimes have acquitted defendants who should have been convicted, and sometimes have based their decisions to acquit on the testimony of defendants who lied on the witness stand. It is also true that the Double Jeopardy Clause bars the reprosecution of such acquitted defendants, although on occasion they can be prosecuted for perjury. But the privilege every criminal defendant has to testify in his own defense "cannot be construed to include the right to commit perjury." To the extent that Whiteside's claim rests on the assertion that he would have been acquitted had he been able to testify falsely, Whiteside claims a right the law simply does not recognize. "A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed." Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice.

* * *

In addition, the lawyer's interest in not presenting perjured testimony was entirely consistent with Whiteside's best interest. If Whiteside had lied on the stand, he would have risked a future perjury prosecution. Moreover, his testimony would have been contradicted by the testimony of other eyewitnesses and by the fact that no gun was ever found. In light of that impeachment, the jury might have concluded that Whiteside lied as well about his lack of premeditation and thus might have convicted him of first-degree murder. And if the judge believed that Whiteside had lied, he could have taken

Whiteside's perjury into account in setting the sentence. In the face of these dangers, an attorney could reasonably conclude that dissuading his client from committing perjury was in the client's best interest and comported with standards of professional responsibility. In short, Whiteside failed to show the kind of conflict that poses a danger to the values of zealous and loyal representation embodied in the Sixth Amendment. A presumption of prejudice is therefore unwarranted.

C

In light of respondent's failure to show any cognizable prejudice, I see no need to "grade counsel's performance." The only federal issue in this case is whether Robinson's behavior deprived Whiteside of the effective assistance of counsel; it is not whether Robinson's behavior conformed to any particular code of legal ethics.

Whether an attorney's response to what he sees as a client's plan to commit perjury violates a defendant's Sixth Amendment rights may depend on many factors: how certain the attorney is that the proposed testimony is false, the stage of the proceedings at which the attorney discovers the plan, or the ways in which the attorney may be able to dissuade his client, to name just three. The complex interaction of factors, which is likely to vary from case to case, makes inappropriate a blanket rule that defense attorneys must reveal, or threaten to reveal, a client's anticipated perjury to the court. Except in the rarest of cases, attorneys who adopt "the role of the judge or jury to determine the facts," pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment.

I therefore am troubled by the Court's implicit adoption of a set of standards of professional responsibility for attorneys in state criminal proceedings. The States, of course, do have a compelling interest in the integrity of their criminal trials that can justify regulating the length to which an attorney may go in seeking his client's acquittal. But the American Bar Association's implicit suggestion in its brief *amicus curiae* that the Court find that the Association's Model Rules of Professional Conduct should govern an attorney's responsibilities is addressed to the wrong audience. It is for the States to decide how attorneys should conduct themselves in state criminal proceedings, and this Court's responsibility extends only to ensuring that the restrictions a State enacts do not infringe a defendant's federal constitutional rights. Thus, I would follow the suggestion made in the joint brief *amici curiae* filed by 37 States at the certiorari stage that we allow the States to maintain their "differing approaches" to a complex ethical question.

Justice STEVENS, concurring in the judgment.

Justice Holmes taught us that a word is but the skin of a living thought. A "fact" may also have a life of its own. From the perspective of an appellate judge, after a case has been tried and the evidence has been sifted by another judge, a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must often deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel.

As we view this case, it appears perfectly clear that respondent intended to commit perjury, that his lawyer knew it, and that the lawyer had a duty--both to the court and to his client, for perjured testimony can ruin an otherwise meritorious case--to take extreme measures to prevent the perjury from occurring. The lawyer was successful and, from our unanimous and remote perspective, it is now pellucidly clear that the client suffered no "legally cognizable prejudice."

Nevertheless, beneath the surface of this case there are areas of uncertainty that cannot be resolved today. A lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury--as well as judicial review of such apparent certainty--should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked. Similarly, the post-trial review of a lawyer's pretrial threat to expose perjury that had not yet been committed--and, indeed, may have been prevented by the threat--is by no means the same as review of the way in which such a threat may actually have been carried out. Thus, one can be convinced--as I am--that this lawyer's actions were a proper way to provide his client with effective representation without confronting the much more difficult questions of what a lawyer must, should, or may do after his client has given testimony that the lawyer does not believe. The answer to such questions may well be colored by the particular circumstances attending the actual event and its aftermath.

Because Justice BLACKMUN has preserved such questions for another day, and because I do not understand him to imply any adverse criticism of this lawyer's representation of his client, I join his opinion concurring in the judgment.

.....

1. A "lawyer's responsibility with relation to client perjury" was the subject of ABA Formal Opinion 87-353 (1987). That Opinion noted that "Model Rule 3.3(a) and (b) represent a major policy change It is now mandatory, under these Model Rule provisions, for a lawyer, who knows the client has committed perjury, to disclose this knowledge to the tribunal if the lawyer cannot persuade the client to rectify the perjury." Is this clear from the rules? Read 3.3 (a)(3).

2. It seems clear that, at least in litigation settings where candor to the court is the competing value, a lawyer has an obligation to prevent or correct client perjury, even to the extent of disclosing confidential information to the court. But what if the perjury is not discovered until after the proceedings are over? Rule 3.3 would appear to let the attorney "off the hook." Rule 3.3 (c) indicates that the obligations in paragraphs (a) and (b) "continue to the conclusion of the proceedings," and the Commentary elaborates as follows: "A practical time limit on the obligation to rectify" has to be established. "The conclusion of the proceeding is a reasonably definite point for the termination of the obligation." Comment to Rule 3.3, at ¶13. What is the justification for ending the lawyer's responsibility at the conclusion of the proceeding? Does this make sense? What restrictions on the lawyer remain in such circumstances? See Rule 1.2(d). New ¶13 provides guidance on what constitutes the "conclusion" of a proceeding.

3. When does “a tribunal” become involved for purposes of this rule? What about the client who lies in a deposition? Arguably, there’s no tribunal involved at that point. Do we look to Rule 3.3 for guidance? Or should we look to Rule 4.1, which addresses truthfulness in statements to others. Note that, unlike 3.3, 4.1 does not have a confidentiality override. The ABA Committee on Ethics and Professional Responsibility has determined that Rule 3.3 applies in such circumstances, see Formal Opinion 93-376, but there was reason to question that resolution. While it is clear that an attorney may not use the deposition testimony at trial if the lawyer has discovered its falsity, is it clear that the lawyer must take remedial measures prior to that time? Can the attorney merely withdraw from the representation? Can the withdrawal be “noisy?” Can the lawyer just settle quickly without disclosing? These are difficult questions, the resolution of which turns on which values and principles take precedence. The new Model Rules directly address this issue, treating statements in a deposition as part of the adjudicatory proceeding. See Comment ¶1 (2004). Therefore, remedial measures would be required.

4. When do the duties of Rule 3.3 “kick in?” When does a lawyer “know” evidence is false, or that failure to disclose is necessary to assist the client in a fraud? See the terminology section of the Rules. Can a lawyer avoid knowing? Can he or she do so consistent with good lawyering and one’s obligations of competence under Rule 1.1? How certain must a lawyer be before taking action? And just what is the judge to do?

These issues were addressed by the Court in *United States v. Long*, 857 F.2d 436, 444-47 (8th Cir. 1988), *cert. denied*, 502 U.S. 828 (1991):

In the instant case, Jackson's lawyer asked to approach the bench after the government had presented its case. The lawyer told the trial judge that Jackson wanted to testify and that he was concerned about his testimony. The lawyer said he advised Jackson not to take the stand. The judge excused the jury and everyone else in the courtroom, except a United States Marshal, Jackson, and his lawyer. At that point, the lawyer said, "I'm not sure if it wouldn't be appropriate for me to move for a withdrawal from this case based upon what I think may be elicited on the stand. . . . I'm concerned about the testimony that may come out and I'm concerned about my obligation to the Court." The trial judge informed Jackson he had a right under the law to testify on his own behalf, which Jackson said he understood. The court also informed Jackson that his counsel was bound by his professional obligation not to place evidence before the court which he believed to be untrue. Jackson also said he understood this. The judge stated that Jackson could take the stand and give a narrative statement without questioning from his lawyer. The judge noted that if Jackson's attorney found "things which he believes to be not true . . . he may have other obligations at that point." The lawyer responded that he had again discussed the matter with Jackson and that Jackson had decided, on his own, not to testify. Upon questioning by the judge, Jackson again stated that he understood his right to testify and his attorney's obligations. Jackson thereupon informed the court that he did not wish to testify.

This case differs from *Whiteside* in three respects. Each difference raises important questions which can only be answered after an evidentiary

hearing.

First, in *Whiteside*, a finding was made that Whiteside would have testified falsely had he given the testimony he initially wanted to give. . . . Such a finding has not been made here. In terms of a possible violation of Jackson's rights, this is crucial. If, for example, Jackson's lawyer had no basis for believing Jackson would testify falsely and Jackson, in fact, wanted to testify truthfully, a violation of his rights would occur.

We do not know what measures Jackson's attorney took to determine whether Jackson would lie on the stand. He was required to take such measures as would give him "a firm factual basis" for believing Jackson would testify falsely. As we stated in our opinion in *Whiteside v. Scurr*, 744 F.2d at 1323, *rev'd on other grounds, sub nom Nix v. Whiteside*, 475 U.S. at 157:

Counsel must act if, but only if, he or she has "a firm factual basis" for believing that the defendant intends to testify falsely or has testified falsely.... It will be a rare case in which this factual requirement is met. Counsel must remember that they are not triers of fact, but advocates. In most cases a client's credibility will be a question for the jury.

The Supreme Court's majority opinion in *Whiteside* emphasizes the necessity of such caution on the part of defense counsel in determining whether a client has or will commit perjury. In discussing the attorney's duty to report possible client perjury, the majority states that it extends to "a client's announced plans to engage in future criminal conduct." Thus, a clear expression of intent to commit perjury is required before an attorney can reveal client confidences.

The concurring opinions in *Whiteside* support this interpretation. Justice Stevens advised circumspection: "A lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury * * * should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked." And, Justice Blackmun in his concurrence observed that "[e]xcept in the rarest of cases, attorneys who adopt 'the role of the judge or jury to determine the facts' . . . pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment."⁵

Justices Blackmun and Stevens focus in their concurring opinions on the reasons the majority opinion carefully limits its holding to "announced plans" to commit perjury. The tensions between the rights of the accused and the obligations of her attorney are considerable in the context of potential client perjury. Justice Stevens points to the potential inaccuracy of a lawyer's perception. For many reasons, a lawyer's perception may be incorrect. Ideally, a client will tell her lawyer "everything." But "everything" may not be one

⁵ We note that under the Minnesota Rules of Professional Conduct, "[a] lawyer may refuse to offer evidence that he reasonably believes is false." Rule 3.3(a)(4)(c). This rule is fully consistent with the obligation under the Constitution to establish a firm factual basis for believing the client intends to testify falsely. Because of the gravity of a decision to notify a court of potential client perjury, a reasonable lawyer would only act on a firm factual basis.

consistent explanation of an event. Not only may a client overlook and later recall certain details, but she may also change intended testimony in an effort to be more truthful. Moreover, even a statement of an intention to lie on the stand does not necessarily mean the client will indeed lie once on the stand. Once a client hears the testimony of other witnesses, takes an oath, faces a judge and jury, and contemplates the prospect of cross-examination by opposing counsel, she may well change her mind and decide to testify truthfully.

As Justice Blackmun observes, an attorney who acts on a belief of possible client perjury takes on the role of the fact finder, a role which perverts the structure of our adversary system. A lawyer who judges a client's truthfulness does so without the many safeguards inherent in our adversary system. He likely makes his decision alone, without the assistance of fellow fact finders. He may consider too much evidence, including that which is untrustworthy. Moreover, a jury's determination on credibility is always tempered by the requirement of proof beyond a reasonable doubt. A lawyer, finding facts on his own, is not necessarily guided by such a high standard. Finally, by taking a position contrary to his client's interest, the lawyer may irrevocably destroy the trust the attorney-client relationship is designed to foster. That lack of trust cannot easily be confined to the area of intended perjury. It may well carry over into other aspects of the lawyer's representation, including areas where the client needs and deserves zealous and loyal representation. For these reasons and others, it is absolutely essential that a lawyer have a firm factual basis before adopting a belief of impending perjury.

The record before us does not disclose whether Jackson's lawyer had a firm factual basis for believing his client would testify falsely. This can only be adequately determined after an evidentiary hearing.

Second, in *Whiteside*, the defendant did testify and was "restricted" or restrained only from testifying falsely." Here, Jackson did not testify at all. It simply is impossible to determine from the record before us whether Jackson was "restrained" by his lawyer from giving truthful testimony. Again, this can only be determined after an evidentiary hearing.

Third, in *Whiteside*, the defense attorney did not reveal his belief about his client's anticipated testimony to the trial court. In contrast, the disclosure to the trial court here was quite explicit. The attorney said to the judge that he might have to withdraw because of what might be elicited on the stand. Such a disclosure cannot be taken lightly. Even in a jury trial, where the judge does not sit as the finder of fact, the judge will sentence the defendant, and such a disclosure creates "significant risks of unfair prejudice" to the defendant.⁶

⁶ Before disclosing to the court a belief of impending client perjury, not only must a lawyer have a firm factual basis for the belief that his or her client will commit perjury, but the lawyer must also have attempted to dissuade the client from committing the perjury. See *Whiteside*, 475 U.S. at 169, ("It is universally agreed that, at a minimum, the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct."). Such dissuasion is usually in the defendant's interest because, as Justice Stevens observes, "perjured testimony can ruin an otherwise meritorious case.

We note that, once the possibility of client perjury is disclosed to the trial court, the trial court should reduce the resulting prejudice. It should limit further disclosures of client confidences, inform the attorney of his other duties to his client, inform the defendant of her rights, and determine whether the defendant desires to waive any of those rights. The trial judge here acted primarily with these concerns in mind. The judge discussed the conflict with only the attorney and his client present. He prevented further disclosures of client confidences. He advised Jackson of his right to testify and determined that Jackson understood his rights and his attorney's ethical obligation not to place false testimony before the court. He advised Jackson that if he took the stand, his lawyer would be required to refrain from questioning Jackson on issues which the lawyer believed Jackson would perjure himself and that Jackson would have to testify in narrative form.⁷ He then directly asked Jackson if he wished to testify. We add that a trial court should also impress upon defense counsel and the defendant that counsel must have a firm factual basis before further desisting in the presentation of the testimony in question.

Under such a procedure, the chance for violations of the defendant's prevented, and the defendant can make a knowing waiver of her constitutional right to testify and to counsel.⁸ It will also be necessary to establish that the waiver was voluntary and that the defendant's rights were not violated prior to the waiver. Such inquiries, however, are best made at an evidentiary hearing.

CONCLUSION

The most weighty decision in a case of possible client perjury is made by the lawyer who decides to inform the court, and perhaps incidentally his adversary and the jury, of his client's possible perjury. This occurs when the lawyer makes a motion for withdrawal (usually for unstated reasons) or allows his client to testify in narrative form without questioning from counsel. Once this has been done, the die is cast. The prejudice will have occurred. At a minimum, the trial court will know of the defendant's potential perjury. For this reason, defense counsel must use extreme caution before revealing a belief of impending perjury. It is, as Justice Blackmun noted, "the rarest of cases" where an attorney should take such action. Once the disclosure of the potential client perjury has occurred, the trial judge can limit the resulting prejudice by

⁷ When a lawyer is confronted during trial with the prospect of client perjury, allowing the defendant to testify in narrative form was recommended by the American Bar Association in its Standards for Criminal Justice, Proposed Standard 4-7.7 (2d ed. 1980). This Standard, however, has not been in force since 1979 when the American Bar Association House of Delegates failed to approve it. It has been criticized because it would indicate to the judge and sophisticated jurors that the lawyer does not believe his client, see, e.g., J. McCall, *Nix v. Whiteside: The Lawyer's Role in Response to Perjury*, 13 *Hastings Const. L.Q.* 443, 469, and because the lawyer would continue to play a passive role in the perjury. See *Whiteside*, 475 U.S. at 170 n. 6, 106 S.Ct. at 996 n. 6 (commenting on the Model Rules of Professional Conduct). In this case, these concerns were largely removed because the judge had already been notified of the potential perjury and because the judge had instructed the attorney to proceed in this manner.

⁸ We believe a trial court should also specifically inform a defendant of the possible consequences of false testimony: (1) the lawyer may reveal to the court what he believes to be false; (2) the lawyer may refrain from referring to the false testimony in final argument; and (3) the defendant may be prosecuted for perjury.

preventing further disclosures of client confidences, by informing the attorney of the obligation to his client, and by informing the client of her rights and determining whether she desires to waive any of them. The determination whether the prejudice was undue must occur at an evidentiary hearing. . . .

* * * * *

5. Finally, what constitutes “false evidence” or a “material fact?” These terms are not self-defining, yet their meaning is crucial to understanding the attorney’s obligations.

Generally, an attorney does not have a duty, beyond that posed by the general duties of competence and diligence, to investigate a client’s story. An attorney is not a guarantor of the accuracy of his or her client’s statements. Where, however, an attorney has doubts, the attorney may not close his or her eyes to the truth.

In *In re Oberhellman*, 873 S.W.2d 851 (Mo. banc 1994), an attorney attempted to avoid discipline under Rule 3.3 for giving false answers in an interrogatory he prepared for the client and in advising the client to testify falsely in a deposition regarding her residence for purposes of establishing jurisdiction. The court rejected the attorney’s argument that facts necessary to establish jurisdiction were not “material.” *Id.* at 854. The respondent attorney in *In re Ver Dught*, 825 S.W.2d 847 (Mo. banc 1992), avoided a finding of violation of Missouri’s version of Rule 3.3(a)(1) and (2) because the client’s false statement regarding her married name (and by implication marital status) was not material, but the attorney was nevertheless disciplined under 3.3(a)(4), which does not have a materiality requirement, for calling the client by her previous name on the witness stand and advising her to testify using that name despite her recent remarriage. Respondent attorney had also advised the client to remove her wedding ring prior to taking the witness stand. He was disciplined despite the fact that he told the client to answer questions about her marital status truthfully if they were asked, although he did tell her not to volunteer information on this issue if not asked.

Rule 3.3 was clarified by the Ethics 2000 proposals. First, 3.3(a)(1) now makes clear that any knowing false statement of law or fact to a tribunal by an attorney is prohibited, regardless of the materiality of that statement. Materiality is only relevant when the question is whether the lawyer has a duty to correct a false statement previously made by the lawyer or where the lawyer has offered evidence that the lawyer later learned is false. (a)(3).

6. Note that Rule 3.3 allows less than complete loyalty to the client even where the lawyer does not “know” the evidence is false. Rule 3.3(a)(3) allows the lawyer to refuse to offer evidence the lawyer “reasonably believes” is false. The lawyer may not disclose in such circumstances, but this Rule allows the lawyer to override the client’s wishes in such situations, except where a criminal defendant is involved. Is the “reasonable belief” standard high enough? Is this an appropriate resolution?

The new Model Rules clarify and strengthen the attorney’s obligation to the tribunal in some respects. As noted, revised M.R. 3.3(a)(1) removes the materiality requirement regarding false statements by the lawyer and requires the lawyer to

correct materially false statements previously made. The revision strikes (a)(2), but incorporates a broader obligation into a new paragraph (b). That paragraph requires that a lawyer “who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” The Reporter’s Explanation indicates that the new provision incorporates the substance of paragraph (a)(2) as well as obligations to prevent fraud on the tribunal, including misconduct toward jurors and venire members. New Comment. ¶12 further explains this duty, which is designed to protect the integrity of the court and the adjudicative process. The revised rule is more protective of the client in one respect: while it continues to allow a lawyer to refuse to offer evidence the lawyer reasonably believes is false, as noted, it limits this option in the case of criminal defendants.

B. Counseling or Assisting Illegality or Fraud

1. When does a lawyer “counsel” or “assist” illegal or fraudulent conduct? Can merely providing information without suggesting a course of conduct violate the Rules? Is it a violation to know the client will act on information you have provided and fail to prevent it? To believe the client will so act? Rule 1.2(d) prohibits a lawyer from counseling a client to engage in, or assisting a client in, conduct the lawyer knows is criminal or fraudulent. The Rule does allow the lawyer to “discuss the legal consequences of any proposed course of conduct.” The Commentary advises that “[t]here is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.” Comment, ¶9.

While this Rule appears clear on its face, it becomes much more complex when one begins to look at the processes of memory and recollection. In an illuminating chapter on “Counseling the Client: Refreshing Recollection or Prompting Perjury” from his controversial book, *LAWYERS ETHICS IN AN ADVERSARY SYSTEM*, Monroe Friedman explores the psychological literature on memory in the context of the ethical issues involved in counseling and advising clients. After describing several studies, he concludes:

[T]he process of remembering is not one dependent on “memory traces,” which can be played back as if by placing a stylus into the groove of a phonograph record. Rather, the process is one of active, creative reconstruction, which begins at the moment of perception. The reconstructive process is significantly affected by the form of the questions asked and by what we understand to be in our own interest -- even though, on a conscious level, we are responding as honestly as we possibly can.

These conclusions might seem to suggest that the conscientious lawyer should avoid giving a client or other witness an understanding of what is relevant and important and should rely only upon narrative statements unassisted by questions that seek to elicit critical facts. However, anyone who has conducted interviews will immediately recognize that such a procedure would be highly impractical. An untrained and perhaps inarticulate person cannot be expected to relate all that is relevant without a substantial amount of direction. That is why one of the most important functions of the lawyer is to

provide an awareness of what is legally relevant. Moreover, the same psychological authorities support the necessity of prompting in order to maximize recall. What prompting can do is to trigger recognition, which is a less complex process than remembering. . . . [I]n any experimental series, “only a relatively small portion of the material that can be recognized can, as a rule, be recalled.” Another authority observes similarly that narrative is “the most accurate” but “the least complete” of all forms of recall. That is, if we rely only upon unprompted narrative, many important facts will be omitted, facts which can be accurately reported if memory is prompted by recognition, such as through leading questions. Obviously, therefore, we are faced with another dilemma. On the one hand, we know that by telling the client that a particular fact is important, and why it is important, we may induce the client to “remember” the fact even if it did not occur. On the other hand, important facts can truly be lost if we fail to provide the client with every possible aid to memory. Furthermore, since the client’s memory is inevitably going to be affected by reconstruction consistent with self-interest, a client who has a misunderstanding of his or her own legal interest could be psychologically inclined to remember in a way that is not only inconsistent with the client’s case, but also inaccurate.

The complexity of the difficulty is heightened, both on a practical and ethical level, if we reconsider at this point the attorney’s professional responsibility to “know all the facts the client knows”

How, then, does an attorney interview clients and witnesses in a way that is likely to obtain truthful, complete, necessary information while at the same time not consciously or unconsciously prompting the client or witness? What about dealing with a client or witness whose memory may have been affected by improper questioning by another? How far can/should you go in that instance? And how does this all impact on what and when the lawyer “knows” with regard to the truth?

A related problem exists where legal rights turn on a particular state of mind, but the client may not have had any thoughts at all with regard to that matter at the crucial time. An example from Friedman addresses this problem:

A young man and a young woman decide to get married. Each has \$1,000. They decide to begin a business with those funds, and the young woman gives her funds to the young man for that purpose. Was the intention to form a joint venture or a partnership? Did they intend that the young man be an agent or a trustee? Was the transaction a gift or a loan? Most likely, the young couple’s state of mind did not conform to any of the modes of “intention” that the law might look for. Thus, if the couple should subsequently visit a tax attorney and discover that it is in their interest that the transaction be viewed as a gift, they might well “remember” that to have been their intention. On the other hand, should their engagement be broken and the young woman consult an attorney for the purpose of recovering her money, she might “remember,” after proper counseling, that it had been her intention to make a loan.

The foregoing is not intended in a cynical way. As in many other instances, the rules of law require determinations of “fact” where the facts are truly ambiguous. Moreover, as we have seen in the normal process of remembering/reconstructing, the client’s honest recollection is inevitably going to be affected

by what the client assumes to be in his or her best interest. In such an ambiguous situation, therefore, it would be absurd for the lawyer to insist that the client state the conclusion as to whether the intent had been to make a gift or a loan, without first explaining to the client what the applicable law is and what the significance would be of each of the possible responses.

Can the attorney probe for facts that the witness does not appear to remember? At what point does this lead to *creating of new memory*, rather than elicitation of what is really there? There is a clear line in the rules between providing information and assisting the client in fraudulent or criminal conduct. Often that line is clear in practice as well, but not always. And frequently, there are strong incentives to cross that line. Friedman ultimately concludes as follows:

In interviewing, therefore, the attorney must take into account the practical psychological realities of the situation. That means, at least at the early stages of eliciting the client's story, that the attorney should assume a skeptical attitude, and that the attorney should give the client legal advice that might help in drawing out useful information that the client, consciously or unconsciously, might be withholding. To that extent -- but on a different and more limiting rationale, I adhere to my earlier position that there are situations in which it may be proper for the attorney to give the client legal advice even though the attorney has reason to believe that the advice may induce the client to commit perjury. There does come a point, however, where nothing short of "brute rationalization" can purport to justify a conclusion that the lawyer is seeking in good faith to elicit truth rather than actively participating in the creation of perjury.

Frequently, the lawyer who helps the client to save a losing case by contributing a crucial fact is acting from a personal sense of justice: the criminal defense lawyer who knows that prison is a horror and who believes that no human being should be subjected to such inhumanity; the negligence lawyer who resents the arbitrary rules that prevent a seriously injured and impoverished individual from recovering from an insurance company; the prosecutor who does not want to see a vicious criminal once again turned loose upon innocent citizens because of a technical defense; or the tax attorney who resents an arbitrary and unfair system that leaves Peter with his wealth while mulcting Paul. I have sometimes referred to that attitude (with some ambivalence) as the Robin Hood principle. We are our client's "champions against a hostile world," and the desire to see justice done, despite some inconvenient fact, may be an overwhelming one. But Robin Hood, as romantic a figure as he may have been, was an outlaw. Those lawyers who choose that role, even in the occasional case under the compulsion of a strong sense of the justness of the client's cause, must do so on their own moral responsibility and at their own risk, and without the sanction of generalized standards of professional responsibility.

2. What about completed fraud? What if the attorney discovers that the client has used information or advice provided to perpetrate a fraud during the course of the representation? As the previous materials note, under the old (2001) version of the Rules, the attorney could not disclose that fraud, but under the current Rules, whether the attorney may disclose turns on whether the lawyer believes disclosure is necessary to prevent, mitigate or rectify substantial injury to the financial interests or property of

another. MR 1.6 (b)(3). Keep in mind that, even if disclosure is authorized, it is discretionary, not mandatory. In any event, the attorney may not act in a way that continues to advance the fraud. As the Commentary to Rule 1.2 indicates, a lawyer “may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent.” Withdrawal from the representation . . . may be required.” ¶10. Why must the attorney disclose (or at least take remedial measures) in the preceding situation (client perjury), but not here? And why may withdrawal be a satisfactory solution here, when it is rejected in the prior situation?

The rationale for the different responses stems from the different competing concerns. In the prior situation, confidentiality and loyalty were positioned against candor to the tribunal. Where these principles clash, candor to the court prevails. But in the latter situation, confidentiality and loyalty are pitted against fairness to third parties, and here fairness loses. Thus, although it is clear that the attorney cannot affirmatively participate in criminal or fraudulent conduct, no matter what other interests are at stake, where no tribunal is involved, the attorney has no obligation to rectify the consequences of a client’s fraudulent activity and disclosure is only permissive at best. Where disclosure is not permitted, the attorney may disassociate him or herself from the client, and must do so if not doing so will involve the attorney in the fraud. M.R. 1.16(a)(1). In some cases, “noisy” withdrawal may be warranted or required. See Comment, ¶10. Is this the proper resolution?

IV. ZEAL: The Juncture of Loyalty and Fairness

Read the remainder of Rule 1.2, 1.4, 2.1, 3.1-3.6, and Rule 4.

We have seen that the attorney-client relationship brings with it many duties on behalf of the client. These include the duty to protect client information as well as the duty to competently carry forward the aims of the representation in consultation with the client. Rule 1.2, 1.3, 1.4. Not surprisingly, however, these duties are qualified by other obligations. The Code perhaps stated it best in Canon Seven, which required that “A lawyer should represent a client zealously within the bounds of the law.” EC 7-1 recognized that this is a duty that inures to both the client and the legal system, and that the bounds of law includes the rules and “enforceable professional regulations.” However, EC 7-2 recognized that “[t]he bounds of law in a given case are often difficult to ascertain.” This section will attempt to ascertain and explore those bounds.

A. Communication with Parties, Witnesses, and Jurors

1. Model Rule 4.2 prohibits an attorney from communicating with a person who is known to be represented by counsel without that attorney’s consent. While the Rule prohibits communications where the attorney “knows” the party to be represented, such knowledge may be “inferred from the circumstances.” ABA Formal Opinion 95-396. Although there is no general duty to inquire, “a lawyer may not avoid Rule 4.2’s bar against communication with a represented person simply by closing her eyes to the obvious.” *Id.* The rule applies in both litigation and transactional contexts. *Id.* See, e.g., *In re Waldron*, 790 S.W.2d 456, 458-9 (Mo. banc 1990).

This Rule applies to “persons” who are represented. This is a change from the term “parties,” which had existed in the rule prior to 1995. The ABA Committee had construed the term “party” broadly to include any person who had retained counsel and whose interests were potentially distinct from those of the client on whose behalf the attorney was acting. The Committee found this interpretation necessary if the Rule was to serve its purposes - to protect against overreaching by adverse counsel, to protect the lawyer-client relationship from interference by the opponent, and to protect against disclosure of protected information. Formal Op. 96-396; see also Comment ¶1. There was a dissent from this broad construction, based on the use of the term “party” in Rule 4.2, in contrast to the use of the word “person” elsewhere, including Rule 4.3. The amendment was apparently to bring the language of the rule in conformance with the majority’s interpretation. Note that the Missouri version of the Rule still uses the term “parties”. The Rule only applies to communications regarding the subject matter of the representation.

Where an attorney representing a client finds that a person with whom he or she is dealing is unrepresented, the attorney may continue the communication, but must not state or imply that the attorney is disinterested. Rule 4.3. Moreover, if the lawyer knows or should know that the unrepresented person misunderstands the attorney’s role, the attorney is required to correct that misunderstanding. An attorney may not give advice (other than the advice to seek counsel) to one whose interests have a reasonable likelihood of being in conflict with the interest of a client. *Id.* (2004 version). Note that the rule applies to lawyers and, through 8.4(a), to agents of the lawyer. The clients themselves, however, are not prohibited from communicating with each other. Comment, ¶4; RESTATEMENT §. 158(2). The line between what is prohibited and permissible communication in this regard is hazy. See, e.g., *In re Pyle*, 91 P.3d 1222, 1228-1230 (Kan. 2004); see also ANNOTATED RULES, at 419.

These rules can act as a trap for the unwary, because the conduct the attorney undertakes may not appear inherently wrong. But the ABA has indicated that the predecessor provision, DR 7-104, precludes communication even where counsel has reason to believe that settlement offers are not being communicated to the opposing party and the communication may be in that party’s best interest. Informal Opinion 1348 (August 19, 1975); see also ABA Formal Opinion 92-362 (lawyers may not communicate settlement offers to opposing client, but may advise their own clients that they are free to do so). Moreover, courts have disqualified lawyers from continuing representation in cases where the rule has been violated, See, e.g., *Papanicolaou v. Chase Manhattan Bank*, 720 F. Supp. 1080 (S.D.N.Y. 1989); *Cronin v. Nevada District Court*, 781 P.2d 1150 (Nev. 1989); and have required other sanctions including exclusion of evidence, disclosure of statements and monetary sanctions. See e.g., *Holdren v. General Motors Corp.*, 13 F. Supp. 2d 1192 (D. Kan. 1998); see also ANNOTATED RULES, 429.

One issue that has frequently arisen is the extent to which contact can be made with employees of a corporate party. Generally, any person who has the power to bind the corporation or to implement advice from corporate counsel should be deemed a party for these purposes. Opinion 95-396. Communication with former employees is

not prohibited according to ABA Formal Opinion 91-359 and the revised Comments to Rule 4.2, although courts have reached varying decisions on these issues. See generally ANNOTATED RULES, 424-425.

This provision has been challenged by commentators, who argue that giving power over communication to the attorney is inconsistent with the control vested in the client. See, e.g., Leubsdorf, *Communicating With Another Lawyers' Client: The Lawyer's Veto and the Client's Interests*, 127 U. OF PENN. L. Rev. 683 (1979). Do you agree?

2. Communication with witnesses is not within the purview of Rule 4.2 unless the witness is represented. The general view is that an attorney may interview opposing witnesses without the presence or consent of opposing counsel. This is permitted as long as there is no deception and counsel is fully identified. M.R. 4.3.

Dealing with favorable witnesses is governed by Rule 3.4. Rule 3.4(b) prohibits a lawyer from counseling or assisting a witness to testify falsely or from offering an inducement prohibited by law. An attorney who advises a witness, whether it be the client or someone else, to testify falsely is subject to discipline. See *In re Oberhellman*, 873 S.W.2d 851 (Mo. banc 1994); *In re Stormont*, 873 S.W.2d 227 (Mo. banc 1994). This rule also applies to the payment of a fee to a witness that is not permitted by controlling law, such as a contingent fee for witnesses.

Rule 3.4(f) prohibits requesting that a person other than the client refrain from giving relevant information to another party unless the person is a relative, employee or other agent of the client and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving the information. Note that attorneys must comply with state and local laws governing tampering with witnesses. For example, in Missouri, R.S.Mo. § 575.270 prohibits "tampering with a witness" and criminalizes the use of force, threat or deception to induce a witness to absent himself, withhold evidence or testify falsely, and the offering of any benefit to a witness for such purpose.

Tampering with or obstructing access to evidence is prohibited by Rule 3.4(a). This obligation is arguably co-extensive with the general obligation under the criminal code. See R.S.Mo. § 575.100.1(1), making it a crime to alter, destroy, suppress or conceal any record, document, or thing with the purpose to impair its verity, legibility or availability in any official proceeding or investigation. See also *State v. Stapleton*, 539 S.W.2d 655, 658 n.1 (Mo. App. 1976).

What about physical evidence of a crime? Must an attorney turn over such evidence to the government if he or she knows of its location? If he or she receives it from the client? From another person? See M.R. 3.4, Comment ¶2.

The prevailing view is that, where the attorney merely learns of the existence of evidence but does not take possession of it, the attorney is not required to advise the government of its existence. This obligation will be different in civil cases where there may be a duty to produce as part of discovery. Where an attorney in a criminal case

takes possession of evidence, however, the attorney must turn that evidence over to the prosecution after a reasonable time for investigation. The prosecutor may not use the source of the information if the attorney received the item from the client or an agent of the client. Where the attorney received the item from a third party, however, the government can inquire into its source.

3. Rule 3.5 deals with communications with judges, jurors and prospective jurors. For the most part, this rule incorporates the law in the jurisdiction and makes failure to comply with that law a violation of the rules. Thus, the extent of contact with jurors and prospective jurors is governed largely by local law. Generally, such contacts are strictly controlled. The 2004 version also addresses communication with jurors after discharge. See 3.5(c)(2004). Rule 3.5 also limits *ex parte* communication with the court and prohibits conduct intended to disrupt a tribunal. See 3.5(b) and (d) (2004). Frequently, such conduct will also subject an attorney to contempt. For examples of conduct falling within this rule, see ANNOTATED RULES, 368-370.

B. Bringing and Prosecuting Claims

1. An attorney is required to advance the client's legitimate interests. Generally, the decision whether to pursue a matter belongs to the client. M.R. 1.2(a). Once a lawyer undertakes a matter, the lawyer must act with reasonable competence and diligence. M.R. 1.1, 1.3. A lawyer may not, however, bring a case merely because the client wants to do so.

Rule 3.1 prohibits bringing or defending a proceeding, or asserting or controverting an issue, where there is no basis for doing so that is not frivolous. A lawyer may make a good faith argument for extension or change of the law, and a criminal defendant may require that every element of the government's case be established. This obligation is similar to that imposed by Rule 11 of the Federal Rules of Civil Procedure, and discipline is possible in many cases where sanctions are imposed.

2. Once a claim is brought, Rule 3.2 requires that a lawyer make reasonable efforts to expedite litigation consistent with the interests of the client. While this rule can lead to discipline where an attorney does not diligently pursue litigation to the detriment of his or her client, see *also* Rule 1.3, it is more difficult to use where the attorney delays to advance an interest of the client. In such circumstances, the question is whether there is some substantial purpose other than delay. Comment to Rule 3.2. Rule 3.4(d) prohibits frivolous discovery requests and failure to respond diligently to discovery requests from the opposing party.

3. In-court conduct is governed by Rule 3.4(c) and (e) and 3.5. These rules prohibit knowing disobedience of the rules of a tribunal except for an open refusal on the grounds no obligation exists, alluding to evidence not reasonably believed to be admissible, assertion of personal knowledge when not testifying, and stating personal opinions regarding matters of justice or credibility. As previously noted, Rule 3.5 prohibits disruption of a tribunal.

Rule 3.3(a)(2) requires that a lawyer disclose legal authority in the controlling jurisdiction known by the lawyer to be directly contrary to the position of the lawyer and not disclosed by opposing counsel. This is tactically advisable in any event. Rule 3.3(a)(1) prohibits making a false statement of fact or law to a tribunal.

Out-of-court comment regarding on-going cases is governed by Rule 3.6, which limits the permissible scope of trial publicity. This rule attempts to balance the lawyer's and client's First Amendment rights while protecting the fair administration of justice. See *Gentile v. Nevada State Bar*, 501 U.S. 1030 (1991). See generally ANNOTATED RULES, 375-79.

4. Several rules address aspects of fairness to others. Rule 4.1 prohibits a lawyer from making false statements of material fact or law to a third person or failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting the client in a criminal or fraudulent act. While this obligation sounds a lot like that in Rule 3.3, note that there is a confidentiality override in Rule 3.3, but there is no such override here. Thus, the attorney has no duty to disclose to a third party, and in fact, it appears that such disclosure would be a violation of the rules. See *Roth v. La Societe Anonyme Turbomeca France*, 120 S.W.3d 764, 777 (Mo. App. W.D. 2003).

Rule 4.4 prohibits the lawyer, in the course of representing a client, from using means that have no substantial purpose other than embarrassment, delay or burdening of a third person. The "substantial purpose" limitation limits effective use of this rule to sanction attorneys. The rule can be used in some circumstances to address threats by attorneys to bring criminal charges or file a disciplinary complaint. See ANNOTATED RULES, 438-39. The Code specifically prohibited threatening criminal charges to gain advantage in a civil case, D.R. 7-105, but this provision was not included in the Model Rules. Where an attorney's conduct appears extortionary, other provisions of the Model Rules are deemed to apply. See 8.4(d).

Rule 4.4(b) addresses receipt of inadvertently sent documents and requires that the lawyer who receives such documents promptly notify the sender. It does not otherwise resolve the obligations of the sending or receiving lawyer.

CHAPTER VI LOYALTY, INDEPENDENT JUDGMENT AND CONFLICT OF INTEREST

I. INTRODUCTION

The concept of loyalty to the client pervades every set of rules governing lawyer behavior and is an essential element of the attorney/client relationship. To promote such loyalty, the Canons of Ethics focused on avoiding "conflicts of interest." That term was difficult to define, however, and the Code focused on the attorney's duty to exercise independent professional judgment on behalf of the client. The rules under the Code suggest that by avoiding situations in which the attorney's independent professional judgment is likely to be impaired, the obligation of loyalty to the client can be achieved. The Model Rules have returned to the concept of conflict of interest, but most of the essence of the rules has not changed. See generally Rule 1.7, Comment ¶1.

Issues of conflict of interest and exercise of independent professional judgment arise in many contexts at all levels of practice. Conflicts can arise in the advising and counseling stage as well as in litigation; and in choosing clients, lawyers and law firms must keep a watchful eye towards current or future conflicts. Challenges to an attorney's acceptance or continuation of employment can arise in various forums as well. In addition to the potentiality of disciplinary proceedings, issues involving conflicts of interest and independent professional judgment arise in attorney disqualification motions, malpractice cases and in appeal of criminal convictions alleging ineffective assistance of counsel.

Should the setting in which the question arises affect the substantive standards used to address whether a conflict exists and whether it is permissible? Should the Code or Model Rules be used as the relevant "law" in disqualification or malpractice cases involving conflicts? Why or why not? Keep these questions in mind as you read the following materials.

What kind of interests can impair an attorney's independent professional judgment? What are the sources of conflict, both potential and real? These materials will consider the various conflicts that may affect a lawyer's independent judgment and the attempts that have been made to balance the various interests at stake. Read M.R. 1.7, 1.8 and 1.10.

II. LAWYER'S OWN INTEREST

The Model Rules address issues of the lawyer's own interests in Rule 1.7(a)(2) and 1.8. The Missouri Supreme Court has recognized the "inherent danger of becoming personally involved with the affairs of clients, self dealing with clients, and of 'taking a piece of the action.'" *In re Lowther*, 611 S.W.2d 1, 2 (Mo. banc 1981). The Court there stated: "The attorney, with his superior knowledge and education, can pursue this course only at his peril. It is an area wrought with pitfalls and traps and the

Court is without choice other than to hold the attorney to the highest of standards under such circumstances." *Id.*

A. Personal and Financial Interests

1. Model Rule 1.7(a)(2) prohibits representation where the lawyer's interest may materially limit the lawyer's representation of a client. The Restatement of the Law Governing Lawyers similarly prohibits undertaking or continuing representation if "there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's financial or other personal interests. RESTATEMENT, § 125 (2000). Interests that have been found to fall within the rule include investing a client's money in property owned by the attorney or the attorney's relative and loans or other arrangements between clients and the lawyer or members of the lawyer's family. See ANNOTATED MODEL RULES, 121-124.

Fee arrangements with clients can also lead to problems under this Rule. Special care is necessary where a lawyer takes an interest in a client's property as part of the fee. See, e.g., *In re Snyder*, 35 S.W.3d 380-384-85 (Mo. banc 2001) (lawyer suspended in part for improperly handling liens he took on client's property as part of his fee arrangement). See generally ANNOTATED MODEL RULES, 150-151.

2. When does a lawyer's personal views give rise to conflicts under this section? When does a lawyer's representation of a client limit what the lawyer can say or do outside of the contours of the attorney-client relationship? See RESTATEMENT, § 125, Comment e. Although a lawyer's representation of a client is not an endorsement of the client or its views, M.R. 1.2(b), there may be a point at which a lawyer's own views and the needs or demands of the client come into real conflict. At what point is consent required? At what point, if any, must or may the attorney withdraw? See M.R. 1.16(a)(1) and (b)(4).

3. What about sexual interest in a client? Can unwanted sexual advances create a conflict of interest? The Missouri Supreme Court said yes in *In re Howard*, 912 S.W.2d 61 (Mo. banc 1995), where the court stated:

The Rules are clear: "The lawyer's own interests should not be permitted to have an adverse effect on representation of a client." Comment, Rule. 1.7. Howard's unwanted sexual advances undermined the client's faith in his service and interfered with his independent professional judgment. Both the complainants testified that rejecting Howard's advances adversely affected his representation. In sum, Howard attempted to force clients to prostitute themselves to secure legal services, and thus violated Rules 1.7(b) and 2.1.

See also ABA/BNA LAWYER'S MANUAL, 51:408-410; ABA Formal Op. 92-364 (1992). The 2002 Model Rules added M.R. 1.8(j), which prohibits such relations unless a consensual sexual relationship existed before the attorney-client relationship commenced.

4. What about the lawyer who is seeking employment with a firm representing adverse to a current client? Do negotiations with that firm create a conflict of interest?

The ABA Commission on Ethics and Professional Responsibility concluded that such negotiation could implicate Rule 1.7(b) [now (a)(2)] where there is sufficient likelihood that a conflict will eventuate and could materially interfere with the lawyer's independent professional judgment. Thus,

a lawyer who has an active and material role in representing a client in litigation must consult with and obtain the consent of that client, ordinarily before he participates in a substantive discussion of his experience, clients, or business potential or the terms of an association with an opposing firm.

ABA Formal Op. 94-400. See also RESTATEMENT, § 127, Comment d.

5. The Model Rules are more specific than the Code with regard to certain potential conflicts. For example, M.R. 1.8(c) prevents a lawyer from soliciting a substantial gift from a client or preparing an instrument giving the lawyer or a person closely related to the lawyer a substantial gift unless the client is related to the donee. See also RESTATEMENT, § 208.

B. Business Transactions With Clients

Model Rule 1.8(a) prevents an attorney from entering into a business transaction with a client or acquiring a pecuniary interest adverse to a client unless the transaction is fair and reasonable, the terms are understandably disclosed in writing to the client, the client is given a reasonable opportunity to seek advice from independent counsel, and the client consents in writing. The 2004 version of the Rule is more specific in its requirements but does not differ in substance from the prior rule. The Restatement prohibits such business or financial transactions except a standard commercial transaction in which the lawyer does not render legal services, unless (1) the client has adequate information about the terms of the transaction and the risks presented by the lawyer's involvement, (2) the terms and circumstances of the transaction are fair and reasonable to the client, and (3) the client consents after being encouraged to seek, and given a reasonable opportunity to obtain, independent legal advice. RESTATEMENT, § 128.

In Missouri, D.R. 5-104(A), the predecessor to Rule 1.8(a), was utilized to discipline an attorney for making a sale of unwanted property to a client, *In re Mills*, 539 S.W.2d 447 (Mo. banc 1976) and for borrowing money from an incompetent client and selling property of the client to the attorney's wife. *In re Miller*, 568 S.W.2d 246 (Mo. banc 1978). In both instances, it was no defense that the transactions were consummated at fair market value and there was neither profit to the attorney nor loss to the client. Further, the court has indicated that dealings between lawyer and client are presumptively invalid, and the attorney bears the burden of demonstrating that the transaction was fair and full disclosure made. *Miller*, 568 S.W.2d at 205-208. This provision (1.8[a]) also applies where a lawyer takes a legal or equitable interest in the client's property as part of a fee. As noted, such transactions are "subject to the heightened scrutiny and notice requirements of Rule 4-1.8(a)." *In re Snyder*, 35 S.W.3d 380, 383 (2000).

Rule 1.8(a) does not apply unless there is an actual attorney-client relationship

between the lawyer and the client at the time the business transaction is entered into. Thus, where an attorney borrowed a substantial sum from a former client, and gave no indication he was giving legal advice to the former client regarding the current transaction, a finding of violation of Rule 1.8(a) was not proper. *In re Disney*, 922 S.W.2d 12, 14-15 (Mo. banc 1996). Discipline is appropriate where the lawyer fails to disclose his interest in a transaction with clients, since "scrupulous fidelity to the cause of the client" is required and "precludes the attorney from any personal advantage from the abuse of that reposed confidence." *In re Weier*, 994 S.W.2d 554, 558 (Mo. banc 1999).

M.R. 1.8(d) prohibits an attorney from acquiring publication rights in a client's case prior to the conclusion of the matter. Note that there is no consent provision relative to this prohibition. See also ABA Standards, The Defense Function, Standard 4-3.4. Why? What are the risks of such transactions? Are they sufficient to override the client's desire for such representation? And why would a client agree to such conflicted representation in any event? Might a criminal defendant have a constitutional right to counsel of choice that overrides this provision? See *Maxwell v. Superior Court*, 639 P.2d 248 (Cal. 1982). See generally ANNOTATED RULES, at 154.

C. A Piece of the Action

Pursuant to M.R. 1.8(i), a lawyer may not acquire a proprietary interest in a client's cause of action. Exceptions to this rule allow an attorney to acquire a lien to collect a fee and to charge a contingent fee. Note that this rule applies only to litigation, and not to business transactions or other non-litigation matters.

M.R. 1.8(e) addresses financial assistance to clients. The Rule prohibits an attorney from advancing or guaranteeing financial assistance to a client unless the items involve costs of litigation. Such costs and expenses may be advanced with repayment contingent on the outcome of the case, and, if the client is indigent, the attorney may pay costs and litigation expenses for the client. Expenses beyond these, however, are still prohibited.

Should an attorney be allowed to advance living expenses to an impoverished client who is unable to work due to an accident? Why or why not? What if the client's lack of funds would cause the client to accept a settlement the attorney considers grossly inadequate, and such advancement of funds would therefore prevent an injustice? What justifications for the rule outweigh these seemingly compelling considerations? For a discussion of the policies behind these rules, see Michael R. Koval, *Living Expenses, Litigation Expenses, and Lending Money to Clients*, 7 Geo. J. Leg. Eth. 1117 (1994); see also ANNOTATED RULES, at 130-132.

III. OTHER CLIENTS

The Missouri Supreme Court has characterized the "basic law of conflict of interest" as follows:

An attorney has a duty of loyalty to his client. A conflict of interest is "any substantial

risk that a lawyer's representation of a client would be materially and adversely affected because of the lawyer's countervailing interests or duties." Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* sec. 10.7 (3d ed. Supp.2004). Consequently, attorneys have a duty to avoid representation of clients when that representation may be affected due to the attorney's relationship to other parties. This is because, "when a lawyer is laboring under this kind of conflict of interest, the conflict in effect forecloses alternatives that would otherwise be available to the client." *Id.* at sec. 11.8 (quoting Model Rules of Prof'l Conduct Rule 1.7(a)(2) cmt. 8 (2002)).

State ex rel. Union Planters Bank, N.A. v. Kendrick, 142 S.W.3d 729, 736 (Mo. banc 2004).

A. Current Clients

M.R. 1.7(a) addresses simultaneous representation of multiple clients. As a general rule, such representation is permitted where the clients consent after consultation (full disclosure of risks and benefits) and where the attorney reasonably believes the interests of both clients can be adequately served by joint representation. Under the current rules, this representation requires "informed consent."

Issues relating to conflicts among current clients can arise in a variety of contexts. The Restatement has developed separate sections dealing with the different types of issues. See, RESTATEMENT, § 128-131.

1. Litigation Conflicts

Initially, current client conflicts can arise in litigation. These conflicts can occur in representing opposing parties or co-parties.

a) Representing Opposing Parties

Representation of parties in opposition to each other implicates loyalty concerns as well as potential misuse of confidential information. Thus, representing opposing parties in the same litigation is clearly prohibited, even when different lawyers from the same firm work on the opposite sides. See M.R. 1.10(a). The same rule applies when one attorney in a firm represents a defendant in a civil case arising out of an assault and another attorney in the firm works as a part-time prosecutor in the office prosecuting the defendant for criminal assault arising out of the same incident. The Missouri Supreme Court held that the entire prosecutor's office had to be disqualified on these facts. *State v. Ross*, 829 S.W.2d 948 (Mo. banc 1992).

But what about representing a client in one case, and opposing that client in a wholly unrelated matter? Would that violate Rule 1.7 or require disqualification? Are the standards for discipline and disqualification the same? Should they be?

Consider the following:

In re DRESSER INDUSTRIES, INC.
972 F.2d 540 (5th Cir. 1992)

E. GRADY JOLLY, Circuit Judge:

In this petition for a writ of mandamus, we determine whether a law firm may sue its own client, which it concurrently represents in other matters. In a word, no; and most certainly not here, where the motivation appears only to be the law firm's self-interest.⁴ We therefore grant the writ, directing the district judge to disqualify counsel.

The material facts are undisputed. This petition arises from a consolidated class action antitrust suit brought against manufacturers of oil well drill bits. *Red Eagle Resources et al. v. Baker Hughes ("Drill Bits ")*.

Dresser Industries, Inc., ("Dresser") is now a defendant in *Drill Bits*, charged--by its own lawyers--with conspiring to fix the prices of drill bits and with fraudulently concealing its conduct. Stephen D. Susman, with his firm, Susman Godfrey, is lead counsel for the plaintiff's committee. As lead counsel, Susman signed the amended complaint that levied these charges against Dresser, his firm's own client.

Susman Godfrey concurrently represents Dresser in two pending lawsuits. *CPS International, Inc. v. Dresser Industries, Inc.*, No. H-85-653 (S.D.Tex.) ("*CPS* "), is the third suit brought by CPS International, a company that claims Dresser forced it out of the compressor market in Saudi Arabia. CPS International initially sued Dresser for antitrust violations and tortious interference with a contract. The antitrust claim has been dismissed, but the tort claim is scheduled for trial. Susman Godfrey has represented Dresser throughout these actions, which commenced in 1985. During its defense of Dresser, Susman Godfrey lawyers have had relatively unfettered access to data concerning Dresser's management, organization, finances, and accounting practices. Susman Godfrey's lawyers have engaged in privileged communications with Dresser's in-house counsel and officers in choosing antitrust defenses and other litigation strategies. Susman Godfrey has also, since 1990, represented Dresser in *Cullen Center, Inc., et al. v. W.R. Gray Co., et al.*, a case involving asbestos in a Dresser building, which is now set for trial in Texas state court.

On October 24 and November 24, 1991, Susman Godfrey lawyers wrote Dresser informing it that Stephen Susman chaired the plaintiffs' committee in *Drill Bits*, that Dresser might be made a *Drill Bits* defendant, and that, if Dresser replaced Susman Godfrey, the firm would assist in the transition to new counsel. Dresser chose not to dismiss Susman Godfrey in *CPS* and *Cullen Center*.

Dresser was joined as a defendant in *Drill Bits* on December 2, 1991. Dresser moved to disqualify Susman as plaintiffs' counsel on December 13. Both Dresser and Susman Godfrey submitted affidavits and depositions to the district court, which, after a hearing, issued a detailed opinion denying the motion.

⁴ "Drill Bits was going to be a case that was going to be active, big, protracted, the first price fixing case that's come along in Houston in a long time. I had made somewhat of a reputation in that area, and I guess it's kind of painful not to be able to play in the game anymore, . . ." Deposition of Stephen D. Susman.

[The District Court, in ruling on the motion, looked to the Texas Disciplinary Rules.]

The district court described the Drill Bits complaint as a civil antitrust case, thus somewhat softening Dresser's description of it as an action for fraud or criminal conduct. The court held, "as a matter of law, that there exists no relationship, legal or factual, between the Cullen Center case and the Drill Bits litigation," and that no similarity between Drill Bits and the CPS suits was material. The court concluded that "Godfrey's representation of the plaintiffs in the Drill Bits litigation does not reasonably appear to be or become adversely limited by Susman Godfrey's responsibilities to Dresser in the CPS and Cullen Center cases," and accordingly denied the motion to disqualify. . . .

[The court determined that mandamus was appropriate to review the denial of a motion to disqualify counsel where the "petitioner can show its right to the writ is clear and undisputable." It then focused on what rules it should apply in determining whether disqualification was required. It concluded that it must "consider the motion governed by the ethical rules announced by the national profession in the light of the public interest and the litigants' rights." It then continued:]

Our most far-reaching application of the national standards of attorney conduct to an attorney's obligation to avoid conflicts of interest is *Woods v. Covington County Bank* We held in *Woods* that standards such as the ABA canons are useful guides but are not controlling in adjudicating such motions. The considerations we relied upon in *Woods* were whether a conflict has (1) the appearance of impropriety in general, or (2) a possibility that a specific impropriety will occur, and (3) the likelihood of public suspicion from the impropriety outweighs any social interests which will be served by the lawyer's continued participation in the case. . . .

In *Woods* [and subsequent cases], we applied national norms of attorney conduct to a conflict arising after the attorney's prior representation had been concluded. Now, however, we are confronted with our first case arising out of concurrent representation, in which the attorney sues a client whom he represents on another pending matter. We thus consider the problem of concurrent representation under our framework in *Woods* as tailored to apply to the facts arising from concurrent representation.

We turn, then, to the current national standards of legal ethics to first consider whether this dual representation amounts to impropriety. Neither the ABA Model Rules of Professional Conduct [1.7] nor the Code of Professional Responsibility allows an attorney to bring a suit against a client without its consent.⁵ This position is also

5 The agreement between the Code and Rules on this point is made obvious in the practice guide of the ABA/BNA Lawyer's Manual On Professional Conduct, which discusses the obligations of a lawyer under both the ABA rules and code. The practice guide describes a bar to a nonconsensual representation adverse to the client: A lawyer may not represent one client whose interests are adverse to those of another current client of the lawyer's even if the two representations are unrelated, unless the clients consent and the lawyer believes he or she is able to represent each client without adversely affecting the other. Courts and ethics panels generally take a broad view of this restriction, and a specific adverse effect probably will not have to be shown. All that need be present is that one lawyer or firm is representing two clients, even in unrelated matters, with potentially conflicting interests. ABA/BNA Lawyer's Manual, 51:101 (1990 Supp.).

taken by the American Law Institute in its drafts of the Restatement of the Law Governing Lawyers.⁶

Unquestionably, the national standards of attorney conduct forbid a lawyer from bringing a suit against a current client without the consent of both clients. Susman's conduct violates all of these standards--unless excused or justified under exceptional circumstances not present here.

Exceptional circumstances may sometimes mean that what is ordinarily a clear impropriety will not, always and inevitably, determine a conflicts case. Within the framework we announced in *Woods*, Susman, for example, might have been able to continue his dual representation if he could have shown some social interest to be served by his representation that would outweigh the public perception of his impropriety.⁷ Susman, however, can present no such reason. There is no suggestion that other lawyers could not ably perform his offices for the plaintiffs, nor is there any basis for a suggestion of any societal or professional interest to be served. This fact suggests a rule of thumb for use in future motions for disqualification based on concurrent representation: However a lawyer's motives may be clothed, if the sole reason for suing his own client is the lawyer's self-interest, disqualification should be granted.⁸

V

We find, therefore, that Dresser's right to the grant of its motion to disqualify counsel is clear and indisputable. We further find that the district court clearly and indisputably abused its discretion in failing to grant the motion. We have thus granted the petition and have issued the writ of mandamus, directing the [District Court] to enter an order disqualifying Stephen D. Susman and Susman Godfrey from continuing as counsel to the plaintiffs in *Red Eagle Resources et al. v. Baker Hughes*.

6 See RESTATEMENT, §127, Comment e (1996) for the current version.]

7 [The Texas rule would allow some concurrent adverse representation, for example where] necessary either to prevent a large company, such as Dresser, from monopolizing the lawyers of an area or to assure that certain classes of unpopular clients receive representation. Although we do not now reach the matter, our consideration of social benefit to offset the appearance of impropriety might allow such a representation if the balance clearly and unequivocally favored allowing such representation to further the ends of justice. We believe, moreover, that the Texas rules are drawn to allow concurrent representation as the exception and not the rule. Even if the Texas rules had applied, no special circumstances being present here, Texas rule 1.06's prohibition of representation of potentially adverse interests would have barred the representation.

8 This result accords with the approach of other circuits, which have similarly found concurrent representation to be grossly disfavored. See, e.g., *International Business Machines Corp. v. Levin*, 579 F.2d 271 (3d Cir.1978) (antitrust plaintiff firm disqualified from suing company for which it was on retainer); *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir.1976) (antitrust plaintiff counsel's representation while firm was counsel in an unrelated antitrust case was prima facie improper); *EEOC v. Orson H. Gygi Co., Inc.*, 749 F.2d 620 (10th Cir.1984) (attorney disqualified from defending employer in sex discrimination suit by employee represented in state annulment proceeding).

1. Is this result fair to the attorneys? Should they be forced to turn down important and lucrative cases simply because someone else hired them first? Might not a strict approach cause firms to shy away from representing small clients with relatively small matters in complex areas for fear that doing so might affect future representation of an existing client or the ability to attract large clients in the future?

2. Remember that, for purposes of disqualification (and discipline under Rule 1.7), courts treat an entire law firm as one unit. Model Rule 1.10(a) provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9" This prohibition may prohibit representation where a lawyer in one office of a "mega-firm" on one coast represents a client, and another attorney in the same firm, a continent away on the other coast (who the first attorney has never even heard of or met), sues that client for something totally unrelated. Should this make a difference to applicability of the rule? Or is this merely a price a firm pays for the benefits of large-scale, multi-office practice? What about representation of a corporation and representation by the same firm adverse to an affiliated corporation, such as a subsidiary? Are the concerns the same? See ABA Formal Op, 95-390. What if the conflict is caused by merger of companies? Of law firms? Should the resolution be the same?

3. Can a law firm resolve this problem by obtaining in advance consent to future adverse representation? Should this be permitted? See Comment ¶22 to Rule 1.7. See also Restatement, § 202, Comment d, which permits waiver of future conflicts with informed consent in most circumstances.

4. Why can't the firm just withdraw from client #1 and turn the situation into a "former client, subsequent representation" case? Where former clients are involved, no disqualification is required unless the matters are substantially related. (See *infra*). In *Dresser*, the client refused to discharge the attorney. Could the firm withdraw in any event? See M.R. 1.16. Would this resolve the problem? Most courts say no. They are unwilling to "allow a law firm to drop a client 'like a hot potato' in order to shift resolution of the conflict question from Rule 1.7 to Rule 1.9." ABA/BNA LAWYERS MANUAL, ' 51:213. The result is to the contrary where the original client agrees to the firm's withdrawal. In such a situation, the concerns of "unceremoniously dumping" the client are not involved. *In re Sandahl*, 980 F.2d 1118, 1121 (7th Cir. 1992).

b) Representing Co-Parties

Representation of co-plaintiffs or co-defendants is not prohibited, but requires consent and a high degree of caution. Initially, if undertaking joint representation, it is necessary to insure that, although nominally aligned on the same side, the parties are not really adverse. If the representation is truly adverse, the prohibition against dual representation applies. See RESTATEMENT, § 128, Comment d. See also Wolfram, MODERN LEGAL ETHICS (West 1986) at ¶ 7.3.3.

If the parties appear to have similar interests, representation may be undertaken where the clients consent and the lawyer believes he or she can provide competent and adequate representation to all clients. Rule 1.7(a) and (b); see RESTATEMENT § 128, especially Comment d. Care must be taken to watch for signs of actual conflict, and further consents or withdrawal may be required if such conflicts do arise. Additionally, lawyers must make clear to jointly represented clients the scope of confidentiality as between co-clients and the limits that joint representation entails. See Comment, ¶29-31.

Why would multiple parties desire the same attorney? What risks does having one attorney for several clients in the same case pose? In what circumstances are the risks likely to outweigh the benefits? What precautions must/should be taken to avoid problems when representing multiple parties? Or should attorneys avoid such representation altogether? Note that joint representation is frequently discouraged and many attorneys have strict policies against it.

Are there special problems or issues in some areas of practice? For example, what about representation of multiple co-defendants in a criminal case? While joint representation is permissible where the interests of the co-defendants are the same, *Holloway v. Arkansas*, 435 U.S. 475 (1978), once these interests begin to diverge, a problem arises under Rule 1.7. See ABA Informal Opinion 1418 (1978). In order to fully protect a defendant's Sixth Amendment right to counsel, an attorney should notify the court immediately when a real conflict becomes apparent. Compare *Holloway* with *Cuyler v. Sullivan*, 466 U.S. 920 (1980). See ABA Standards, The Defense Function, Standard 4-3.5(b). Continuing such employment without clear consent after full disclosure may lead to discipline as well as a finding of ineffective assistance of counsel. As a result, most Public Defender offices will not engage in joint representation of multiple co-defendants. See generally RESTATEMENT, § 129.

Difficult issues also arise in matrimonial cases. In Missouri, an attorney is not permitted to represent both husband and wife in a dissolution proceeding even where it is uncontested and both parties consent. See Missouri Formal Op. 109 (1974). This view is consistent with the standards of the American Academy of Matrimonial Lawyers. See Standard 2-20, 9 J. AMER. ACAD. OF MATRIM. LAWYERS (1992). Many states permit such representation where there is informed consent. Which approach is better. Missouri does permit one lawyer to represent one of the parties and draft the joint petition, while the other party remains unrepresented. Is this a better solution than joint representation? See generally Saylor, *Conflict of Interest in Family Law*, 28 FAM. L.Q. 451, 454-55 (1994); see also ANNOTATED RULES, 132-33.

What about representation of an insured and the insurer against a third-party claimant? Again, the interests of the parties may appear identical, but the possibility of conflicts are legion. See generally ANNOTATED RULES, at 158-59. There is some question whether this is properly viewed as a multiple client issue or a third party payor situation. Compare *In re Allstate Ins. Co.*, 722 S.W.2d 947 (Mo. banc 1987) with *Arana v. Koerner*, 735 S.W.2d 729 (Mo. App. 1987). If the latter, Rule 1.8(f), which requires client consent, protection of client information, and exercise of independent professional judgment, is implicated. Particularly difficult issues arise where the lawyer

is representing under a reservation of rights. For more detailed analysis of the complex issues in this area, see ABA/BNA LAWYERS MANUAL ¶ 51:308.

Special rules apply as well to settlement of multiple claims. Where aggregate settlements are involved, each client must give written consent after consultation, which must include disclosure of the existence and nature of all claims involved and the participation of each person in the settlement. M.R. 1.8(g). Failure to obtain proper consent may be grounds to void a settlement. See *Hayes v. Eagle-Pilcher Indust., Inc.*, 513 F.2d 892 (10th Cir. 1975).

An area that has caused some confusion and difficulty is issue, or positional, conflict. Under what circumstances should an attorney be prohibited from advancing arguments for one client that potentially may be harmful to another client? Can an attorney take inconsistent positions in different courts, for different clients, at the same time? In the same court? If the rules are too strict in this regard, won't this substantially limit the lawyer's ability to practice, perhaps restricting lawyers to only one side of any given area of law? Won't this also limit client access to competent lawyers, especially in specialized areas?

Comment 24 to Rule 1.7 addresses positional conflict, allowing it unless "there is a significant risk that the lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client" The Comment sets out relevant factors to consider, including where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issues to the immediate and long-run interests of the clients involved, and the clients' reasonable expectations in retaining the lawyer. The ABA Formal Opinion on this issue and the Comment to the Restatement focus on "whether the lawyer in either case would be caused to 'soft-pedal' or alter arguments on behalf on one client so as not to undercut the position of the other client." Reporter's Notes, Comment f to § 128. See also Formal Op. 93-377.

2. Non-litigation Conflicts

Representation of multiple clients arises also in nonlitigation settings. For example, can an attorney properly represent more than one party in putting together a business transaction. Can a lawyer represent both buyer and seller in a real estate deal? Can an attorney represent the entrepreneurs who are working to set up a new company? Formerly, Rule 2.2 addressed these issues, but they are now dealt with in Rule 1.7. Rule 1.7 permits such representation where the lawyer reasonably believes he or she can impartially and competently handle the matter and the clients give informed consent. See Comment 24, see also RESTATEMENT, § 211. See generally G. Hazard, *Ethics in the Practice of Law*, 61-68 (1978), discussing the "lawyer for the situation." What interests are served by such representation? What interests would be served by prohibiting it? Does Rule 1.7 adequately address these issues?

A significant issue that arises with joint representation is its effect on confidentiality. "Sharing of information among . . . co-clients with respect to the matter involved in the representation is normal and typically expected." RESTATEMENT § 60,

Comment I (P.F.D. 1). A lawyer representing more than one client may have a fiduciary duty to share any information relating to the representation obtained from one client with other jointly represented clients (as part of the lawyer's duties of diligence and communication, 1.3 and 1.4). This may well include information adverse to a co-client. See *generally* RESTATEMENT § 60, Comment I. While information obtained may not be confidential among co-clients, it is confidential as to third parties (those outside the attorney-client relationship). See *generally* Comment ¶30. Of course, at some point, the existence of information that one co-client does not want to share may well be a signal to the attorney that he or she is no longer able to reasonably believe that all clients can be adequately represented and may be a strong indicator that withdrawal is advisable or necessary. RESTATEMENT §60 , Comment I. It has been suggested, however, that the parties can agree in advance to limit the sharing of information, see COMMENT ¶31, but caution is advised.

B. Former Clients

Although the Code did not directly address the problem of successive representation, the Model Rules adopted a version of the substantial relationship test used by the courts to disqualify attorneys. Under the Model Rules, a lawyer who has previously represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter where that person's interests are materially adverse to the former client unless the client gives informed consent. M.R. 1.9. In interpreting the Rule, paragraph 2 of the Commentary indicates that the scope of a matter depends on the facts involved, and that the "underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides. . . ." See also RESTATEMENT, § 132. The primary rationale behind this rule is protection of client confidences and, to a lesser extent, preservation of loyalty and avoidance of an appearance of impropriety.

Most of the law in this area has developed in the context of disqualification cases. During the time of the Code of Professional Responsibility, courts looked to Canons 4 (confidentiality), 5 (conflicts/independent judgment) and 9 (appearance of impropriety) for guidance, but no provision expressly addressed this issue. The courts developed their own approaches, culminating in the "substantial relationship" test, which was ultimately adopted by the Model Rules. The term "substantially related" appears in Rule 1.9, but is not defined, although it is explained in Comment 3. Court opinions help with the definition.

As noted, most of these issues arise in the disqualification context. The following is one of the few cases in which attorneys were actually disciplined for violation of Rule 1.9. Under what circumstances can and should an attorney be disciplined for undertaking subsequent representation adverse to a former client? Are the standards for disqualification different? Should they be? Read Model Rule 1.9, 1.10(b) and related Commentary.

In re John J. CAREY, Respondent.
In re Joseph P. DANIS, Respondent.
89 S.W.3d 477 (Mo. banc 2002)

WILLIAM RAY PRICE, JR., Judge.

It is a fair characterization of the lawyer's responsibility in our society that he stands "as a shield," to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries been compendiously described as "moral character." *Schwartz v. Bd. Of Bar Exam'rs*, 353 U.S. 232 (1956) (Frankfurter, J., concurring).

The Chief Disciplinary Counsel (CDC) filed a three count information against attorneys John J. Carey and Joseph P. Danis based upon their alleged professional misconduct in prosecuting product liability class action suits against a former client, the Chrysler Corporation, and in making misrepresentations in discovery in the subsequent lawsuit for breach of fiduciary duty brought by Chrysler against them. We find that both John Carey and Joseph Danis engaged in professional misconduct by representing another person in a substantially related matter adverse to the interest of a former client in violation of Rule 4-1.9(a), Rule 4-8.4(a), and by making false discovery responses in violation of Rule 4-3.3(a)(1), Rule 4-8.4(c)], Rule 4-8.4(d), Rule 4-3.4(a) and Rule 4-3.4(d). John J. Carey and Joseph P. Danis are indefinitely suspended from the practice of law, with leave to apply for reinstatement not sooner than one year from the date of this opinion.

I. Factual Background

A. Representation of Chrysler by John Carey and Joseph Danis

John Carey joined Thompson & Mitchell in 1987, after being admitted to practice law in Missouri. While at Thompson & Mitchell, Carey worked under Charles Newman as part of a "team" of partners and associates that defended Chrysler against product liability and consumer class action cases brought against it nationwide. From January 1992 through December 1995, Carey billed 1,314.6 hours to Chrysler. As part of the Chrysler team, Carey was privy to all aspects of the Chrysler representation and directly participated in nearly all aspects of the Chrysler litigation. In addition, Carey assessed Chrysler's potential liability in pending litigation and helped draft a "blueprint" for Chrysler to follow in defending class action product defect suits pending concurrently with a National Highway Traffic Safety Administration ("NHTSA") investigation.

Joseph Danis was licensed to practice law in Missouri in 1993 and began work as an associate for Thompson & Mitchell that year. Carey acted as Danis' mentor while Danis was a summer associate and again when Danis was a new associate. Danis joined Carey as a member of Charles Newman's Chrysler team. As a new associate, Danis' involvement with the Chrysler class action litigation was less extensive than Carey's. However, as a member of the team, Danis was privy to all aspects of the Chrysler representation. Danis billed 513.5 hours to Chrysler from January 1992 through December 1995.

Newman would circulate information on the widest possible basis to every member of the Thompson & Mitchell team involved in representation of Chrysler. Carey was the primary associate on four different Chrysler class action cases. Charles Newman testified:

John [Carey] was totally immersed in that case [Osley], along with me, and played the same role that I played in many respects. And that obviously involved ... determining the legal issues that the case presented. It also involved analyzing the jurisdiction

...

He was also involved with me and others in massing the facts relevant to the claims that were asserted, and that involved contacting and principally working with the personnel in the office of the general counsel at Chrysler Corporation.

Newman further testified that in the other three cases, Carey had "a similar role with a few additional aspects."

Danis was not involved in *Osley*, but did participate in the other three cases. Danis was involved in the lower level associate functions, but worked extensively with both Newman and Carey. Danis worked principally on drafting discovery responses and obtaining information from Chrysler to respond to discovery requests.

The component parts involved in the class action lawsuits Carey and Danis defended while with Thompson & Mitchell were Renault heater coils and Chrysler minivan door latches. Charles Newman and other Chrysler attorneys, William McLellan and Lewis Goldfarb, each stressed, however, that the actual defective component was not materially important in this type of class action lawsuit. Goldfarb testified:

The products at issue in class actions are almost irrelevant to how we go about defending class actions. There's almost an identity of process in terms of how we defend class actions, regardless of the nature of the component involved.

...

Product-related class action[s], particularly those that follow on the heels of a government investigation, are virtually identical in the way the company handles them. The nature of the component involved is almost irrelevant to these cases because they never go to trial. We're always dealing with the government, that investigation relates to the ongoing class action case. And the class action strategy is almost independent in some respects of the nature of the component involved.

These three Chrysler attorneys also testified that respondents Carey and Danis were privy to a wealth of information that would be useful to them in prosecuting a product-related class action against Chrysler. Newman testified that Carey and Danis learned Chrysler's strategy in defending minivan product liability class action suits:

Respondents [were] present during meetings with in-house Chrysler counsel when there was a discussion of the strengths and weaknesses

of various Chrysler employees ... [and] with non-lawyer Chrysler employees; for example, expert witnesses.

...

We would talk with the client about other pending litigation alleging a similar product or defect So we would talk to the attorneys at Chrysler about their defense of those cases, what factual defenses were being developed and implemented, what expert witnesses, if any, they were working with there. The legal strategies in those cases, the legal defenses in those cases. Determine their applicability, determine their usefulness, determine whether they could be implemented in the class action

Newman also said that Carey and Danis knew that Chrysler was very hesitant to interplead or sue a critical supplier because of the way its supply lines were managed.

[I]f somebody was thinking of suing Chrysler and knew ... that Chrysler had a predisposition against bringing in third parties, you would know in contemplating a suit against Chrysler that it would be relatively efficient in that Chrysler wouldn't bring in everybody else in the world that might be involved or had a bearing with that particular component or product and that you could tailor your claims accordingly to focus just on Chrysler and not have to worry about suppliers and the like.

Newman testified that, although the component parts differed, there were many similarities in available defenses, such as statute of limitations, improper certification of the class, improper class representatives, and improper assertion of claims. Finally, Newman indicated that many expert witnesses overlap: economists, automotive repair experts and human factor engineers. Newman testified that "[t]he Respondents ... learn[ed] which experts Chrysler chose to use and not use." He stressed that Carey and Danis helped formulate Chrysler's defense strategy in class action product liability cases involving Chrysler minivans.

William McClelland confirmed that Carey and Danis were "made aware about the types of information Chrysler kept, the sources of information within Chrysler relevant to the defense of a product liability class action lawsuit involving the minivan." McClelland testified that respondents' specific knowledge of the minivan would be extraordinarily helpful.

[T]he minivan was incredibly important to Chrysler. It still is today. I'm not sure the public fully understands its importance to our profitability. They know Chrysler makes solid minivans, but not I think the importance that we attach to it internally.

We were just coming out with a brand-new minivan at the time. We had put over a billion dollars investment into that minivan and were very concerned from a marketing and public relations perspective.

One of the strategies of the plaintiffs' bar would be to muddy our name. We noticed during that time Ford was coming out with ads touting its safety record.

Carey's and Danis' first-hand knowledge of the minivan's importance would allow them to "know what hot buttons to push."

Lewis Goldfarb also discussed respondents' work for Chrysler. Goldfarb testified that Carey and Danis had access to "detailed, internal information and analysis done by the in-house legal department, as well as [Chrysler] engineers and other personnel, regarding the status of a confidential government investigation" He emphasized that Carey and Danis had a "road map as to how we [Chrysler] look at and analyze alleged defects concerning our products."

The "road map" Goldfarb spoke of referred to a "matrix" or "blueprint" that the Chrysler team--including John Carey and Joseph Danis--developed to formulate Chrysler's defense to class action product liability cases involving Chrysler minivans. The team prepared a matrix of all considerations that Chrysler should consider in deciding whether or not to settle the minivan latch cases. This matrix listed relevant criteria and matched those criteria with a factual scenario. For each scenario, the team gave thoughts about the applicability of the criteria and its impact on the company. The matrix also included a form of a decision tree. The decision tree visually described the different scenarios and their implication on important areas of the company like marketing, public and consumer relations, dealer relations, and the recall itself.

This information was very important to Chrysler. Charles Newman summed up Chrysler's position on the matrix in saying:

[T]his is highly confidential information and it was shared with us by our client in confidence. We had a discussion, extensive discussions with the client that resulted in the creation of this document, this matrix or template. And to have a plaintiff's lawyer know, for instance, of the very considerations themselves what Chrysler's thought process deemed important and deemed material and how I in representing them analyzed each of those aspects would be very sensitive, confidential information that neither the company nor I would want to share with anyone.

B. Carey & Danis, L.L.C.--The Chrysler ABS Class Action

In January 1995, Carey and Danis left Thompson & Mitchell and formed their own firm, Carey & Danis, L.L.C. Carey & Danis shared office space with the firm of David Danis--Joseph Danis' father--Danis, Cooper, Cavanagh & Hartweger, L.L.C. The two firms shared staff, a bookkeeper, a fax machine, and unlocked (but separate) filing cabinets.

In August 1995, a Thompson & Mitchell secretary referred her brother-in-law, Dennis Beam, to Carey & Danis after he experienced problems with the anti-lock brake system on his Chrysler minivan. Carey discussed the potential case with Beam. Carey, obviously aware that he and Danis had represented Chrysler, researched Rule 1.9 of the Model Rules of Professional Conduct for an hour or two to determine if a conflict existed. Carey testified that he "made the determination that since Joey [Danis] and I had no knowledge or information at all concerning anti-lock brakes ... that those were not substantially related under my review of the case law and reading those rules." Carey determined there was not a conflict. However, Carey & Danis did not file

suit because Thompson & Mitchell had been referring business to them and they did not want to embarrass their former firm by filing suit against a former client.

Carey & Danis arranged for the Danis, Cooper firm to represent Beam and a class of plaintiffs against Chrysler. Danis, Cooper was to get help on the case from another St. Louis law firm, Blumenfeld, Kaplan & Sandweiss. Carey and Danis met with attorneys from Danis, Cooper and the Blumenfeld firm to discuss the *Beam* class action suit over lunch at a restaurant. According to Evan Buxner, who was working for Blumenfeld at the time, the "purpose of the meeting was to discuss generally if Blumenfeld, Kaplan & Sandweiss participated in the litigation what our role was and what we might expect representing a plaintiff in a proposed class in a plaintiffs' class action case." Carey & Danis was the only firm with any significant class action litigation experience among the three firms. The firms discussed a number of topics relating to the class action against Chrysler: attorney time and cost, the fact that NHTSA was conducting an investigation into the brake system, that a proposed class action could ride the government coattails and let the government agency do most of the work, the effect of a recall on a potential class action, the necessity (or lack thereof) of hiring experts, and that they could expect a barrage of motions from Chrysler.

Shortly after their involvement began, Blumenfeld was informed that Carey & Danis' involvement in *Beam* was being investigated for conflict of interest. Blumenfeld then withdrew from the *Beam* litigation. Carey explained:

Once they withdrew David [Danis] and Richard [Cooper] approached Joey [Danis] and I and asked us if we would be interested in getting involved in the case, we knew that there was no conflict of interest, and they needed help because ... there was a motion to transfer that was pending in St. Louis City. They needed help. There wasn't time to try and go out and find another co- counsel.

Carey & Danis entered their appearance on behalf of the *Beam* plaintiffs. However, neither Carey nor Danis sought or received Chrysler's consent to act as plaintiffs' counsel against Chrysler.

In December 1995, Joseph and David Danis met in New York with Stanley Grossman, an attorney who had a similar ABS class action suit against Chrysler in New Jersey. At the meeting they discussed joining--and later did join--the two class actions as well as a third group of plaintiffs from Mississippi represented by John Deakle. Following the meeting, Joseph Danis wrote Grossman to confirm the discussion regarding the ABS cases. Danis also inquired as to allocation of attorneys' fees if the cases were consolidated, saying there was "plenty of money for all Consequently, we will all be better served working together against Chrysler" This correspondence has been termed "the Grossman letter."

While Danis and his father were in New York meeting with Grossman, Carey received a letter from Charles Newman accusing Carey & Danis of having a conflict of interest in the *Beam* case. Carey was "very upset" upon reading Newman's letter and immediately called Newman to tell him that he believed "in the strongest terms that [Carey & Danis] did not have a conflict of

interest," but that he did not want to cause any trouble with Newman, Thompson & Mitchell, or Chrysler. Carey inquired if they could put an end to "all this ugliness and nastiness" if he and Danis withdrew from the *Beam* case. Newman did not make any promises, but thought that might appease Chrysler.

Thereafter, the *Beam* case was voluntarily dismissed and then joined with Grossman's case in New Jersey. Carey & Danis withdrew from *Beam*, but the Danis, Cooper firm and John Deakle were among the attorneys listed for the plaintiffs. Carey & Danis associated with a group of class action attorneys--David Danis and John Deakle, among others, that often worked together on cases and shared information. A number of these attorneys were involved in Chrysler ABS litigation. Members of this group would forward correspondence regarding the ABS litigation to each other and many of these communications would find their way to Carey & Danis.

C. *Chrysler v. Carey & Danis*--False and Misleading Statements

Respondents Carey and Danis notified their malpractice insurer of a potential lawsuit by Chrysler and gave the insurer copies of documents that could be relevant--including the Grossman letter. The insurer later met with Lou Basso, the attorney Carey and Danis had chosen to represent them. The insurer gave the documents respondents had compiled to Mr. Basso. Basso made copies and then returned the documents to the insurer. Carey and Danis had also given the original Grossman letter to Basso, along with some other documents, when Basso was originally retained.

On March 26, 1996, Chrysler sued Carey & Danis for breach of fiduciary duty and respondents were served with process. Chrysler alleged that Carey & Danis, though not attorneys of record, assisted a group of lawyers in prosecuting ABS class action claims against Chrysler. Chrysler served interrogatories and requests for production upon both Carey and Danis, individually. [The Court discussed requests for production of documents related to this litigation and the attorneys failure to produce documents pursuant to those requests. The Court found that both attorneys made misrepresentations regarding the existence and production of those documents. Based on this failure to produce and misrepresentation, the judge in the civil case brought by Chrysler struck the attorneys' response and entered a default judgment against them.]

II. Discussion

A. Count I: Conflict of Interest

Count I alleges professional misconduct by violating Rule 4-1.9(a), which governs conflict of interest with former clients. Rule 4-1.9(a) states:

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

It is not disputed that respondents Carey and Danis formerly represented the Chrysler Corporation, nor is it disputed that respondents' representation of the plaintiffs against Chrysler in *Beam* was materially adverse

to Chrysler. The only issue presented is whether the *Beam* case was "substantially related" to Carey's and Danis' previous defense work for Chrysler.

"Gallons of ink" have been consumed by those trying to articulate or explain the test for deciding whether a substantial relationship exists between two representations. ABA/BNA Lawyer's Manual on Professional Conduct, 51:215. See also *Chrispens v. Coastal Ref. & Mktg., Inc.* The "substantially related" test was first announced in *T.C. Theatre Corp. v. Warner Brothers Pictures, Inc.* In announcing the rule, the court was primarily concerned with preserving client confidences and avoiding conflicts of interest. The court said:

It would defeat an important purpose of the rule of secrecy--to encourage clients fully and freely to make known to their attorneys all facts pertinent to their cause. Considerations of public policy, no less than the client's private interest, require rigid enforcement of the rule against disclosure. No client should ever be concerned with the possible use against him in future litigation of what he may have revealed to his attorney. Matters disclosed by clients under the protective seal of the attorney-client relationship and intended in their defense should not be used as weapons of offense. The rule prevents a lawyer from placing himself in an anomalous position. Were he permitted to represent a client whose cause is related and adverse to that of his former client he would be called upon to decide what is confidential and what is not, and, perhaps, unintentionally to make use of confidential information received from the former client while espousing his cause. Lawyers should not put themselves in the position "where, even unconsciously, they might take, in the interests of a new client, an advantage derived or traceable to, confidences reposed under the cloak of a prior, privileged relationship." In cases of this sort the Court must ask whether it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject of his subsequent representation. If so, then the relationship between the two matters is sufficiently close to bring the later representation within the prohibition . . .

Other courts have also commented on the rule's purpose:

It is a prophylactic rule to prevent even the potential that a former client's confidences and secrets may be used against him. Without such a rule, clients may be reluctant to confide completely in their attorneys. Second, the rule is important for the maintenance of public confidence in the integrity of the bar. Finally, and importantly, a client has a right to expect the loyalty of his attorney in the matter for which he is retained.

Important policies behind the rule include the promotion of "fundamental fairness ... by prohibiting an attorney from using an informational advantage gained in the course of a former representation, the desire to promote client disclosure of all pertinent information ..., and the desire to promote confidence in the integrity of the judicial system."

There are three primary tests for substantial relationship used throughout the country. See *Chrispens*. The first approach compares the facts of the former and current representations. The second approach, which has

not been widely adopted, insists that the issues involved in the two representations be identical or essentially the same. The third approach, developed by the Seventh Circuit Court of Appeals, blends the fact and issue comparisons into a three-step test. The Seventh Circuit test states:

[D]isqualification questions require three levels of inquiry. Initially, the trial judge must make a factual reconstruction of the scope of the prior legal representation. Second, it must be determined whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters. Finally, it must be determined whether that information is relevant to the issues raised in the litigation pending against the former client.

The test "does not require the former client to show that actual confidences were disclosed. That inquiry would be improper as requiring the very disclosure that [MRPC 1.9(a)] is intended to protect."

Missouri addressed substantial relationship in *State v. Smith*, 32 S.W.3d 532 (Mo. banc 2000). Our approach is consistent with that set out in *Westinghouse* and *Chrispens*, combining an analysis of both the facts and issues in determining substantial relationship. In *Smith* we said that the court "employs a focused approach, where the court examines the relevant facts of the case in order to determine whether the various matters are substantially related." "[W]hether there is a 'substantial relationship' involves a full consideration of the facts and circumstances in each case." "The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." Rule 4-1.9 cmt. The key to the analysis is whether there was a central issue common to both representations. *Smith*,

The fact that a lawyer has previously represented a client does not automatically preclude the lawyer from opposing that client in a later representation. The court must determine whether confidential information acquired in the course of representing the former client is relevant to the issues raised in the current litigation. "The 'appearance' of impropriety must be more than a fanciful possibility. It must have a rational basis." The court's conclusion must be based on a close and careful analysis of the record. Without such an analysis, the test serves "as a substitute for analysis rather than a guide to it. It is easier to find 'doubt' than to resolve difficult questions of law and ethics."

Chrispens offers a short, non-exclusive list of six factors that courts following the Seventh Circuit approach have considered in determining whether a substantial relationship exists. The factors include:

(1) the case involved the same client and the matters or transactions in question are relatively interconnected or reveal the client's pattern of conduct; (2) the lawyer had interviewed a witness who was key in both cases; (3) the lawyer's knowledge of a former client's negotiation strategies was relevant; (4) the commonality of witnesses, legal theories, business practices of the client, and location of the client were significant; (5) a common subject matter, issues and causes of action existed; and (6) information existed on the former client's ability to satisfy debts and its possible defense and negotiation strategies.

In some cases, one factor, if significant enough, can establish that the subsequent case is substantially related. Careful review of the facts at hand in relation to these six factors provides a specific framework for resolution of this case.

First, when compared to the prior representation, the ABS cases involve the same client, Chrysler. Because the cases all involve the Chrysler minivan in the same "type" of case, Chrysler's pattern of conduct is applicable despite the different specific component parts involved. It is undisputed that Carey and Danis defended the Chrysler Corporation on product liability class action lawsuits involving Chrysler minivan components and then later prosecuted a product liability class action lawsuit involving another minivan component against Chrysler. The subject matter of the lawsuits was components of Chrysler's minivan. Carey and Danis also knew how important the minivan was to Chrysler and had access to "detailed, internal information and analysis done by the in-house legal department" In fact, both Carey and Danis helped formulate the "blueprint" Chrysler used when defending a product liability class action suit involving the minivan.

Second, respondents interviewed or deposed a number of expert witnesses while working for Chrysler that could have been called to testify in the *Beam* lawsuit. Carey and Danis were present during meetings with in-house Chrysler counsel when there was a discussion of the strengths and weaknesses of various Chrysler employees and expert witnesses. Carey and Danis had personal contact with a number of expert witnesses that could be used in both cases and had learned which experts Chrysler chose to use and not use. Specifically, Charles Newman stated that "... I contacted some of the same experts for possible use in the defense of the ABS case that we had contacted in the defense of the *Osley* case." Two witnesses, Mr. Pat Gross, an auto mechanic, and Dr. Mather, an economist, were mentioned by name and the general nature of their testimony common to these cases was briefly discussed.

Third, Carey's and Danis' knowledge of Chrysler's negotiation strategies were particularly relevant. Respondents helped formulate the decision matrix used by Chrysler when defending suits precisely like *Beam*. The matrix listed criteria Chrysler deemed relevant and matched those criteria with a factual scenario. For each scenario, the team gave thoughts about the applicability of the criteria and the impact on the company.

Fourth and Fifth, the commonality of witnesses, legal theories, and business practices of the client were significant, and there was a common subject matter as well as common issues and causes of action. This case involved the Chrysler minivan. Although the particular minivan parts at issue may have been different, in this case, testimony indicated that the actual components at issue in this type of product liability class action suit are almost irrelevant to how Chrysler defended the case. Lewis Goldfarb testified:

Product-related class action[s], particularly those that follow on the heels of a government investigation, are virtually identical in the way the company handles them. The nature of the component involved is almost irrelevant to these cases because they never go to trial. We're always

dealing with the government, that investigation relates to the ongoing class action case. And the class action strategy is almost independent in some respects of the nature of the component involved.

Finally, information existed on Chrysler's possible defense and negotiation strategies. As previously discussed, Carey and Danis knew of and actually helped formulate Chrysler's defense and negotiation strategies.

Respondents' justification for prosecuting a consumer class action lawsuit involving Chrysler minivans, within one year after having represented Chrysler, was that the component parts were different. Carey and Danis defended Chrysler on Chrysler minivan door latch cases while *Beam* involved Chrysler minivan anti-lock brake systems.

Certainly, a client does not own a lawyer for all time. In appropriate circumstances our rules allow lawyers to take positions adverse to former clients and even to bring suit against them. See Rule 4-1.9. The similarity of each case and its facts and issues is the determinative factor. Rule 4-1.9, however, simply does not allow respondents to cut such a sharp corner here. This is why the rule is not limited to "the same" matter but also extends to "a substantially related" matter.

Upon a close examination of the facts and issues surrounding the respondents' representation of Chrysler, the fact that Carey and Danis defended Chrysler in product liability class action claims involving Chrysler's minivan overshadows the fact that different automotive parts were at issue. Respondents' work at Thompson & Mitchell allowed them access to information and strategy considerations that could not be turned fairly against their former client after changing employment. Although these lawsuits concerned different parts, the issues in the lawsuits and Chrysler's defense strategies were shown to be unavoidably linked. The expertise that Carey and Danis developed at Chrysler's expense and the confidences shared with them by Chrysler cannot be used by respondents to harm their former client.

"No client should ever be concerned with the possible use against him in future litigation of what he may have revealed to his attorney. Matters disclosed by clients under the protective seal of the attorney-client relationship and intended in their defense should not be used as weapons of offense." The public must have confidence in the integrity of the Bar and every "client has a right to expect the loyalty of his attorney in the matter for which he is retained." "Every lawyer owes a solemn duty ... to strive to avoid not only professional impropriety but also the appearance of impropriety."

It is this Court's duty to not only dispense justice, but equally important, to maintain the integrity of the judicial system. The public's trust and confidence in the system is essential to the ability of the system to function efficiently and justly. As this Court has previously noted "even an appearance of impropriety may, under the appropriate circumstances, require prompt remedial action"

By representing Dennis Beam in a products liability class action lawsuit against Chrysler, respondents Carey and Danis represented another person in

a substantially related matter that was materially adverse to their former client in violation of Rule 4-1.9.

B. Count II: Client Confidentiality

Count II alleges that Carey and Danis violated Rule 4-8.4 by using confidential information obtained while representing Chrysler to later prosecute the ABS class action claim against Chrysler. The Disciplinary Hearing Panel found that respondents did not violate Rule 4-8.4. We agree.

The Chief Disciplinary Counsel's contention is based in large part on the fact that respondents took over 800 pages of documents from Thompson & Mitchell when they left. The CDC argues that many of these documents were confidential and that Carey and Danis violated their duty of loyalty by using some of these documents as templates for the pleadings filed in the *Beam* case. The only specific document identified was a Chrysler petition used by Carey and Danis as a form for the *Beam* petition. The Chrysler petition had been filed and was thus a public record. It was not confidential.

W. David Wells, the head of litigation at Thompson & Mitchell when respondents left that firm, testified that he had reviewed the documents Carey and Danis had taken and did not find them to be confidential. Wells testified that most of the documents were either a matter of public record or were generic memos that could apply to a variety of clients. Wells further testified that he believed that it was not uncommon for lawyers to take copies of such documents when they leave one law firm for another.

Count II alleges specifically that respondents used confidential documents against Chrysler, and this must be proved specifically. Given the testimony of those involved, the preponderance of the evidence supports a finding that respondents did not take confidential documents from Thompson & Mitchell and use them against Chrysler. We hold that respondents Carey and Danis did not violate Rule 4-8.4.

....

III. Discipline

The purpose of discipline is not to punish the attorney, but to protect the public and maintain the integrity of the legal profession. Those twin purposes may be achieved both directly, by removing a person from the practice of law, and indirectly, by imposing a sanction which serves to deter other members of the Bar from engaging in similar conduct.

....

Assessing discipline in cases such as this is always difficult. Here, two talented young lawyers, full of promise, lost their way among the economic temptations of modern practice and then again lost their way while struggling to defend themselves. In doing so, they violated two of the most fundamental principles of our profession, loyalty to the client and honesty to the bench. Significant discipline must follow to maintain the public's trust and confidence in our ability to police ourselves. A "slap on the wrist" will not suffice.

While disbarment would ordinarily be expected in a case such as this, the mitigating factors warrant some degree of leniency and offer hope that respondents can return to the responsible practice of law having learned a very hard lesson.

John J. Carey and Joseph P. Danis are indefinitely suspended from the practice of law, with leave to apply for reinstatement not sooner than one year from the date of this opinion.

As noted, disqualification, rather than discipline, is the common means by which courts usually address issues relating to representation of former clients. As you may have noted, the following case is cited extensively in *Carey and Danis*. This case presents one of the best explanations of the issues involved in deciding whether to disqualify an attorney who has previously represented adverse to a current client.

CHRISPENS v. COASTAL REFINING & MARKETING, INC.
257 Kan. 745, 897 P.2d 104 (1995)

DAVIS, Justice

This appeal involves a motion to disqualify counsel under Model Rules of Professional Conduct (MRPC) 1.9(a) (1994 Kan.Ct.R.Annot. 320)

Christopher Christian was a member of the firm of Turner and Boisseau, Chartered, from 1991 to 1993. During this time, he, along with Eldon Boisseau, represented Coastal Refining and Marketing, Inc., in several cases involving pipeline leakage or spills. In September 1993, Christian left Turner and Boisseau and began working for the firm of Michaud, Hutton, Fisher & Andersen (Michaud firm). In November 1993, the Michaud firm, with Christian signing the petition on behalf of plaintiffs Eldon Chrispens, et al, (Chrispens), filed an action against Coastal Refining and Marketing, Inc., (Coastal) alleging that its clients were injured by substances that leaked from a pipeline owned by Coastal.

Before any discovery, Coastal filed a motion to disqualify Christian pursuant to MRPC 1.9(a), and to disqualify the Michaud firm pursuant to MRPC 1.10(b). After an evidentiary hearing with testimony from Eldon Boisseau and Debra Broussard, Coastal's in-house counsel, the trial court determined that the Coastal cases upon which Christian worked when a member of the firm of Turner and Boisseau were not substantially related to the case in which Christian, as a member of the Michaud firm, now brought suit against Coastal. The court held that in the absence of a substantial relationship between the cases, MRPC 1.9(a) did not prevent Christian from suing his former client, Coastal. Based on its decision of no personal conflict, the question of imputed disqualification of the Michaud firm was resolved against Coastal. . . .

Our discussion centers upon [MRPC 1.9] The applicable provisions of MRPC 1.9(a) provide:

A lawyer who has formerly represented a client in a matter shall not thereafter: (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to

the interests of the former client unless the former client consents after consultation." (1994 Kan.Ct.R.Annot. 320.) (Emphasis added.)

The trial court determined that there was not a substantial relationship between the previous cases Christian worked on while at Turner and Boisseau and the new case filed by Christian against his former client while working at the Michaud firm. This conclusion resulted in the court's denial of the motion for disqualification based upon a conflict of interest. Our first inquiry, and to a large extent, the resolution of this appeal, involves a determination of what is meant by the phrase "substantially related matter" expressed in MRPC 1.9(a) . .

. .

SUBSTANTIALLY RELATED MATTER

One noted authority has commented that gallons of ink have been consumed by those who have tried to determine or explain the test for deciding whether a substantial relationship exists between representations. ABA/BNA Lawyers' Manual on Professional Conduct, 51:215. There is widespread agreement that conflict questions involving former clients should be resolved through application of the substantial relationship test. However, there is no standard definition of what the test should compare in determining whether there is a close connection between the conflicting representations. ABA/BNA Lawyer's Manual on Professional Conduct, 51:225. The Model Rules do not provide a definition, nor do the comments to the rules attempt to define the phrase "substantially related." There is no Kansas case law addressing the meaning and application of the phrase "substantially related matters" as used in MRPC 1.9(a)

The ABA/BNA Lawyer's Manual on Professional Conduct, 51:225 notes:

Perhaps the most widely followed formulation of the substantial relationship test is that it compares the 'matter' or 'subject matter' of the former representation to that of the current representation. 'Matter' is the word used in Model Rule 1.9(a), and this word, or the term 'subject matter,' is a popular means of applying the substantial relationship test.

Three separate approaches regarding the substantial relationship test have been used throughout the country. The first approach indicates that the comparison of the former and current representations should center on the facts of each case. The second approach, advanced by the Second Circuit, insists that the inquiry should focus on legal issues and requires the issues involved in the former representation to be "identical" to or "essentially the same" as those presented in the current representation. The relationship under the second approach must be "patently clear." This approach has not been a view widely adopted. See Nelson, *Conflicts in Representation: Subsequent Representations in a World of Mega Law Firms*, 6 GEO.J. LEGAL ETHICS 1023, 1031 (1993). The third approach is set forth in the case of *Westinghouse Elec. Corp. v. Gulf Oil Corp.* The Seventh Circuit blends fact and issue comparisons into a three-step substantial relationship test:

[D]isqualification questions require three levels of inquiry. Initially, the trial judge must make a factual reconstruction of the scope of the prior

legal representation. Second, it must be determined whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters. Finally, it must be determined whether that information is relevant to the issues raised in the litigation pending against the former client.

The substantial relationship test developed so that a determination of a conflict of interest could be made without requiring the former client to reveal what confidential information passed from client to lawyer. The following quote from *T.C. & Theatre Corp. v. Warner Bros. Pictures*, which did not invent the substantial relationship test but is perhaps the case responsible for popularizing it, highlights the objective of the test: " 'In cases of this sort the Court must ask whether it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject of his subsequent representation. If so, then the relationship between the two matters is sufficiently close to bring the latter representation within the prohibition of Canon 6,' the former- client conflicts rule in the ABA Canons of Professional Ethics. Whether using the Model Code or the Model Rules as their guide, courts follow the same path today." ABA/BNA Lawyer's Manual on Professional Conduct, 51:226-27.

Several federal cases interpreting Kansas law have dealt with the phrase "substantially related" as used in MRPC 1.9(a). In *Graham v. Wyeth Laboratories*, the Tenth Circuit noted that the term "has acquired the status of a term of art in the general law of attorney conflicts of interest," and defined the term to mean that the "factual contexts of the two representations are similar or related." This same definition was employed in *Geisler* by *Geisler v. Wyeth Laboratories*.

In *Graham v. Wyeth Laboratories*, the Tenth Circuit found that cases were substantially related when the actual context of the two representations were similar or related. In *Koch v. Koch Industries*, the United States District Court defined the term "substantially related" to mean that the cases "involve the same client and the matters or transactions in question are relevantly interconnected or reveal the client's pattern of conduct." . . . In *Trone*, the court states: "[T]he underlying concern is the possibility, or appearance of the possibility, that the attorney may have received confidential information during the prior representation that would be relevant to the subsequent matter in which disqualification is sought. The test [under MRPC 1.9(a)] does not require the former client to show that actual confidences were disclosed. That inquiry would be improper as requiring the very disclosure the [MRPC 1.9(a)] is intended to protect."

Each case under both MRPC 1.9(a) . . . must be decided on its unique facts and an application of the rule to those facts. This perhaps is another way of saying that the determination of conflict under MRPC 1.9(a) . . . must be made on a case-by-case basis with the decision to be based on the unique facts and application of the rule to facts of that case. Factors which courts have considered in making a determination under MRPC 1.9(a) . . . include: (1) The case involved the same client and the matters or transactions in question are relevantly interconnected or reveal the client's pattern of conduct; (2) the lawyer had interviewed a witness who was key in both cases; (3) the lawyer's knowledge of a former client's negotiation strategies was relevant; (4) the

commonality of witnesses, legal theories, business practices of the client, and location of the client were significant; (5) a common subject matter, issues and causes of action existed; and (6) information existed on the former client's ability to satisfy debts and its possible defense and negotiation strategies. This is by no means an exhaustive list but merely reflects that the determination is oftentimes an evaluative determination by the trial court based upon the unique facts of the case. In some cases, one factor, if significant enough, may establish that the subsequent case is substantially similar. For example, if the former representation involved defending the client on a criminal charge and the attorney is thereafter elected as a prosecutor and then seeks to prosecute the same client upon a charge connected with the prior defense, the former representation alone makes the disqualification an easy question.

On the other hand, in cases less clear, the trial court must balance the previous client's right of confidentiality, the right of having a reasonable choice of legal counsel, and the right of lawyers to form new associations and take on new clients when leaving a previous association. Given the mobile society we live in and the very real need to preserve professional integrity as well as the real needs of those citizens who rely upon attorneys for assistance, the balancing of the competing interests becomes very difficult at times. Both the wording of the rules involved and the somewhat elusive test of "substantially related" provide the court with an opportunity to make a circumspect decision concerning conflict of interest. We reject the narrow Second Circuit view, which requires that a substantial relationship must be patently clear and disqualification is required only when the issues involved are identical or essentially the same. We adopt a rule which requires the trial court to make a determination after considering the facts surrounding the two representations. .

. .

BURDEN OF PROOF

. . . MRPC 1.9 deals with the disqualification of an individual attorney. There is no requirement under this rule as there is under MRPC 1.10(b) to establish that the attorney gained material and confidential information during the course of his or her previous employment. As stated in *Koch v. Koch Industries*, disqualification under MRPC 1.9(a) is dependent upon the party moving for disqualification to establish that (1) the attorney whose disqualification is sought formerly represented them in a matter, (2) the matter is substantially related to a matter in which the attorney now seeks to represent a new client, and (3) the new client's interest is substantially adverse to the interest of the party seeking disqualification. We hold that the burden of proof under MRPC 1.9(a) is upon the party alleging conflict and moving for disqualification.

PRESUMPTIONS

The question under MRPC 1.9(a) regarding presumptions is: Once a matter has been found to be substantially related under MRPC 1.9(a) and all other requirements of the rule have been satisfied, does this result in automatic disqualification of the subject attorney? . . .

The answer to the question posed in the last paragraph is twofold. First, if the disqualification motion is advanced solely under MRPC 1.9(a), an

irrebuttable presumption arises that in cases "substantially related," the former client revealed confidential information requiring the attorney's disqualification. . . .

A. Proceeding Under MRPC 1.9(a)

Once it has been established that an attorney has formerly represented a client in a matter and seeks to represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client, an irrebuttable presumption arises that the attorney acquired confidential information in the former representation and is disqualified from representing the latter client. MRPC 1.9(a), by its express terms, provides that an attorney who has represented a client in a matter "shall not" represent an adverse party in the same or a substantially related matter. This is consistent with the substantial relationship test as used in the majority of jurisdictions. In *Koch*, the federal district court stated:

If a substantial relationship is found, an irrebuttable presumption arises that the former client revealed facts requiring the attorney's disqualification. The court need not inquire into whether the confidential information was actually revealed or whether the attorney would be likely to use the information to the disadvantage of the former client. . . . To conduct such an inquiry would frustrate the former client's interest in the confidential information.

We believe the reasoning of *Koch* is sound. The reason for this irrebuttable presumption, as noted in *Koch*, is rooted in the idea of attorney loyalty:

[MRPC 1.9(a)] is a prophylactic rule to prevent even the potential that a former client's confidences and secrets may be used against him. Without such a rule, clients may be reluctant to confide completely in their attorneys. Second, the rule is important for the maintenance of public confidence in the integrity of the bar. [Citation omitted.] Finally, and importantly, a client has a right to expect the loyalty of his attorney in the matter for which he is retained.

Where a lawyer has been directly involved in a specific transaction, subsequent representation of clients with materially adverse interests in a matter substantially related to the specific transaction is prohibited. The burden upon a motion for disqualification under this rule is upon the moving party asserting the conflict. See MRPC 1.9, Comment (1994 Kan.Ct.R.Annot. 320-21). . . .

[The court engaged in a lengthy analysis of the facts involving Christian's prior representation of Chrispens and the current case]

CONCLUSION

Coastal's burden under MRPC 1.9(a) was to show that (1) Christian formerly represented it in a matter, (2) that the matter is substantially related to the matter in which Christian now seeks to represent a new client, and (3) that the new client's interests are substantially adverse to the interests of Coastal.

The essential facts are not in dispute. As we have stated above, the trial court's conclusion that the matters were not substantially related is a question of law subject to de novo review. Contrary to the trial court's conclusion, we conclude as a matter of law that the matter between the two representations were substantially related. We base this conclusion on the facts that all cases involved the same client; that the matters or transactions in question are relevantly interconnected and reveal Coastal's pattern of conduct; that Christian had interviewed and acquired valuable knowledge of the weaknesses and strengths of key witnesses who will be key witnesses in the *Chrispens* case; that Christian obtained confidential financial information in representing Coastal concerning the settlement of a punitive damage claim in the *Jerke/Ebenkamp* cases, which information is material and relevant in the *Chrispens* case; that Christian gained material, confidential information of Coastal's negotiations strategies which may become valuable in the *Chrispens* case; that all cases involve the common subject of pipeline leaks or spills from Coastal's Wichita refinery; and that the previous representation by Christian of Coastal terminated less than three months from the time Christian initiated the *Chrispens* action against Coastal.

Reversed and remanded with directions to grant the motion for disqualification.

1. *Chrispens* identifies various approaches to determining whether a substantial relationship exists. Which approach (issue or fact-based) seems more appropriate? It appears that the majority is leaning toward a fact-based approach, which may be more sound since, as the court noted in *Carlson v. Langdon*, 751 P.2d 344, 349 (Wyo. 1988), issues frequently do not develop until long after litigation has been instituted. An approach that considers the factual context of the matters to determine if they have common facts is more consistent with the underlying concern that the attorney may have been in a position to receive confidential information which could possibly be used to the detriment of the former client in the later proceeding. *Id.* Some courts look to both a comparison of the issues and a review of the facts in order to determine whether a substantial relationship exists. See, e.g., *Home Ins. Co. v. Marsh*, 790 S.W.2d 749, 754 (Tex. Ct. App. 1990). As the authors of the ABA/BNA Manual have noted, “[i]n practice, the distinctions between formulations of the substantial relationship test become blurred.” 51:226.

2. Should the test for “substantial relationship” be a strict one, or should it be fairly liberal? Which approach does the *Chrispens* court take? As noted, some courts require that the relationship be “patently clear,” while other courts appear to require merely that there be an opportunity for “greater insight” into the affairs of the client. The courts using a strict approach are usually concerned primarily, if not exclusively, with protecting confidential information. Those courts using broader tests are frequently also concerned about appearance of impropriety. How would it look to the public to allow the attorney to sue his or her former client in this situation? Is this an appropriate consideration? Canon 9 of the Code of Professional Responsibility provided that a lawyer should avoid the appearance of impropriety. The Model Rules contain no such provision.

Is appearance of impropriety an appropriate basis for disqualification where there is little or no real risk to confidential information? Courts today are split on this issue. Compare *Harker v. Commissioner of Internal Revenue*, 82 F.3d 806, 808-809 (8th Cir. 1996)(not appropriate); *President Lincoln Hotel Venture v. Bank One*, 271 Ill. App. 3d 1048, 649 N.E.2d 432, 441 (1994)(appearance of impropriety too slender a reed” on which to base disqualification even under the Code) with *First American Carriers, Inc. v. Kroger*, 302 Ark. 86, 787 S.W.2d 696 (1990) (test still appropriate); *Heringer v. Haskell*, 536 N.W.2d 362, 366-67 (N.D. 1995)(appearance of impropriety standard “has not been wholly abandoned in spirit.”). At least one court has equated the appearance of impropriety considerations that appeared in the old Code with loyalty considerations recognized by the Commentary to the Model Rules. See *In re American Airlines, Inc. AMR*, 972 F.2d 605, 607-20 (5th Cir. 1992).

3. As noted, where a court finds a substantial relationship, it will presume that the attorney has access to confidential information that would be helpful in the current litigation. Most courts hold this presumption to be irrebuttable and require disqualification. See, e.g. *Herbes v. Graham*, 180 Ill. App. 3d 692, 536 N.E.2d 164, 168 (1989); *Home Insurance*, 790 S.W.2d at 754. If no substantial relationship is found, the party seeking disqualification may still be permitted to demonstrate that there is a substantial risk that confidential information may be used improperly. See RESTATEMENT, § 213. If such a risk exists, disqualification is appropriate. Does the availability of disqualification even in the absence of a finding of substantial relationship indicate that the test ought to be a narrow one? After all, the test only addresses when *automatic* disqualification is required. If no such relationship exists, the party seeking disqualification still can prove that specific information is at risk. But doesn't the need to do so put the information even more at risk?

4. Where an attorney has been disqualified, most courts will permit that attorney to turn over work product to new counsel unless actual confidential information is included or other improper advantage is likely. See, e.g., *First Wisconsin Mortgage Trust v. First Wisconsin Corp.*, 584 F.2d 201 (7th Cir. 1978) and *Canadian Gulf Lines, Inc. v. Triton International Carriers, Ltd.*, 434 F. Supp. 691 (D. Conn. 1976); see also *EZ Painter Corp. v. Padco, Inc.*, 746 F.2d 1459, 1463 (Fed. Cir. 1984) (work product created after new lawyers who possessed information came to firm not turned over; previous work product could be given to new counsel.)

5. What about consultations with prospective clients? If a lawyer declines representation and is thereafter consulted by a person with interests materially adverse to the prospective client in a substantially related matter, should the lawyer be disqualified? Not necessarily, according to the Restatement. The Restatement would require disqualification only if the lawyer “has received from the prospective client confidential information that could be significantly harmful to the prospective client.” Restatement § 15. The Restatement recognizes that the policy considerations are different with prospective and actual clients. What are these differences? Do you agree that prospective clients should be treated differently? This is dealt with in the new Model Rules in Rule 1.18. Read that Rule now. Are you satisfied with its resolution of the relevant issues?

C. Imputed Disqualification

Difficult questions arise with regard to imputed disqualification. As a general matter, where attorneys are associated in a firm none of them may represent a client if any one of them, practicing alone, would be prohibited from doing so by the conflict rules. M.R. 1.10(a). Where lawyers do not move between firms, this rule is not usually difficult to apply except with regard to determining whether the affiliation requirement has been met. See RESTATEMENT, § 203. That requirement has been held by the ABA in Formal Opinion 90-357 (1990) to apply to lawyers who are "of counsel" to a firm. Thus, for purposes of imputed disqualification, if two or more firms share an "of counsel" attorney they are effectively considered to be a single firm in determining whether disqualification is required. Similarly, where a firm is "of counsel" to another firm, this would "entail the complete reciprocal attribution of disqualifications of all lawyers in each firm." *Id.* Where lawyers change firms, the conflicts are more difficult to resolve.

The question of "imputed knowledge, and therefore "imputed" disqualification, exists at both ends of the representation. The issue arises because of the presumption of shared confidences. It has long been accepted that attorneys in the same firm can, and often do, share information. One of the advantages of practicing in a firm setting is the ability to bounce ideas off others in the firm, and to obtain expertise in a variety of areas within the firm. This requires consultation among attorneys in the firm. In addition, in many firms, there is unrestricted access to client files, and in some firms, regular meetings are held at which progress on cases is discussed. Thus, in many cases, it is reasonable to presume that, where an attorney in a firm represents a client, the attorney's partners and associates have access to, and in fact have, protected information about that client.

The issue also arises where an attorney works on a client's case within a firm, but may have very little to do with the case. This comes up most often involving young associates in large firms. It is not uncommon that the attorney will be given few, if any facts, and will be asked to research a discrete issue. The attorney may have no access to the client file and little opportunity to discuss the case with others. Is it reasonable to presume that this attorney has confidential information of the client that would be at risk if the attorney were on the other side?

These questions are at the core of the courts' attempts to resolve the issue of imputed disqualification. Under what circumstances should the courts presume that an attorney who did not actually represent a client has protected information? Under what circumstances should the courts allow an attorney who actually worked on a case to deny that he or she has such information? While these matters are difficult enough, they are further complicated by the fact that it may not be the lawyer him or herself, but rather the lawyer's new firm, that is undertaking the subsequent representation. How, if at all, should this alter the analysis?

Where disqualification is sought against a lawyer whose firm previously represented a client who the lawyer now represents adversely to, the courts have generally used two levels of presumptions to determine whether disqualification is

required. The first presumption is that the attorney who represented the client in fact had confidential information that (if the matters are substantially related, and the subsequent representation is materially adverse) could be used against the client. This presumption is routinely viewed as irrebuttable. But where the attorney whose disqualification is sought did not actually work on the matter, most courts will apply a rebuttable presumption on the issue of whether that attorney has protected information. If the attorney can rebut that presumption, by showing, for example, that he or she had no access to files and spoke to no one about the case, disqualification will not be ordered unless the other side comes back with information to show the contrary. In that case, the courts, not wanting a "swearing contest," will generally allow the presumption to carry the day and will disqualify the attorney.

Where, however, the attorney actually worked on the matter, most courts will not allow the presumption of access to confidential information to be rebutted. In such situations, disqualification will be mandated. Some courts, however, are concerned about the limited access problem. In order to facilitate mobility among lawyers and choice of counsel by clients, these courts will allow rebuttal where the attorney was only "peripherally involved" in the previous matter. This issue was addressed in another portion of the *Chrispens* decision as follows:

This idea [of limited representation] is best reflected in the case of *Silver Chrysler Plymouth Inc. v. Chrysler Mot. Corp.*, 518 F.2d 751, 756-57 (2d Cir.1975), wherein the court stated: "But there is a reason to differentiate for disqualification purposes between lawyers who become heavily involved in the facts of a particular matter and those who enter briefly on the periphery.... Under the latter circumstances the attorney's role cannot be considered 'representation.'"

In order for the automatic disqualification to take place under MRPC 1.9(a), there must be a showing that the attorney whose disqualification is sought actually represented the former client, not just that his or her law firm did so. This allows attorneys on the periphery of issues to avoid being cast as having represented a client when, in fact, they merely belonged to the firm. This also corresponds to the Comment to MRPC 1.9, which states: "The lawyer's involvement in the matter can also be a question of degree."

Although the court in *Silver Chrysler* refused to draw a controlling distinction between partners and associates in addressing this question, it seems clear that this doctrine is designed to protect those with limited access to information, and they are most likely to be younger associates. For the most part, it is only where the scope and degree of representation by their nature rebut the presumption of shared confidences that the *Silver Chrysler* peripheral involvement approach has been accepted.

While the use of these presumptions to resolve issues of disqualifications has been generally accepted for some time, the advent of the Model Rules has begun to cause a change in focus. Under the Model Rules, a lawyer should not represent a person in the same or a substantially related matter in which that lawyer's prior firm previously represented a client whose interests are materially adverse and about whom the lawyer has acquired protected information. M.R. 1.9(b). The disciplinary rule allows for discipline only where the lawyer in fact possesses such information, although proof

of such fact may be aided by "inferences, deductions or working presumptions." Comment ¶ 6.

Courts in a number of jurisdictions that have adopted the Model Rules have begun to use the language of the rules, rather than the presumptions, to resolve disqualification issues. Thus, in *Parker v. Volkswagenwerk Aktiengesellschaft*, 781 P.2d 1099 (Kan. 1989), the court focussed not on whether it should presume access to information, but rather on whether there had been a showing that the attorney "had knowledge of material and confidential information." See also *Graham v. Wyeth Labs*, 906 F.2d 1419 (10th Cir. 1990) (applying Kansas law). Missouri appears to have followed this approach in *In re Marriage of Carter*, 862 S.W.2d 461 (Mo. App. 1993). Does this provide sufficient protection to the former client's information? Does it adequately address appearances? Is use of the Model Rules appropriate in this context? Why or why not?

The problem is further complicated by the issue of screening. If it is not the attorney, but the attorney's new firm, that is currently representing adverse to the attorney's former client, can the attorney be screened from the current representation so that the firm can continue in the representation? The majority view, at least in the state courts, does not allow screening to prevent disqualification if the substantial relationship test has been met. See, e.g., *Parker*, 781 P.2d at 1106-07 (Model Rules "reject. . . any thought that the 'taint' of the incoming lawyer can be cured by screening. . ."); *JK & Susie L. Wadley Research v. Morris*, 776 S.W.2d 271, 284 (Ten. Ct. App. 1989); *Weglarz v. Bruck*, 128 Ill. App. 3d 1, 470 N.E.2d 21, 24 (1984) (screening only permitted where attorney had no confidential information). These courts believe that the continued risk of disclosure, coupled with the appearance of impropriety, outweigh interests in mobility and the right to counsel of choice.

A growing minority of courts has begun to recognize screening as a legitimate means of curing conflicts of this type based on the new realities of law practice which require a balancing of interests. *Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222, 225 (6th Cir. 1988); see *Schiessle v. Stephens*, 717 F.2d 417, 421 (7th Cir. 1983); *EZ Painter, supra*. This issue caused heated discussion during debate on the Restatement. The current version of the Restatement would permit representation in the "former client" context "when there is no reasonably apparent risk that confidential information of the former client will be used with material adverse effect on the former client." Such risk will not be found where any confidential information "is unlikely to be significant in the subsequent matter" and the lawyer having such information "is subject to screening measures adequate to eliminate involvement by that lawyer in the representation." The Restatement also requires "timely and adequate notice of the screening" to all affected clients. RESTATEMENT, § 124(2). Is this an adequate resolution of the issue? Is it likely to be effective?

Where screening is permitted, it generally requires that the screened attorney be denied access to files, not discuss the matter with others in the firm, and not share in profits or fees derived from the representation. See Restatement, Comment to § 204; ABA/BNA LAWYER'S MANUAL, ¶51:2004-2005, 2010-2013.

Note that, in the prospective client context, the Restatement would permit screening even where the screened attorney actually had access to information that could be significantly harmful to the prospective client. RESTATEMENT § 15. Does this satisfactorily resolve the issues where prospective clients are concerned? See also M.R. 1.18.

D. Non-lawyer Personnel

Conflict of interest problems can arise with regard to non-lawyer personnel within a law firm. In Informal Opinion 88-1526 (1988), the ABA addressed whether a law firm must be disqualified where a paralegal, who worked on a case with a prior firm, joined the firm representing the opposing party. The Committee noted that, under M.R. 5.3, the firm has an obligation to protect information that the paralegal may possess. This information can be adequately protected by using screening procedures that ensure the employee does not discuss the case with lawyers in the firm and does not work on the matter in any way. Disqualification of the firm, however, is not required.

This Opinion reflects the prevailing view in the courts, *see, e.g. Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831 (Tex. 1994), although there are courts that see no reason for making a distinction between lawyers and non-lawyers in this situation. See *Esquire Care Inc. v. Maguire*, 532 So. 2d 740 (Fla. App. 1988) and cases discussed therein. See Comment ¶4, Rule 1.10. In Kansas, the Supreme Court, citing Kansas Bar Association Ethics Opinion 90-05, stated:

A law firm that employs a nonlawyer who formerly was employed by another firm may continue representing clients whose interests conflict with the interests of clients of the former employer if (1) the former employing firm and their affected clients consent after consultation, or (2) the employee can meet the burden of proof that he or she did not acquire 'material and confidential information during the course of his former employment.' A screening wall imposed unilaterally is inappropriate to meet this burden under our case law."

Zimmerman v. Mahaska Bottling Co., 270 Kan. 810, 19 P.3d 784, 791-2 (2001). Thus, where the secretary had obtained confidential information before switching firms, disqualification was required despite the attempt at screening.

Where lawyers and non-lawyer personnel are treated differently for these purposes, how should law students be treated?

E. Government Lawyers

Read Rule 1.11 and Comments.

Why are the rules for government lawyers different than for private lawyers? See A.B.A. Formal Opinion 342 (1975); see also *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980), *vacated on jurisd. grounds*, 449 U.S. 1106 (1981). What competing interests are at stake where Rule 1.11 is involved? Are these interests balanced appropriately? Who has a right to complain when a former government lawyer gets

involved in a private matter? Do the rules adequately address their legitimate complaints? See generally RESTATEMENT § 133.

What constitutes a “matter”? Can drafting legislation or regulations ever constitute a “matter”? Should it? What about participating “personally and substantially”? What level of participation implicates the interests the rule was designed to protect? See *Kelly v. Brown*, 9 Vet. App. 37 (1996); *Securities Investor Protection Corp. v. Vigman*, 587 F. Supp. 1358, 1366-67 (C.D. Calif. 1984); see generally Opinion 342.

Does Rule 1.9 apply when an attorney who formerly represented the government represents adverse to the same governmental entity in a substantially related matter? See *Violet v. Brown*, 9 Vet. App. 530 (1996). Should it? See ABA Formal Op. 97-409, holding 1.9(a) and (b) inapplicable to former government lawyers. Is this a correct result?

Does the government, as a “client,” have the same entitlement to confidentiality that non-government clients have? Is there any justification for a distinction here? Consider the following:

The government has few secrets of the kind Canon 4 is meant to protect. A basic premise of the Freedom of Information and Government in the Sunshine Acts is that, with the exception of classified information, the only types of information that the government should properly seek to protect are matters of tactics, investigatory documents, and similar materials.

National Bonded Warehouse Ass’n, Inc. v. United States, 718 F. Supp. 967, 970 n.2 (C.I.T. 1989), quoting *Developments in the Law - Conflict of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1431 (1981). Do you agree?

Is the government consent provision too easy? Who is it that must provide the consent? Does that person have a sufficient stake in the outcome when the government is not a party to the subsequent litigation? And does that person have a potential conflict - between protecting the agency’s legitimate interests and setting a precedent that will preserve that individual’s own marketability in the future? While the government frequently consents, there are situations where it refuses to do so. See, e.g., *Vigman*. Is there any better solution to this problem?

F. Lawyer as Witness

Read Rule 3.7 and Comments. Why is it inappropriate or professionally irresponsible for an attorney to act as both witness and advocate in the same case? Read the following, interpreting the predecessor provision under the Code.

NUNN v. STATE
778 S.W.2d 707 (Mo. App. 1989)

STEPHAN, Judge.

Michael Nunn appeals the judgment of the trial court denying his Rule 27.26 motion. . . . In his first point, movant asserts that he was denied effective assistance of counsel in that his counsel testified at the trial and, when counsel's conduct was made an issue, counsel failed to move for a mistrial or to withdraw as counsel.

Prior to movant's trial on charges of arson, assault, and burglary, defense counsel decided to interview three of the state's witnesses over the telephone. Defense counsel tape-recorded portions of these conversations without the other person's knowledge.

About six months prior to defendant's trial, one of these witnesses, Ms. Yvette Blake, was subpoenaed to appear for a deposition at defense counsel's office. The state, however, received no notice of the subpoena or scheduled deposition nor was a copy of the subpoena filed with the court. Ms. Blake appeared at defense counsel's office; however, no deposition was taken.

At trial, Ms. Blake testified for the state. When defense counsel cross-examined her, he attempted to attack her credibility and establish her bias by showing that her testimony, if favorable to the state, would result in the state's more lenient disposition of certain criminal charges pending against her. She denied this. She further denied that she remembered talking to defense counsel on the telephone about the case, although she acknowledged she had appeared at his office.

Defense counsel attempted to refresh her recollection of the telephone conversation by mentioning the subpoena she had received from his office. After the prosecutor's objections, defense counsel abandoned his efforts to impeach her credibility. Instead, during defense counsel's presentation of his case-in-chief, he called himself as the first witness in order to counter the testimony of Ms. Blake. Prior to testifying, he made no motion to withdraw as defense counsel. His brother, also an attorney, conducted the direct examination and defense counsel testified to his knowledge of the inconsistent statements by the state's witness, Ms. Blake.

The prosecutor vigorously interrogated defense counsel suggesting that defense counsel had served the subpoena on Yvette Blake for improper reasons. The prosecutor inquired whether defense counsel knew of the requirement not only that notice be given to all parties in an action when a deposition is to be taken, but also that attorneys avoid even the appearance of impropriety. The prosecutor further asked whether, in defense counsel's opinion, it was "legally, morally or ethically wrong" to call a state's witness and tape record their telephone conversation without disclosing they are being taped. After defense counsel finished testifying, he resumed his place at counsel's table and continued his presentation of defendant's case.

The last witness defense counsel called to testify was Timothy Murphy, an attorney and former law clerk in defense counsel's firm. He admitted being

responsible for the handling of the subpoena. The sole purpose of his testimony was to absolve defense counsel of any wrongdoing with the subpoena episode.

During the state's closing argument, the prosecutor attacked defense counsel's credibility. He mentioned both the taping of telephone conversations and also the subpoena incident. He concluded his argument with the following: [Defense counsel] thinks it's an honorable thing to call witnesses up and not tell them they are being taped. Is it an honorable thing also to deliver a subpoenaed witness for deposition to a State's witness, have them come in to a law firm when there is no deposition taken, where there is no notice to the Prosecutor? If we are going to talk about Yvette Blake's credibility, look at the people who are calling her a liar, and [defense counsel is] the primary one.

At the hearing on the motion, defense counsel testified he knew that if he took the stand his credibility, like that of any other witness, would be put in issue. Nevertheless, since he was the only person to hear the inconsistent statements from the state's witnesses, he believed his testimony was vital in the case. He discussed his course of action with movant and other members of his office.

After the evidentiary hearing, the motion court issued its findings of fact and conclusions of law and denied movant's allegation that his attorney was ineffective for failing to withdraw after testifying in movant's behalf. The court observed that defense counsel "wanted to testify on behalf of Movant at the trial in order to show that a State's witness had lied on the witness stand" and that "[t]he only way to show the witness' inconsistent statement was for [defense counsel] to testify." The court stated there was no reason for defense counsel to withdraw from the case prior to or during the trial since he could not have known that the state's witness would testify differently as to the facts she had related to defense counsel before trial. The court concluded that defense counsel's decision to call himself as a witness was one of "trial strategy" and did not reflect "errant judgment."

We disagree. Rule 4 of the Supreme Court of Missouri Rules, (since repealed) DR 5-101(B) provides that a lawyer shall not accept employment if he knows or it is obvious that he ought to be called as a witness, except if the testimony will relate solely to an uncontested matter, a matter of formality, the nature and value of legal services, or would work a substantial hardship on the client. DR 5-102(A) requires a lawyer and his firm to withdraw from the conduct of the trial if he learns or it is obvious that he ought to be called as a witness on behalf of his client except as allowed by the exceptions in DR 5-101(B).

Our Missouri Supreme Court analyzed the rationale behind DR 5-102 and 5-101 in *State v. Johnson*, 702 S.W.2d 65, 69 (Mo. banc 1985):

The reasons underlying this rule are set forth in Ethical Consideration 5-9 of Missouri's Code of Professional Responsibility. First, a lawyer who serves as both trial counsel and witness is open to impeachment on the basis of an apparent interest in the outcome of the trial and is thus rendered less effective as a witness. Second, a lawyer who assumes both of those roles in a single case makes it more difficult for opposing counsel to conduct effective cross-examination and creates an awkward

scenario in which one advocate must challenge the credibility of his legal adversary. Third, the lawyer who assumes the role of a witness must argue his own credibility, which may serve to weaken his credibility and effectiveness as an advocate. Finally, the two roles are said to be simply inconsistent. These reasons, though, have greatest purpose when the witness and advocate are one and the same.

Here, since each of these concerns surfaced during trial, we conclude that an actual conflict of interest existed between defense counsel and movant. At trial, the state first identified defense counsel's obvious interest in the outcome of the case by noting that he was not an appointed counsel but, rather, had been retained by defendant. Second, through its intimation of impropriety in counsel's tape-recording telephone conversations without the other side's knowledge and issuing a subpoena for an improper purpose, the state made defense counsel's credibility an issue for the jury. Third, defense counsel called a witness for the sole purpose of rehabilitating defense counsel's own credibility. Finally, defense counsel's appearance in the inconsistent roles of advocate and witness may have undermined the jury's ability to decide the facts and its perception of movant.

Although the courts of Missouri have not addressed the particular situation in which a defense counsel testifies on behalf of his client and then continues with the case, a comparable scenario developed in *State v. Hayes*, 473 S.W.2d 688 (Mo.1971). In *Hayes*, the prosecuting attorney appeared as a witness for the state and then continued in the case as the prosecutor. Our Missouri Supreme Court echoed *Tomlin v. State*, 81 Nev. 620, 407 P.2d 1020, 1022 (1965), stating as follows: [T]he right of a prosecuting attorney to testify in a criminal case 'is strictly limited to those instances where his testimony is made necessary by the peculiar and unusual circumstances of the case. Even then, his functions as a prosecuting attorney and as a witness should be disassociated. If he is aware, prior to trial, that he will be a necessary witness, or if he discovers this fact in the course of the trial, he should withdraw....' The court held that "the prosecuting attorney occupied conflicting positions as a witness for the State and as a prosecutor ... and the natural tendency in such a case is for defendant to question the fairness of a trial when the prosecutor becomes a witness for the state."

In the instant case, when defense counsel decided that he should testify in his client's behalf, he was under a duty to withdraw from the case. He should not have been surprised that the state inquired about the subpoena and the taping of the telephone calls. Defense counsel's disregard for EC 5-9 and DR 5-102(A) thus put him in a situation where his continued representation jeopardized movant's position during the criminal trial. For example, counsel's act in calling the last defense witness, his former law clerk, was solely to refute the allegations of counsel's involvement with the subpoena. The only testimony elicited from the witness was directed at disassociating defense counsel from the entire subpoena episode.

Counsel was caught between the obligation to do his best for movant and the need to justify his own conduct as legal and ethical. An accused is entitled to representation which is uncluttered by counsel's efforts to vindicate his own conduct. A conflict of interest resulting in ineffective assistance of

counsel may arise from an interest adverse to the accused or an interest simply personal to the attorney.

The only issue which should have been before the jury was defendant's conduct, not that of his attorney. Counsel's actions which injected his credibility as an issue during movant's trial undoubtedly adversely affected his client's interests. Counsel's prior conduct was completely irrelevant to movant's case and could only detract from his defense. That the jury unintentionally imputed the alleged improprieties of defense counsel to his client is a very real possibility. Counsel could have avoided this possibility by adhering to the ethical prohibitions.

We do not dispute counsel's right to call himself as a witness; clearly, an attorney may be a competent witness. Trial strategy, however, only applies to the decision to call a witness; it does not extend to the decision to remain as counsel. Such a situation produces a conflict of interest, and to sweep it under the rug of trial strategy is a mischaracterization. Furthermore, we find no "peculiar and unusual circumstances" as referred to in *Hayes* which would justify the need to remain as counsel.

Can a defendant consent to his or her lawyer serving as both advocate and witness? While ordinarily Rule 3.7 prohibits a lawyer doing so even where the attorney consents, the Missouri Court of Appeals noted that, where a defendant desires to retain counsel despite the possible conflict of roles, the court "must balance the defendant's constitutional right against the need to preserve the highest ethical standards of professional responsibility." *State ex rel. Fleeer v. Conley*, 809 S.W.2d 405, 409 (Mo. App. 1991). In *Fleeer*, the court found that the lawyer might not in fact have to testify. In addition, it believed that the trial judge had not adequately considered the degree of hardship disqualification would cause to the defendant who had no further funds to retain counsel and who was ready for trial and did not want a further long delay. It reversed the trial court's disqualification of counsel pending a more complete balancing of the interests involved.

Outside the context of criminal defense, the courts generally will not permit the lawyer to play dual roles except in exceptional circumstances. Courts generally construe the exceptions to Rule 3.7 rather narrowly. Note also that the rule applies only to appearance and testimony at trial; appearance at pretrial proceedings, and involvement outside of the courtroom, are not addressed by this rule. See generally ANNOTATED RULES, at 387-88.

If a lawyer cannot represent a client because that lawyer will be required to testify, should the lawyer's firm be disqualified as well? Under the Code, the answer was generally "yes," but the Model Rules are more liberal in this regard. Rule 3.7(b) permits associated lawyers to continue to represent as long as they are not precluded by other conflict of interest rules (e.g., 1.7, 1.9). In what circumstances would such a conflict arise? When would no such conflict exist?

CHAPTER VII
DOING IT AND DOING IT RIGHT:
COMPETENCE, COMMUNICATION AND CLIENT FUNDS

I. INTRODUCTION

It is clear that, as part of the agency relationship and the duty of loyalty to the client, an attorney has an obligation to perform the work required for the client and to do so competently while keeping the client informed. These obligations are found in the Model Rules in Rules 1.1-1.4.

Historically, competence was not viewed as an ethical or professional responsibility concern. It was not until the adoption of the Code of Professional Responsibility in 1969 that competence was "explicitly made a professional obligation." Comment to Model Rule 1.1, Proposed Final Draft, Model Rules of Professional Conduct (May 30, 1981). Even then, while the incidence of complaints against attorneys regarding incompetence and neglect was high, the incidence of discipline was not, and what discipline was imposed was generally not severe.

In recent years, however, the incidence and severity of discipline for incompetence and neglect has increased. The seriousness of the problem of attorney competence is reflected in the placement of the rule relating thereto as the first of the Model Rules, (see 1.1) , a placement that Robert Kutak, chairman of the ABA Commission on the Evaluation of Professional Standards, characterized as "no accident." Remarks to the 10th Annual Conference of the National Association of Law Placement, June 15, 1981, at 13.

This chapter will explore what is meant by competence and neglect, what obligations a lawyer has in dealing with client property and funds, what sanctions can be imposed for violations of these obligations, and what can be done in law office practice to avoid exposure in these areas.

II. WHAT IS COMPETENCE?

Read Model Rule 1.1 and Commentary.

While lawyers may face sanctions for incompetence and neglect, there had been little written until the early 80's regarding what constitutes competence. One attempt at a comprehensive definition of competence appeared in the ALI-ABA Committee on Continuing Professional Responsibility Discussion Draft, "A Model Peer Review System." That Report defined legal competence as follows:

Legal competence is measured by the extent to which an attorney (1) is specifically knowledgeable about the fields of law in which he or she practices, (2) performs the techniques of such practice with skill, (3) manages such practice efficiently, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the client's attention, (5) properly

prepares and carries through the matter undertaken, and (6) is intellectually, emotionally, and physically capable. Legal incompetence is measured by the extent to which an attorney fails to maintain these qualities.

What do you think of this definition? Does it capture all the elements of competent performance as an attorney? Is competence more of function of knowing what to do or actually getting the job done? The Report notes the importance of “knowledge, skill, care and performance.” How important is each of these? What about motivation, and where does it fit into the equation? What other factors are relevant, and how are they weighed?

The A.B.A. Section of Legal Education and Admission to the Bar, in its *Report and Recommendations of the Task Force on Lawyer Competency: the Role of the Law Schools* (1979) [often referred to as the Cramton Report in recognition of the Chairman, Roger Cramton], noted:

Too much of the discussion of the “problem of lawyer incompetence” has failed to distinguish between competence and performance. Inadequate lawyer performance --- the failure to meet a satisfactory standard in some task undertaken for a client --- is not synonymous with lawyer incompetence. Competency properly refers to an individual’s capacity to perform a particular task in an acceptable manner. A lawyer’s actual performance may fall short of the appropriate standard for any number of reasons unrelated to competence: inattention, laziness, the press of other work, economic factors, or mistake. Indeed, available evidence suggests that reasons such as these, not a lack of capacity to do a proper job (incompetence in the narrow sense), are the cause of most instances of lawyer failure.

The Task Force then went on to address the “components of lawyer competence.” It concluded:

The Task Force believes it useful to view lawyer competence as having three basic elements: (a) certain fundamental skills; (b) knowledge about law and legal institutions; and (c) ability and motivation to apply both knowledge and skills to the task undertaken with reasonable proficiency.

Is it helpful to identify the characteristics of competent performance and encourage that lawyers conduct their practices in conformance therewith? The ALI-ABA Report attempted to do so. It identified ten criteria which it felt “give more specific content to the concept of legal competence.” The first four were viewed as broad types of work performed by attorneys and were “most important in that they directly reflect the attorney’s ultimate performance --- his or her output as a professional.” The remaining six were viewed as “qualities or activities which tend to promote competent performance.” The Committee Report defined each one, then provided commentary and illustrative indicators. The ten criteria are as follows: information gathering, legal analysis, strategy formation, strategy execution, following through, practice management, professional responsibility, practice evaluation, training and supervising support personnel, and continuing attorney self-education.

Are the various standards discussed above helpful? For what purpose? Are

the standards for "competence" the same when dealing with malpractice liability and discipline? Should they be? In thinking about competence, should we view it from the client's perspective? What do clients think they are getting when they buy a lawyer's services? What should they have a right to expect?

The meaning of competence, and the related requirements of diligence and communication, are important in the abstract, but are even more crucial when we are attempting to define and deal with incompetence and neglect, the subject of the following section.

III. SANCTIONS FOR INCOMPETENCE AND NEGLIGENCE

Failure to act properly on behalf of a client may subject an attorney to a private civil suit for malpractice as well as to discipline for violation of the Code or Rules. The actions are different both as to matters of proof and as to the ultimate sanctions imposed. See *generally* Mallen and Smith, *Legal Malpractice* (3d edit. 1990) § 1.8, 1.9.

A. Discipline

Model Rule 1.1 requires that an attorney provide competent representation to a client, and indicates that such representation "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Rule 1.1 is stated as more of an affirmative requirement than its predecessor in the Code, D.R. 6-101 (A). Like 6-101, however, Rule 1.1 is rarely used by itself to discipline an attorney. It is more frequently used in conjunction with Rule 1.3 (diligence) and 1.4 (communication), and generally where there has been a pattern of incompetence and neglect, see, e.g., *In re Frank*, 885 S.W.2d 328 (Mo. banc 1994); or in conjunction with other violations, see, e.g., *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994); *In re Stricker*, 808 S.W.2d 356 (Mo. banc 1991); *In re Barr*, 796 S.W.2d 617 (Mo. banc 1990). For a discussion of whether one incident is enough, and of the types of cases leading to sanction, see generally *Annotated Rules*, at 19-24, 44-47.

As indicated, neglect, or lack of diligence, is the more common basis for discipline and sanctions are usually imposed for a pattern of neglect. See, e.g., *In re Crews*, 159 S.W.3d 355, 361 (Mo. banc 2005); *Oklahoma Bar Ass'n. v. Benefield*, (Ok. 10/25/2005). Despite possible indications to the contrary, there is no doubt that "neglect of duty to clients is sufficient for disciplinary action." *In re Alpers*, 574 S.W.2d 427, 428 (Mo. banc 1978). According to most courts, it is not necessary that such neglect be accompanied by moral turpitude or dishonesty. *Alpers, supra*. The concurring opinion of Judge Holman in *In re Holm*, 285 Or. 189, 590 P.2d 233 (1979) is indicative of the thinking of many courts and judges in this area:

In the past this Court has made an understandable distinction in the way offending members of the bar have been treated between those guilty of dishonesty and those guilty of procrastination and inattention to their clients' affairs. It has been reluctant to inflict severe sanctions for other than dishonesty. Because of the number of cases presently coming to this Court which concern legitimate complaints of procrastination and inattention, I have come to the conclusion that protection of the public requires that more severe sanctions

be imposed for such offenses. Unfortunately, the effect on the client may be just as disastrous as if dishonesty were involved.

Id. at 235; see also *In re O'Brien*, 29 P.3d 1044, 1049 (NM 2001).

The concern of courts regarding neglect is well stated in *Office of Disciplinary Council v. Kagawa*, 622 P.2d 115, 118 (Hawaii 1981):

Procrastination and delay in handling of legal affairs not only induces a client to lose confidence in his attorney, but reflects badly on the profession and the courts, and may foster an impression in the public mind that the highly-vaunted standards of professional ethics are no more than a sham.

Quoting from *In re Trask*, 53 Hawaii 165, 172, 488 P.2d 1167, 1171 (1971). See also *In re Hardge*, 713 S.W.2d 503,506 (Mo. 1986) where, in imposing a public reprimand for violation of DR 6-101 (A)(1)(3) and 7-101 (A), the court stated:

Having considered the entire record as presented we conclude that reprimand is adequate and proper. The failure of respondent to timely pursue her client's legal interests represents conduct that is simply unacceptable. The consequences of such conduct harms both the public and the legal community. Our action here is meant to protect the public and the profession by making it clear to both that the Court expects lawyers to be diligent and competent in all aspects of handling their clients' business.

Neither the fact that there has been no actual monetary loss to the client, nor that the attorney has been ill or is youthful or inexperienced, nor the demands of other legal work, will excuse or act as a defense to a charge under M.R. 1.1 and 1.3, although such factors may be considered in mitigation of the severity of discipline. See Annotated Rules, at 43-44, 47.

In addition to imposing discipline, several courts have required that the attorney return his or her fee where there has been a finding of neglect. In *Matter of Jaynes*, 267 N.W.2d 782 (1978), the North Dakota court issued a public reprimand to an attorney who had neglected the probate of an estate, but also required the return of the entire fee. The court in *Florida Bar v. Fuller*, 389 So.2d 998 (Fla. 1980) suspended the attorney for one month for failing to effectively communicate with his client and for not proceeding with the action as agreed, and conditioned readmission on return of the fee to the client. In addition to suspending an attorney who exhibited "inexcusable delay and procrastination in pursuing matters entrusted to his care," the Washington Supreme Court required an attorney who failed to close out an estate to hire another attorney to do so at his own expense and to pay interest charges which accrued on taxes for the estate which he had failed to pay. *In re Loomos*, 90 Wash. 2d 98, 579 P.2d 350 (en banc 1978). Thus, in addition to jeopardizing one's license to practice, neglect can be costly as well.

Discipline is also possible for failure to adequately communicate even absent incompetence or neglect. See *In re Harris*, 890 S.W.2d 299 (Mo. banc 1994). The court there recognized that "it is irritating to clients and damaging to the public

perception of the legal profession when clients are not given timely and adequate information regarding the status of their case. *In re Kopf*, 767 S.W.2d 20, 24 (Mo. banc 1989) (Blackmar, J., concurring).” 890 S.W.2d at 302.

B. Malpractice

Although there are disputes as to exactly what constitutes malpractice, there is general agreement that it includes a "broad spectrum of acts and omissions which can result in the liability of an attorney for non-fraudulent wrongs committed as a professional," including breach of standard of care, fiduciary obligation, or implied contractual commitments. Mallen and Levit, *Legal Malpractice* (1977); see generally Mallen and Smith, § 1.1.

Attorney malpractice claims have increased dramatically in the recent past. There were more reported legal malpractice decisions in the ten years ending 1977 than in the 100 preceding years. Zilly, *Recent Developments in Legal Malpractice Litigation*, 6 *Litigation* 8. In 1977, seven percent or more of all attorneys faced malpractice claims *Id.* A survey in Missouri indicated that 9.5% of attorneys responding gave an affirmative answer to the question "Has anyone in your firm ever been sued or a settlement arranged . . . because of alleged legal malpractice during the past ten years?" Rottman and Stern, *The Risk of Attorney Professional Liability*, 28 *J. Mo. Bar* 127, 133 (1972). The numbers since the 70's continue to increase. Information about reported malpractice decisions shows a dramatic increase since 1959, well beyond the increase in the number of lawyers over that time. See Smith and Mallen, *Preventing Legal Malpractice* (2d edit. 1996), at 18-25. Although the incidence of malpractice is hard to track, since there is not complete reporting by insurance carriers (and fewer than two thirds of lawyers carry malpractice insurance in any event), it is estimated that 10-20% of lawyers will have claims made against them in any given year, and that a new lawyer entering practice will have three claims filed against him or her over the course of a lifetime of practice. See Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 *Vand. L. Rev.* 1657, 1664-68 (1995). While these figures represent a less than scientific sample and for the most part reflect claims, not successful judgments, they are cause for concern.

Most malpractice actions are the result of attorney negligence, although there are other bases for such actions including conflict of interest and breach of fiduciary duty. See, e.g., *Klemme v. Best*, 941 S.W.2d 493 (Mo. banc 1997). Substantive errors account for over 40% of malpractice claims, while administrative errors and client relations account for another 40% or more of such claims. Contrary to popular belief, it is lawyers in practice over ten years, and not new admits, who account for the largest percentage of malpractice claims, and firms of two to five lawyers have the largest incidence of claims, with solo practitioners not far behind. See Mallen and Smith, § 1.7

There are four central elements to a malpractice claim. "To prevail in a legal malpractice action, these elements must be pled and proven: (1) that an attorney/client relationship existed; (2) that the attorney acted negligently or in breach of contract; (3) that such acts were the proximate cause of plaintiff's damages; and (4) but for

attorney's conduct, the plaintiff would have been successful in the prosecution of his underlying claim.” *McDowell v. Waldron*, 920 S.W.2d 555 (Mo. App. 1996); *Boatright v. Shaw*, 804 S.W.2d 795, 796 (Mo.App.1990); *Thiel v. Miller*, 164 S.W.3d 76, 82 (Mo. App. 2005).

An attorney-client relationship arises where the parties have agreed to enter into it, or where the client reasonably assumes that the attorney has agreed to the representation and the attorney fails to effectively advise the "client" otherwise. Mallen and Smith, § 8.2 (Supp 1993); see *Donohoe*, 900 S.W.2d at 626 (attorney-client relation where “clients” can prove they sought and received legal advice and assistance and the attorney intended to undertake to give such advice and assistance on their behalf). Once this relationship arises, the normal duty is to do all things reasonably necessary to fulfill the objective of the employment.

A difficult question in malpractice litigation is whether an attorney can be held liable for malpractice not by the client, but by third parties to the transaction at issue. Should such liability be permitted? Although Missouri courts had refused to recognize third party liability, they finally did so in *Donohoe*. The court concluded:

[T]he first element of a legal malpractice action may be satisfied by establishing as a matter of fact either that an attorney-client relationship exists between the plaintiff and defendant or an attorney-client relationship existed in which the attorney-defendant performed services specifically intended by the client to benefit plaintiffs. As a separate matter, the question of legal duty of attorneys to non-clients will be determined by weighing the factors in the modified balancing test. The factors are:

- 1) the existence of a specific intent by the client that the purpose of the attorney's services were to benefit the plaintiffs.
- (2) the foreseeability of the harm to the plaintiffs as a result of the attorney's negligence.
- (3) the degree of certainty that the plaintiffs will suffer injury from attorney misconduct.
- (4) the closeness of the connection between the attorney's conduct and the injury.
- (5) the policy of preventing future harm.
- (6) the burden on the profession of recognizing liability under the circumstances.

900 S.W.2d at 628-29. Thus, intended beneficiaries of a failed testamentary transfer may well have the ability to sue the attorney who drafted the will for malpractice. *Id.* at 629.

The standard of care required is generally that degree of care, skill, professional knowledge and diligence which is commonly possessed by members of the legal profession. Comment, *Attorney Liability for Unintentional Malpractice in Missouri*, 39 Mo. L. Rev. 400, 401 (1974). Mere loss of a case, and even bad judgment, are generally not held sufficient to give rise to malpractice liability. Mallen & Smith, § 14.1; Comment, *supra* at 401. There is a split of authority on whether the rules of professional responsibility establish the duty of care, or are even relevant or

admissible for this purpose. Most courts reject the view that ethics violations establish malpractice, *see, e.g.*, Annotated Rules, at 5-7. More courts permit the rules to be used as evidence or to be part of an expert witness's conclusions, *see id.* at 7-8. In Missouri, an attorney cannot be held liable for a breach of an ethical rule, *Williams v. Preman*, 911 S.W.2d 288, 300 (Mo. App. 1995); *Greening v. Klamen*, 652 S.W.2d 730, 734 (Mo. App. 1984). Moreover, it is potentially reversible error to either admit the content of such rules into evidence or to allow an expert to refer to them. *Bross v. Denney*, 791 S.W.2d 416, 420 (Mo. App. 1990).

Generally, the most difficult hurdles for a malpractice plaintiff are causation and damages. In order to recover, a client must demonstrate that the wrongful conduct of the attorney was the proximate cause of the plaintiff's injury. In litigation situations, this often means the client must show that, but for the attorney's breach of duty, the client would have been entitled to money or property which he or she did not receive. In such cases, the client-plaintiff must show that the underlying claim was valid and would have produced recovery. This leads to the trial of the underlying case in the malpractice action. Comment, *supra* at 403-404; *see also Williams v. Preman, supra*. Complicated issues can arise where the underlying case has been settled. *See, e.g., Williams v. Preman, supra.; Bross*, 791 S.W.2d at 421.

While the hurdles to be faced by malpractice plaintiffs are not insignificant, as stated, the incidence of claims and recoveries has risen substantially in recent years. While malpractice insurance is available and desirable, there is no substitute for conducting one's practice so as to avoid legal malpractice claims. *See Stern, Avoiding Legal Malpractice Claims* (5th edit. 1987); *Smith and Mallen, Preventing Legal Malpractice* (2d edit. 1996).

IV. AVOIDING MALPRACTICE AND DISCIPLINE

The largest causes of difficulty with malpractice claims and Code and Rule violations are failure to conduct one's office practice properly and failure to communicate with clients. It is imperative that good office procedures be established, including effective filing, calendaring and telephone message systems which these days are largely computer-based. There are many sources of information regarding such systems, and these should be consulted by any inexperienced attorney going into practice alone or with inexperienced partners. Some excellent resource books are available, including Foonberg, *How to Start and Build a Law Practice* (ABA 4th edit. 1999) and Bennett, *Flying Solo: A Survival Guide for the Solo Lawyer* (ABA 3rd edit. 2001).

V. LIMITING LIABILITY

MR 1.8(h) prohibits an attorney from attempting to prospectively limit his or her liability for malpractice unless permitted by law and the client is independently represented in the agreement. It also prohibits an attorney from settling a claim for malpractice liability with a client unless the lawyer first advises the client in writing to seek independent representation. Violations of DR 6-102, the predecessor section to 1.8(h), have been found where an attorney attempted to secure a release as a condition of returning a client's papers (*In re Preston*, 111 Ariz. 102, 523 P.2d 1303

[1974]) and where an attorney placed a release as part of a client's endorsement of a check which was the return of the retainer in a case the lawyer had failed to pursue (*People v. Good*, 576 P.2d 1020 [Colo. 1978]). These rules apply even if there is no actual malpractice liability. *People v. Good, supra*. They do not apply to limitations on liability for actions by other lawyers within a professional corporation. See generally Annotated Rules, at 161-162.

VI. HANDLING CLIENTS' PROPERTY AND FUNDS

One of the areas of office practice that causes most problems for attorneys, and particularly for inexperienced attorneys, is the handling of clients' funds. Read MR 1.15 and Comments.

The requirements of Rule 1.15 are fairly clear. Pursuant to subsections (a) and (d), an attorney must promptly notify his or her client or a third party when property or funds belonging to the client or third party are received, must identify and label such property and place it for safe-keeping as soon as possible, must maintain complete records of the clients' properties and funds and provide an accounting where requested, and must promptly pay or deliver such funds or property to the client or third party. In addition, the Rule requires that the attorney maintain a *separate* account for clients' funds. This account is not to be used by the attorney for office or other expenses. The account, termed a "client escrow account" or "client trust fund," should not contain any funds belonging solely to the lawyer, except those necessary to pay bank charges. M.R. 1.15(b). Failure to properly maintain a trust account and to keep client and lawyer funds separate is termed "commingling."

While these rules appear fairly simple, they have increasingly become a source of discipline for attorneys, and serious discipline at that. This has been true both under the Code and the Model Rules.

Consider the following:

In re WILLIAMS
711 S.W.2d 518 (Mo. banc 1986)

RENDLEN, Judge.

. . . An Information was filed in this Court charging violation of Rule 4 DR 9-102(A) and (B) in that respondent failed to make timely, accurate and adequate accounting of funds to a client. Respondent answered admitting the violation but seeking dismissal of the Information because his conduct did not constitute a knowing and intentional violation. The Honorable L. Thomas Elliston . . . was appointed Master, and after plenary hearing the Master in his findings of fact and conclusions of law determined that respondent had violated Rule 4 DR 9-102(B) and (C), and the violation was willful, deliberate, and inexcusable. He recommended that respondent be disbarred. . . .

[T]he fact of violation of the Disciplinary Rules is not in dispute. Respondent undertook to represent a client, Marvin E. Miller, in a Workmen's Compensation claim. A settlement was reached in the amount of \$6,000 and on July 16, 1984, Maryland Casualty Company issued its \$6,000 draft payable

to respondent and Miller. On or about July 17, 1984, respondent and Miller agreed that respondent would receive \$1,486.64 for his fee and expenses incurred and Miller would receive \$4,513.36, the balance of the \$6,000. Miller endorsed the check, leaving it in respondent's custody and was informed that "within a few days" respondent would deliver a check to Miller in the amount of \$4,513.36.

On July 18, 1984, respondent deposited the \$6,000 draft into an account titled "Law Clinic of David F. Williams Client Funds Account," an account which was overdrawn at that time. On July 20, 1984, a check in the amount of \$4,513.36 was drawn on that account and forwarded to Miller. However, that check was returned for insufficient funds on August 3, 1984, and again on August 14, 1984. Subsequently respondent's law office wire-transferred funds to Miller in the amounts of \$500 on August 17, 1984, and \$1,000 on August 21, 1984, leaving a balance due the client of \$3,013.36. On August 31, 1984, another check in the amount of \$3,013.36, drawn on the account of "Law Clinic of David F. Williams Client Funds Account," was forwarded to Miller, but on September 5, 1984 it too returned for insufficient funds. Throughout this period, Miller made numerous requests to respondent's office for his money, but did not receive his funds from respondent or respondent's law office until September 10, 1984, five days after he filed a complaint with the Thirty-first Judicial Circuit Bar Committee.

Although as discussed below respondent offers the circumstances surrounding the above events, including his wife's role in the events and his ignorance of the problems encountered in paying Miller, in mitigation to harsh punishment, he does not offer such circumstances to deny his guilt. It is admitted and this Court finds that respondent failed to make timely, accurate and adequate accounting to a client in violation of DR 9-102

The sole issue remaining is to determine appropriate punishment. In requesting sanctions less than disbarment, respondent submits his was not an intentional violation. Such claim is based upon the following circumstances surrounding the facts constituting the violation. Respondent and his wife each held signature authorization for the trust account and he had delegated to his wife (as secretary and bookkeeper) the tasks of making the daily bank deposits, writing checks and balancing the checking accounts. Respondent testified that he did not know at the time of the deposit of the \$6,000 check that the trust account was overdrawn, nor did he know of certain transactions which produced the insufficiency. Rather such problems were caused by his wife who did not inform him of the problems. Similarly, respondent and his wife testified that he was not made aware of the delays in paying Miller or the return of the checks for insufficient funds nor was he aware of Miller's attempts to contact him and thought Miller had been paid promptly.

Although respondent recognizes his ultimate responsibility for the acts of his employee-wife regarding the trust account and therefore does not offer them in defense to the charges, he does offer his ignorance in mitigation. We cannot rule out the possibility that such circumstances might work in mitigation in a different case, but in view of all the evidence here, respondent's assertion must fail. The record discloses that with respondent's knowledge the trust account long had been in serious disarray and he had taken little if any corrective action. Yet despite his knowledge of this disarray respondent knowingly exposed Miller's funds to the risks of this unstable account and must

be held accountable to the same degree as if he had known of the specific problems encountered with the Miller payment. Having been aware of ongoing problems with the trust account, including return of checks for insufficient funds, credence cannot be afforded his plea of ignorance.

Respondent knew in December 1983 that problems were developing in the trust account. Checks drawn on the account and made payable to various courts were returned for insufficient funds. Respondent testified that he was not sure whether the account was ever "straight" after that time. Although he talked to his wife about these problems, respondent never attempted to review the account or obtain a proper accounting. Not once from January 1984 to July 1984 did respondent review the check stubs or the bank statements in an attempt to establish an understanding of the account. He testified that his only contact with the account "would be to see the envelopes unopened two and three months after they'd been received, the bank statements, and to holler about that. " When he saw such unopened envelopes, which he recognized as containing bank statements, he would merely talk to his wife about the fact that the account needed balancing and that they needed to know what was "going on" with the account. Although he threatened to take over supervision of the account from his wife, he failed so to do. Yet respondent testified he was so concerned that checks drawn on the account might be returned for insufficient funds he began making payments, including court filing fees, by cash or money order rather than by check. Respondent testified that although he thought about straightening out the account, or that he should have opened a new trust account, he did neither. He also testified that after May 1983 he did not maintain a law office general checking account and if it became necessary to write a check for his firm he drew it on the trust account.

Additionally it is demonstrated by the evidence that subsequent to deposit of the \$6,000 draft but prior to return of the \$4,513.36 check for insufficient funds, a \$3,100 check was drawn on respondent's trust account by his wife, for payment on an amount due by respondent to the Internal Revenue Service. Respondent testified that check was written and cashed without his knowledge, and upon that check respondent places principal blame for his trust account's deficiencies regarding Miller's funds. However, the evidence also shows that before the check to Miller could clear the bank, \$1,400 was transferred from respondent's trust account to his landlord's bank account for payment of office rent, and respondent was paid his \$1,200 fee on Miller's case from the account. Respondent also on August 13, 1984, cashed a \$1,000 check from his trust account made payable to cash. This check had been signed by his wife in blank, and carried a brief time by respondent before cashing. Despite the fact that his \$1,200 fee already had been taken from the account, respondent testified that he thought this \$1,000 was fee from the Miller settlement though he made no attempt to verify that any funds in his trust account belonged to him.

Though, as noted above, respondent attempts to avoid the harsh result of disbarment by characterizing his violation as unintentional, it is clear from the evidence that while he may not have known of the specific problems with the Miller payment, he was well aware of prior problems with the account, including return of checks for insufficient funds, and that he knowingly and intentionally failed to correct the ongoing problems or supervise the account. The evidence establishes that he should have known a problem such as Miller's would soon

occur, and that he should have reviewed the account and taken corrective action to ensure that Miller would receive the funds belonging to him.

In deciding the appropriate sanction, we recognize that the primary purpose of this proceeding is not to punish respondent, but to inquire into his fitness to continue as an attorney. "Any discipline imposed has as its objective the protection of the courts and the public and maintenance of the integrity of the profession and the courts."

We further recognize that, as we held in *In re Mentrup*, 665 S.W.2d 324, 325 (Mo. banc 1984):

The misappropriation of a client's funds is a serious matter. It is always a ground for the disbarment of an attorney that he has misappropriated the funds of his client, either by failing to pay over money collected by him for his client or by appropriating to his own use funds entrusted to his care. That respondent has made restitution of the converted funds is no defense to these charges. Neglect of duty to one's client also justifies disciplinary action.

From our review of the entire record we are unimpressed with respondent's attempt to avoid disbarment by characterizing his misconduct as unintentional. While it is true that we recently stated "an appropriate remedy for willful conversion or misappropriation of client's funds is disbarment," disbarment is no less appropriate here. Respondent's offer of his ignorance as mitigation to harsh punishment must fail where he had knowingly and intentionally failed to correct the ongoing problems with the trust account, given that he knew of the account problems. It is readily apparent from the evidence that respondent is not the innocent victim of an errant employee-spouse. We cannot allow an attorney to escape ultimate responsibility for mishandling of a client's funds where he knowingly and intentionally ignores trust account problems and demonstrates an almost total disregard for the protection of those funds. Certainly where an attorney misappropriates a client's funds, protection of the public is uppermost in our minds and disbarment is generally appropriate in such cases. Given the nature of the violation, and respondent's long disregard for the protection of his clients' funds, respondent's testimony regarding recent improvements upon his accounting system does not offer sufficient safeguard to the public interest and therefore cannot alter the result here.

Respondent is ordered disbarred.

The Missouri Supreme Court continues to consider disbarment the appropriate sanction for trust fund violations, although the Court has, on occasion, found extenuating circumstances that make suspension, rather than disbarment, the proper sanction in particular cases. *Compare In re Griffin*, 873 S.W.2d 600 (Mo. banc 1994) (disbarment for failure to properly handle estate funds and forging name on check); *In re Schaeffer*, 824 S.W.2d 1 (Mo. banc 1992)(disbarment for depositing settlement check in business account); *In re Staab*, 785 S.W.2d 551 (Mo. banc 1990) (disbarment appropriate where lawyer failed to pay over funds received in settlement to reimburse Union that had paid medical costs for client); *In re Fenlon*, 775 S.W.2d 134 (Mo. banc 1989) (disbarment appropriate for failing to notify client of receipt of funds and delay in

payment of bills from settlement despite restitution) *with In re Barr*, 796 S.W.2d 617 (Mo. banc 1990) (suspension for at least six months proper where lawyer deposited settlement check in non-trust account); *In re Charron*, 918 S.W.2d 257 (Mo. banc 1996) (minimum one year suspension proper where lawyer failed to turn over property and files to client and took unauthorized payment from estate [of funds the lawyer actually was owed]). The Missouri Supreme Court obviously takes commingling seriously, and so should all lawyers.

For further help in understanding your obligations with regard to trust funds, including the duty to use interest-bearing accounts pursuant to IOLTA, see Devine, *Trust Accounting, IOLTA and the New Missouri Ethics Rules*, 44 J. Mo. Bar 169 (1988). More specific information on handling trust funds can be found in *The Lawyer Trust Funds Handbook* (available from the Missouri Bar), *Money of Others: Accounting for Lawyer Trust Accounts* (available from the Kansas Bar Foundation IOLTA Program), as well as Foonberg, *The ABA Guide to Lawyer Trust Accounts* (1996).

CHAPTER VIII ADVERTISING AND SOLICITATION

I. ADVERTISING

Read M.R. 7.1 - 7.5 and Comments.

A. Background

Revised Report of the Supreme Court Committee on Lawyer Advertising, 39 J.MO. BAR 34 (1983). [This Committee was constituted to recommend revised advertising rules to the Court in light of changes in the law regarding commercial speech.]

To properly research lawyer advertising, and to recommend new rules on the subject, an historical perspective may be helpful. Abraham Lincoln advertised his law practice in the newspapers around Springfield, Illinois as early as 1838. See L. Andrews, *Birth of a Salesman: Lawyer Advertising and Solicitation 1* (A.B.A. 1980). In 1910, shortly after the adoption of the ABA Canons of Ethics, George Archer, Dean of the Suffolk School of Law, wrote: "On the question of advertising there is probably more difference of opinion than upon any other that confronts the lawyer." . . . When the ABA first adopted its Canons on lawyer advertising, House of Delegates member A.A. Freeman of New Mexico told the other delegates: "I do not believe that it is any part of our duty to adopt a code of ethics, the effect of which is to deter the young and aspiring members of the Bar from bringing themselves before the public in a perfectly legitimate way." See 33 A.B.A. Rep. 85 (1908).

Issues relating to the scope of lawyer advertising are likewise not new to the State of Missouri. The first rules relating to the subject were adopted with this state's first ethics code, in 1906. . . . Substantially identical to the only then existing ethics code for lawyers in the United States, the 1887 Alabama Code, the 1906 Missouri Code provided:

Newspaper advertisements, circulars, and business cards, tendering professional services to the general public, are proper; but special solicitation of particular individuals to become clients ought to be avoided. Indirect advertisements for business, by furnishing or inspiring editorials or press notices, regarding cases in which the attorney takes part, the manner in which they are conducted, the importance of his positions, the magnitude of the interests involved, and all other self-laudation, is of evil tendency, and wholly unprofessional.

This provision continued in Missouri until 1914, when the Missouri Bar adopted the 1908 ABA Canons. . . . ABA Canon 27, as adopted in 1914 in Missouri provided:

the most worthy and effective advertisement possible, even for a young

lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not per se improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisements for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's position, defy the traditions and lower the tone of our high calling, and are intolerable.

The provisions of this Canon remained as a guide for the Missouri lawyer from 1913 until 1934. Following [a landmark decision] declaring the court's plenary power over the practice of law, the court codified the ethics process into Court Rules. . . . Adopting the ABA Canons of Ethics as "the measure of the conduct and responsibility of the members of the bar of this Court and of all lawyers who practice in the State of Missouri," Canon 27 thus became the mandatory advertising standard for all Missouri lawyers.

Canon 27, permitting the publication or circulation of ordinary business cards remained as the rule of Missouri, from the adoption of the Court Rules in 1934 until the adoption of the Code of Professional Responsibility in 1971. . . . [I]t appears that between 1934 and 1971, the publication of the simple business card was permitted in this State/ As would later be observed by Henry Drinker, such advertising rules were [r]eally rules of professional etiquette rather than of ethics.

On January 1, 1971, the Code of Professional Responsibility became obligatory for all Missouri lawyers. Contained within that Code was Ethical Consideration 2-9, which spoke of "a traditional ban against advertising by lawyers." While the provisions of that ethical consideration thus overstate the history of lawyer advertising in Missouri, it is unquestioned that the provisions of the new D.R. 2-101 did ban virtually all forms of advertising and solicitation by lawyers.

The first challenge to the advertising ban of D.R. 2-101 came in *Bates v. State Bar of Arizona*. Today, while it is unquestioned that the decision in *Bates* extended some First Amendment protection to lawyer advertising, the decision can also be viewed as the result of a number of competing factors existing immediately prior to the decision. First, the total ban on lawyer advertising, a ban which had prompted one suit by Consumer's Union, and another challenge against the ABA, on antitrust grounds, by the Department of Justice . . . ; Second, the belief by the Bar that the consumer of legal services was generally uneducated about the role of lawyers, a result supported by the Missouri Bar/Prentice Hall Survey; Third, a belief that the rising cost of legal services was causing many Americans to be unable to use any legal services

that were available; and Fourth, a belief that all legal services were unavailable to persons with incomes above the poverty line, but below wealth, a perception that the ABA survey on legal needs was unable to document but which nonetheless existed. . . .In *Bates* all of these factors coalesced. Bates and O'Steen were former legal services attorneys who perceived that people above the poverty line had unmet legal needs. Their purpose was to perform routine legal services for which persons might not otherwise be able to seek legal counsel. They purposefully charged low fees. Finally, they believed the public would be uneducated about the services offered, and the cost thereof, unless they used the medium of advertising.

In *Bates*:

1. The Court did not consider advertising relating to the quality of legal services --- although it was recognized that claims of quality are probably not susceptible to verification by the public and could thus be deceiving.

2. The Court did not consider solicitation --- particularly in-person solicitation --- although it recognized that such actions could pose significant problems of overreaching.

3. The Court did not consider advertising of the name and address of the lawyer, the telephone number and related factors already approved as a result of amendments to the existing rule.

4. The Court did consider the advertising of prices at which certain routine services would be performed.

5. The Court held that attorney advertising could not be blanketly suppressed.

6. The Court held that the Bates and O'Steen advertisement was protected commercial speech within the meaning of the First Amendment.

7. The Court indicated that the states could regulate lawyer advertising and mentioned several permissible areas of regulation:

a) False, misleading or deceptive advertising could be banned

b) Reasonable restrictions could be placed on the time, place and manner of advertising;

Finally, although recognizing that advertising should not form the entire basis of a consumer's decision on the choice of a lawyer, the Court chose not to restrict the flow of information to the consumer, indicating instead that any absence of sophistication by the consumer should be resolved in favor of more disclosure, rather than less. The Court placed great faith in the consumer's ability to discern the nature of advertising:

But advertising by attorneys is not an unmitigated source of harm to the administration of justice. It may offer great benefits. Although the advertising might increase the use of the judicial machinery, we cannot

accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action. As the bar acknowledges, the middle 70% of our population is not being reached or served adequately by the legal profession. . . . Among the reasons for this underutilization is fear of the cost, and an inability to locate a suitable lawyer. . . . Advertising can help to solve this acknowledged problem: Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of an exchange. The disciplinary rule at issue has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgeable. A rule allowing restrained advertising would be in accord with the bar's obligation to "facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available."

In response to the decision in *Bates*, the ABA advanced two possible new rules: Proposal A, a regulatory proposal; and Proposal B, a prohibitory one. Proposal A provided a list of types of advertising that could be used by a lawyer-advertiser, while Proposal B prohibited advertising that was false, fraudulent or deceptive and gave some examples of advertising falling within that classification.

In Missouri, the Supreme Court appointed the Hawkins Committee, which made an extensive study of the Constitutional issues involved in *Bates*. The Hawkins Committee also studied Proposals A and B of the ABA and elected to propose a rule utilizing the regulatory approach of Proposal A, with substantial modifications. Following the adoption of this new rule, the Court sought the aid of the Advisory Committee, which provided a list of those areas of practice which could be used in advertising.

Missouri was not alone in adopting the regulatory approach to lawyer advertising. The ABA also adopted the provisions of Proposal A, and, in her 1980 survey of advertising changes among the states following *Bates*, Lori Andrews, a research attorney for the American Bar Foundation, found that some 29 states had followed that model. Of those 29 states, however, Andrews also concluded that 26 of them, including Missouri, would still not permit the very advertising that was approved by the court in *Bates*.

In June, 1980, the Supreme Court decided *Central Hudson Gas & Electric Corp. v. Public Service Comm.*, 447 U.S. 557 (1980). In its opinion, the Court announced a four-prong test for commercial speech regulation:

At the outset, we must determine (1) whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. (2) Next, we must ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine (3) whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than is necessary to serve that interest.

Because *Central Hudson* did not involve advertising by lawyers, there was a substantial question as to its applicability to such advertising. The opinion itself did not indicate that it was expanding the rules announced in

Bates. Thus, when the Missouri Supreme Court decided *R.M.J.*, it was unclear that *Central Hudson* was applicable to issues of lawyer advertising, and, consequently, the Missouri Supreme Court elected not to overrule the advertising rule previously adopted by it as a result of the Hawkins Committee report.

As this Committee reads the United States Supreme Court's decision in *R.M.J.*, it concludes that the *Central Hudson* test is applicable to lawyer advertising, and reaches the following conclusions:

1. Truthful advertising relating to lawful activities is generally entitled to protection under the First Amendment as commercial speech;
2. If the method or content of the advertising makes it inherently misleading, such advertising may be restricted;
3. If otherwise truthful advertising proves itself misleading in fact, it too can be restricted;
4. Misleading advertising can generally be prohibited;
5. Any restrictions on advertising can be no broader than reasonably necessary to prevent the deception claimed by the restriction;
6. Thus, absolute prohibitions may not be made on material which can be presented in a truthful way, such as field of practice advertising;
7. Truthful advertising may only be regulated if the state demonstrates a substantial state interest in the regulation, and if the regulation furthers that interest, and is no more restrictive than is necessary to further that interest;
8. The states are freely able to control the practice of lawyer-advertisers, so long as they do so consistently with the forgoing Constitutional guidelines.

Based on all of the foregoing, the Committee has developed a draft of the permissible purposes of lawyer-advertising:

1. To provide a method for members of the public who need a lawyer to obtain information about lawyers;
 - a. By public, the Committee refers to all members of the public, together with corporations and other groups of persons;
 - b. Such methodology will necessarily create competition among members of the profession;
 - c. Such information would probably include personal information about the lawyer, but is not thereby limited;
2. To provide information to the public about their rights so the public can make informed decisions about the need to employ a lawyer;
3. To provide information about special competencies of

particular lawyers in special areas (e.g., field of practice advertising);

4. To protect the First Amendment commercial speech rights of lawyer-advertisers;

5. To assist the public in a general understanding of the role of a lawyer as a professional.

Recognizing, then, that advertising by lawyers should generally be permitted, the Committee finds that the following regulatory measures would aid those purposes:

1. Regulation to prevent the dissemination of misleading information as to any of the purposes of advertising;

2. Regulation to prevent abuse and/or harassment of the public even from truthful advertising;

3. Regulation of the inherently misleading nature of qualitative advertising;

4. Regulation recognizing that the profession of law is different from that of a trade in that the attorney-client relationship is a uniquely personal one based on emotion and confidence and that the lawyer advertiser may have a higher duty to prevent deception.

B. Permissible Advertising Expands

Following *Bates* and *RMJ*, the Supreme Court once again addressed attorney advertising in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (a portion of which is reproduced *infra* at 145). Among the issues in *Zauderer* were whether a total ban on the use of illustrations or pictures in lawyer advertising violated the first amendment and whether the state could require an attorney to include in his ad a disclaimer advising potential clients that they might be liable for significant litigation costs if they were unsuccessful in their lawsuit.

With regard to the first issue, the Court struck down the blanket ban on use of pictures or illustrations.

. . . The use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly. Accordingly, commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech: restrictions on the use of visual media of expression in advertising must survive scrutiny under the *Central Hudson* test. . . .

The text of DR 2-101(B) strongly suggests that the purpose of the restriction on the use of illustrations is to ensure that attorneys advertise "in a dignified manner." There is, of course, no suggestion that the illustration actually used by appellant was undignified; thus, it is difficult to see how the application of the rule to appellant in this case directly advances the State's

interest in preserving the dignity of attorneys. More fundamentally, although the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights. Even if that were the case, we are unpersuaded that undignified behavior would tend to recur so often as to warrant a prophylactic rule. As we held in *Carey v. Population Services International*, the mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.

In its arguments before this Court, the State has asserted that the restriction on illustrations serves a somewhat different purpose

The use of illustrations in advertising by attorneys, the State suggests, creates unacceptable risks that the public will be misled, manipulated, or confused. Abuses associated with the visual content of advertising are particularly difficult to police, because the advertiser is skilled in subtle uses of illustrations to play on the emotions of his audience and convey false impressions. Because illustrations may produce their effects by operating on a subconscious level, the State argues, it will be difficult for the State to point to any particular illustration and prove that it is misleading or manipulative. Thus, once again, the State's argument is that its purposes can only be served through a prophylactic rule.

We are not convinced. The State's arguments amount to little more than unsupported assertions: nowhere does the State cite any evidence or authority of any kind for its contention that the potential abuses associated with the use of illustrations in attorneys' advertising cannot be combated by any means short of a blanket ban. Moreover, none of the State's arguments establish that there are particular evils associated with the use of illustrations in attorneys' advertisements. Indeed, because it is probably rare that decisions regarding consumption of legal services are based on a consumer's assumptions about qualities of the product that can be represented visually, illustrations in lawyer's advertisements will probably be less likely to lend themselves to material misrepresentations than illustrations in other forms of advertising.

Thus, acceptance of the State's argument would be tantamount to adoption of the principle that a State may prohibit the use of pictures or illustrations in connection with advertising of any product or service simply on the strength of the general argument that the visual content of advertisements may, under some circumstances, be deceptive or manipulative. But as we stated above, broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force. We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burdensome that the State is entitled to forgo that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations. The experience of the FTC is, again, instructive. Although that agency has not found the elimination of deceptive uses of visual media in advertising to be a simple task, neither has it found the

task an impossible one: in many instances, the agency has succeeded in identifying and suppressing visually deceptive advertising. . . . Given the possibility of policing the use of illustrations in advertisements on a case-by-case basis, the prophylactic approach taken by Ohio cannot stand; hence, appellant may not be disciplined for his use of an accurate and nondeceptive illustration.

The Court was more receptive to the state's argument that requiring a disclaimer did not violate the first amendment. In rejecting Zauderer's argument that this issue was essentially the same as that involving the use of illustrations, the Court stated:

Appellant, however, overlooks material differences between disclosure requirements and outright prohibitions on speech. In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present. We have, to be sure, held that in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech. Indeed, . . . the Court went so far as to state that "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."

But the interests at stake in this case are not of the same order as those discussed Ohio has not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required ... in order to dissipate the possibility of consumer confusion or deception."

We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.

The State's application to appellant of the requirement that an attorney advertising his availability on a contingent-fee basis disclose that clients will have to pay costs even if their lawsuits are unsuccessful (assuming that to be

the case) easily passes muster under this standard. Appellant's advertisement informed the public that "if there is no recovery, no legal fees are owed by our clients." The advertisement makes no mention of the distinction between "legal fees" and "costs," and to a layman not aware of the meaning of these terms of art, the advertisement would suggest that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge. The assumption that substantial numbers of potential clients would be so misled is hardly a speculative one: it is a commonplace that members of the public are often unaware of the technical meanings of such terms as "fees" and "costs"--terms that, in ordinary usage, might well be virtually interchangeable. When the possibility of deception is as self-evident as it is in this case, we need not require the State to "conduct a survey of the ... public before it [may] determine that the [advertisement] had a tendency to mislead." The State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed.

In dissent, Justices Brennan and Marshall questioned whether discipline of Zauderer based on his omission of the disclaimer was consistent with the first amendment and due process.

C. Future Directions

The Court has not decided a "pure advertising" case in recent years. It noted probable jurisdiction in a case involving testimonials in 1988, but, due to a procedural quirk in the case, it dismissed it after oral argument for want of a properly presented federal question. See *Oring v. State Bar of California*, 489 U.S. 1092 (1989). Until the Court speaks definitively, jurisdictions are taking various approaches to try to get some control over lawyer advertising. Many jurisdictions require disclaimers of all types. Several jurisdictions have limited radio and TV ads, and some require that advertisements be predominantly informative. In addition, interesting and difficult questions are now facing attorneys regarding the use of the Internet, and in particular whether home pages and other presence on the Internet constitute advertisement (and are therefore subject to restrictions and disclaimer requirements). These issues are likely to be even more difficult as the technology becomes more advanced and the economics of presence on the Internet changes much of our thinking about advertising by lawyers.

What should the scope of permissible regulation be? Should some advertising be prohibited because it is in bad taste and demeaning to the profession? If so, what will it take for a state to be able to enforce such prohibitions?

II. SOLICITATION

OHRALIK V. OHIO STATE BAR ASS'N. 436 U.S. 447 (1978)

In *Bates v. State Bar of Arizona*, this Court held that truthful advertising of "routine" legal services is protected by the First and Fourteenth Amendments

against blanket prohibition by a State. The Court expressly reserved the question of the permissible scope of regulation of "in-person solicitation of clients--at the hospital room or the accident site, or in any other situation that breeds undue influence--by attorneys or their agents or 'runners.'" Today we answer part of the question so reserved, and hold that the State--or the Bar acting with state authorization-- constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent.

I.

Appellant, a member of the Ohio Bar, lives in Montville, Ohio. Until recently he practiced law in Montville and Cleveland. On February 13, 1974, while picking up his mail at the Montville Post Office, appellant learned from the postmaster's brother about an automobile accident that had taken place on February 2 in which Carol McClintock, a young woman with whom appellant was casually acquainted, had been injured. Appellant made a telephone call to Ms. McClintock's parents, who informed him that their daughter was in the hospital. Appellant suggested that he might visit Carol in the hospital. Mrs. McClintock assented to the idea, but requested that appellant first stop by at her home.

During appellant's visit with the McClintocks, they explained that their daughter had been driving the family automobile on a local road when she was hit by an uninsured motorist. Both Carol and her passenger, Wanda Lou Holbert, were injured and hospitalized. In response to the McClintocks' expression of apprehension that they might be sued by Holbert, appellant explained that Ohio's guest statute would preclude such a suit. When appellant suggested to the McClintocks that they hire a lawyer, Mrs. McClintock retorted that such a decision would be up to Carol, who was 18 years old and would be the beneficiary of a successful claim.

Appellant proceeded to the hospital, where he found Carol lying in traction in her room. After a brief conversation about her condition,⁹ appellant told Carol he would represent her and asked her to sign an agreement. Carol said she would have to discuss the matter with her parents. She did not sign the agreement, but asked appellant to have her parents come to see her.¹⁰ Appellant also attempted to see Wanda Lou Holbert, but learned that she had just been released from the hospital. He then departed for another visit with the McClintocks.

On his way appellant detoured to the scene of the accident, where he took a set of photographs. He also picked up a tape recorder, which he concealed under his raincoat before arriving at the McClintocks' residence. Once there, he re-examined their automobile insurance policy, discussed with them the law applicable to passengers, and explained the consequences of the

⁹Carol also mentioned that one of the hospital administrators was urging a lawyer upon her. According to his own testimony, appellant replied: "Yes, this certainly is a case that would entice a lawyer. That would interest him a great deal."

¹⁰Despite the fact that appellant maintains that he did not secure an agreement to represent Carol while he was at the hospital, he waited for an opportunity when no visitors were present and then took photographs of Carol in traction.

fact that the driver who struck Carol's car was an uninsured motorist. Appellant discovered that the McClintocks' insurance policy would provide benefits of up to \$12,500 each for Carol and Wanda Lou under an uninsured-motorist clause. Mrs. McClintock acknowledged that both Carol and Wanda Lou could sue for their injuries, but recounted to appellant that "Wanda swore up and down she would not do it." The McClintocks also told appellant that Carol had phoned to say that appellant could "go ahead" with her representation. Two days later appellant returned to Carol's hospital room to have her sign a contract, which provided that he would receive one-third of her recovery.

In the meantime, appellant obtained Wanda Lou's name and address from the McClintocks after telling them he wanted to ask her some questions about the accident. He then visited Wanda Lou at her home, without having been invited. He again concealed his tape recorder and recorded most of the conversation with Wanda Lou. After a brief, unproductive inquiry about the facts of the accident, appellant told Wanda Lou that he was representing Carol and that he had a "little tip" for Wanda Lou: the McClintocks' insurance policy contained an uninsured-motorist clause which might provide her with a recovery of up to \$12,500. The young woman, who was 18 years of age and not a high school graduate at the time, replied to appellant's query about whether she was going to file a claim by stating that she really did not understand what was going on. Appellant offered to represent her, also, for a contingent fee of one-third of any recovery, and Wanda Lou stated "O. K."

Wanda's mother attempted to repudiate her daughter's oral assent the following day, when appellant called on the telephone to speak to Wanda. Mrs. Holbert informed appellant that she and her daughter did not want to sue anyone or to have appellant represent them, and that if they decided to sue they would consult their own lawyer. Appellant insisted that Wanda had entered into a binding agreement. A month later Wanda confirmed in writing that she wanted neither to sue nor to be represented by appellant. She requested that appellant notify the insurance company that he was not her lawyer, as the company would not release a check to her until he did so. Carol also eventually discharged appellant. Although another lawyer represented her in concluding a settlement with the insurance company, she paid appellant one-third of her recovery in settlement of his lawsuit against her for breach of contract.

Both Carol McClintock and Wanda Lou Holbert filed complaints against appellant with the Grievance Committee of the Geauga County Bar Association. The County Bar Association referred the grievance to appellee, which filed a formal complaint with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. After a hearing, the Board found that appellant had violated Disciplinary Rules (DR) 2-103(A) and 2-104(A) of the Ohio Code of Professional Responsibility. The Board rejected appellant's defense that his conduct was protected under the First and Fourteenth Amendments. The Supreme Court of Ohio adopted the findings of the Board, reiterated that appellant's conduct was not constitutionally protected, and increased the sanction of a public reprimand recommended by the Board to indefinite suspension. . . .

II

The solicitation of business by a lawyer through direct, in-person communication with the prospective client has long been viewed as inconsistent with the profession's ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client. It has been proscribed by the organized Bar for many years. Last Term the Court ruled that the justifications for prohibiting truthful, restrained" advertising concerning "the availability and terms of routine legal services" are insufficient to override society's interest, safeguarded by the First and Fourteenth Amendments, in assuring the free flow of commercial information. The balance struck in *Bates* does not predetermine the outcome in this case. The entitlement of in-person solicitation of clients to the protection of the First Amendment differs from that of the kind of advertising approved in *Bates*, as does the strength of the State's countervailing interest in prohibition.

A

Appellant contends that his solicitation of the two young women as clients is indistinguishable, for purposes of constitutional analysis, from the advertisement in *Bates*. Like that advertisement, his meetings with the prospective clients apprised them of their legal rights and of the availability of a lawyer to pursue their claims. According to appellant, such conduct is "presumptively an exercise of his free speech rights" which cannot be curtailed in the absence of proof that it actually caused a specific harm that the State has a compelling interest in preventing. But in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services, let alone with forms of speech more traditionally within the concern of the First Amendment.

Expression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently. In rejecting the notion that such speech "is wholly outside the protection of the First Amendment," we were careful not to hold "that it is wholly undifferentiable from other forms" of speech. We have not discarded the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

Moreover, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." . . . [T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. Neither *Virginia Pharmacy* nor *Bates* purported to cast doubt on the permissibility of these kinds of commercial regulation.

In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment, as was held in *Bates* and *Virginia Pharmacy*, it lowers the level of appropriate judicial scrutiny.

As applied in this case, the Disciplinary Rules are said to have limited the communication of two kinds of information. First, appellant's solicitation imparted to Carol McClintock and Wanda Lou Holbert certain information about his availability and the terms of his proposed legal services. In this respect, in-person solicitation serves much the same function as the advertisement at issue in *Bates*. But there are significant differences as well. Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decision making; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual. The admonition that "the fitting remedy for evil counsels is good ones" is of little value when the circumstances provide no opportunity for any remedy at all. In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the "availability, nature, and prices" of legal services, it actually may disserve the individual and societal interest, identified in *Bates*, in facilitating "informed and reliable decision making."

It also is argued that in-person solicitation may provide the solicited individual with information about his or her legal rights and remedies. In this case, appellant gave Wanda Lou a "tip" about the prospect of recovery based on the uninsured-motorist clause in the McClintocks' insurance policy, and he explained that clause and Ohio's guest statute to Carol McClintock's parents. But neither of the Disciplinary Rules here at issue prohibited appellant from communicating information to these young women about their legal rights and the prospects of obtaining a monetary recovery, or from recommending that they obtain counsel. DR 2-104(A) merely prohibited him from using the information as bait with which to obtain an agreement to represent them for a fee. The Rule does not prohibit a lawyer from giving unsolicited legal advice; it proscribes the acceptance of employment resulting from such advice.

Appellant does not contend, and on the facts of this case could not contend, that his approaches to the two young women involved political expression or an exercise of associational freedom, "employ[ing] constitutionally privileged means of expression to secure constitutionally guaranteed civil rights." Nor can he compare his solicitation to the mutual assistance in asserting legal rights that was at issue in *United Transportation Union v. Michigan Bar* A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation. While entitled to some constitutional protection, appellant's conduct is subject to regulation in furtherance of important state interests.

B

The state interests implicated in this case are particularly strong. In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions. "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' " While lawyers act in part as "self-employed businessmen," they also act "as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes."

As is true with respect to advertising, it appears that the ban on solicitation by lawyers originated as a rule of professional etiquette rather than as a strictly ethical rule. "[T]he rules are based in part on deeply ingrained feelings of tradition, honor and service. Lawyers have for centuries emphasized that the promotion of justice, rather than the earning of fees, is the goal of the profession." But the fact that the original motivation behind the ban on solicitation today might be considered an insufficient justification for its perpetuation does not detract from the force of the other interests the ban continues to serve. While the Court in *Bates* determined that truthful, restrained advertising of the prices of "routine" legal services would not have an adverse effect on the professionalism of lawyers, this was only because it found "the postulated connection between advertising and the erosion of true professionalism to be severely strained." The *Bates* Court did not question a State's interest in maintaining high standards among licensed professionals. Indeed, to the extent that the ethical standards of lawyers are linked to the service and protection of clients, they do further the goals of "true professionalism."

The substantive evils of solicitation have been stated over the years in sweeping terms: stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation, and misrepresentation. The American Bar Association, as amicus curiae, defends the rule against solicitation primarily on three broad grounds: It is said that the prohibitions embodied in DR 2-103(A) and 2-104(A) serve to reduce the likelihood of overreaching and the exertion of undue influence on lay persons, to protect the privacy of individuals, and to avoid situations where the lawyer's exercise of judgment on behalf of the client will be clouded by his own pecuniary self-interest.¹⁹

We need not discuss or evaluate each of these interests in detail as

¹⁹ A lawyer who engages in personal solicitation of clients may be inclined to subordinate the best interests of the client to his own pecuniary interests. Even if unintentionally, the lawyer's ability to evaluate the legal merit of his client's claims may falter when the conclusion will affect the lawyer's income. A valid claim might be settled too quickly, or a claim with little merit pursued beyond the point of reason. These lapses of judgment can occur in any legal representation, but we cannot say that the pecuniary motivation of the lawyer who solicits a particular representation does not create special problems of conflict of interest.

appellant has conceded that the State has a legitimate and indeed "compelling" interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct." We agree that protection of the public from these aspects of solicitation is a legitimate and important state interest.

III

Appellant's concession that strong state interests justify regulation to prevent the evils he enumerates would end this case but for his insistence that none of those evils was found to be present in his acts of solicitation. He challenges what he characterizes as the "indiscriminate application" of the Rules to him and thus attacks the validity of DR 2-103(A) and DR 2-104(A) not facially, but as applied to his acts of solicitation.²⁰ And because no allegations or findings were made of the specific wrongs appellant concedes would justify disciplinary action, appellant terms his solicitation "pure," meaning "soliciting and obtaining agreements from Carol McClintock and Wanda Lou Holbert to represent each of them," without more. Appellant therefore argues that we must decide whether a State may discipline him for solicitation per se without offending the First and Fourteenth Amendments.

We agree that the appropriate focus is on appellant's conduct. And, as appellant urges, we must undertake an independent review of the record to determine whether that conduct was constitutionally protected. But appellant errs in assuming that the constitutional validity of the judgment below depends

²⁰To the extent that appellant charges that the Rules prohibit solicitation that is constitutionally protected--as he contends his is--as well as solicitation that is unprotected, his challenge could be characterized as a contention that the Rules are overbroad. But appellant does not rely on the overbreadth doctrine under which a person may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him. On the contrary, appellant maintains that DR 2-103(A) and 2-104(A) could not constitutionally be applied to him. Nor could appellant make a successful overbreadth argument in view of the Court's observation in *Bates* that "the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context." Commercial speech is not as likely to be deterred as noncommercial speech, and therefore does not require the added protection afforded by the overbreadth approach. Even if the commercial speaker could mount an overbreadth attack, "where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." The Disciplinary Rules here at issue are addressed to the problem of a particular kind of commercial solicitation and are applied in the main in that context. Indeed, the Bar historically has characterized impermissible solicitation as that undertaken for purposes of the attorney's pecuniary gain and as not including offers of service to indigents without charge. Solicitation has been defined in terms of the presence of the pecuniary motivation of the lawyer, and ABA Formal Opinion 148 states that the ban on solicitation "was never aimed at a situation . . . in which a group of lawyers announce that they are willing to devote some of their time and energy to the interests of indigent citizens whose constitutional rights are believed to be infringed." We hold today in *Primus* that a lawyer who engages in solicitation as a form of protected political association generally may not be disciplined without proof of actual wrongdoing that the State constitutionally may proscribe. As these Disciplinary Rules thus can be expected to operate primarily if not exclusively in the context of commercial activity by lawyers, the potential effect on protected, noncommercial speech is speculative.

on proof that his conduct constituted actual overreaching or inflicted some specific injury on Wanda Holbert or Carol McClintock. His assumption flows from the premise that nothing less than actual proved harm to the solicited individual would be a sufficiently important state interest to justify disciplining the attorney who solicits employment in person for pecuniary gain.

Appellant's argument misconceives the nature of the State's interest. The Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs. The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert. In such a situation, which is inherently conducive to overreaching and other forms of misconduct, the State has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed.

The State's perception of the potential for harm in circumstances such as those presented in this case is well founded.²² The detrimental aspects of face-to-face selling even of ordinary consumer products have been recognized and addressed by the Federal Trade Commission, and it hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person. Such an individual may place his trust in a lawyer, regardless of the latter's qualifications or the individual's actual need for legal representation, simply in response to persuasion under circumstances conducive to uninformed acquiescence. Although it is argued that personal solicitation is valuable because it may apprise a victim of misfortune of his legal rights, the very plight of that person not only makes him more vulnerable to influence but also may make advice all the more intrusive. Thus, under these adverse conditions the overtures of an uninvited lawyer may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy, even when no other harm materializes. Under such circumstances, it is not unreasonable for the State to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited.

The efficacy of the State's effort to prevent such harm to prospective clients would be substantially diminished if, having proved a solicitation in circumstances like those of this case, the State were required in addition to prove actual injury. Unlike the advertising in *Bates*, in-person solicitation is not visible or otherwise open to public scrutiny. Often there is no witness other than the lawyer and the lay person whom he has solicited, rendering it difficult or impossible to obtain reliable proof of what actually took place. This would be especially true if the lay person were so distressed at the time of the solicitation that he could not recall specific details at a later date. If appellant's view were sustained, in-person solicitation would be virtually immune to effective oversight and regulation by the State or by the legal profession, in contravention of the State's strong interest in regulating members of the Bar in an effective,

²² Although our concern in this case is with solicitation by the lawyer himself, solicitation by a lawyer's agents or runners would present similar problems.

objective, and self-enforcing manner. It therefore is not unreasonable, or violative of the Constitution, for a State to respond with what in effect is a prophylactic rule.

On the basis of the undisputed facts of record, we conclude that the Disciplinary Rules constitutionally could be applied to appellant. He approached two young accident victims at a time when they were especially incapable of making informed judgments or of assessing and protecting their own interests. He solicited Carol McClintock in a hospital room where she lay in traction and sought out Wanda Lou Holbert on the day she came home from the hospital, knowing from his prior inquiries that she had just been released. Appellant urged his services upon the young women and used the information he had obtained from the McClintocks, and the fact of his agreement with Carol, to induce Wanda to say "O. K." in response to his solicitation. He employed a concealed tape recorder, seemingly to insure that he would have evidence of Wanda's oral assent to the representation. He emphasized that his fee would come out of the recovery, thereby tempting the young women with what sounded like a cost-free and therefore irresistible offer. He refused to withdraw when Mrs. Holbert requested him to do so only a day after the initial meeting between appellant and Wanda Lou and continued to represent himself to the insurance company as Wanda Holbert's lawyer.

The court below did not hold that these or other facts were proof of actual harm to Wanda Holbert or Carol McClintock but rested on the conclusion that appellant had engaged in the general misconduct proscribed by the Disciplinary Rules. Under our view of the State's interest in averting harm by prohibiting solicitation in circumstances where it is likely to occur, the absence of explicit proof or findings of harm or injury is immaterial. The facts in this case present a striking example of the potential for overreaching that is inherent in a lawyer's in-person solicitation of professional employment. They also demonstrate the need for prophylactic regulation in furtherance of the State's interest in protecting the lay public. We hold that the application of DR2-103(A) and 2-104(A) to appellant does not offend the Constitution.

Accordingly, the judgment of the Supreme Court of Ohio is

Affirmed.

In a concurring opinion, Justice Marshall expressed concern with the far-reaching scope of the Court's decision. Believing that total restriction on in-person solicitation has a discriminatory impact on less privileged classes of society and on sole practitioners and small firms, and that some solicitation can have the same beneficial effects on public knowledge of availability of legal services as advertising, Justice Marshall expressed reservations that a total ban on solicitation could pass constitutional muster.

In a companion case, *In re Primus*, 436 U.S. 412 (1978), the Court held that solicitation undertaken to offer representation in litigation that will express political beliefs and advance civil-liberties objectives rather than for pecuniary gain is not subject to the same analysis as that in *Ohrlik*. Rather, because such speech and conduct are closer to the core of the First Amendment, they are to be governed by "pure" First Amendment analysis rather than the more restrictive analysis used for

commercial speech. Thus, a state may not categorically ban such solicitation, but must examine each case to determine, on the facts, whether the solicitation in question actually involved the undue influence, misrepresentation, overreaching or invasion of privacy that the solicitation rules are designed to prevent. Only in cases where such evils are actually present may discipline be imposed.

Justice Rehnquist concurred in *Ohralik* but dissented in *Primus*, finding no basis for a “principled distinction” between the two cases.

III. THE JUNCTURE OF ADVERTISING AND SOLICITATION

A. Targeted Advertisements

Is a newspaper ad providing advice that a particular claim may exist and offering representation to those potentially having such a claim closer to advertising or solicitation for purposes of first amendment analysis? The Court addressed that issue in *Zauderer*.

In the spring of 1982, appellant placed an advertisement in 36 Ohio newspapers publicizing his willingness to represent women who had suffered injuries resulting from their use of a contraceptive device known as the Dalkon Shield Intrauterine Device. The advertisement featured a line drawing of the Dalkon Shield accompanied by the question, "DID YOU USE THIS IUD?" The advertisement then related the following information:

The Dalkon Shield Interuterine [sic] Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.

The ad concluded with the name of appellant's law firm, its address, and a phone number that the reader might call for "free information.

The advertisement was successful in attracting clients: appellant received well over 200 inquiries regarding the advertisement, and he initiated lawsuits on behalf of 106 of the women who contacted him as a result of the advertisement. The ad, however, also aroused the interest of the Office of Disciplinary Counsel. On July 29, 1982, the Office filed a complaint against appellant

He was charged with recommending employment of himself to a non-lawyer who had not sought his advice (D.R. 2-103[A]) and with accepting employment from persons to whom he had given unsolicited advice (D.R. 2-104[A]). A disciplinary panel found that Zauderer's ad violated the rules and recommended sanctions. Both the Board of Commissioners of the Bar and the Ohio Supreme Court upheld this finding and rejected appellant's claim that the

rules as applied in this case violated the first amendment. On this issue, the Supreme Court reversed:

There is no longer any room to doubt that what has come to be known as "commercial speech" is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded "noncommercial speech." More subject to doubt, perhaps, are the precise bounds of the category of expression that may be termed commercial speech, but it is clear enough that the speech at issue in this case--advertising pure and simple-- falls within those bounds. Our commercial speech doctrine rests heavily on "the 'common-sense' distinction between speech proposing a commercial transaction ... and other varieties of speech," and appellant's advertisements undeniably propose a commercial transaction. Whatever else the category of commercial speech may encompass, it must include appellant's advertisements.

Our general approach to restrictions on commercial speech is also by now well settled. The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction. Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest. Our application of these principles to the commercial speech of attorneys has led us to conclude that blanket bans on price advertising by attorneys and rules preventing attorneys from using nondeceptive terminology to describe their fields of practice are impermissible, but that rules prohibiting in-person solicitation of clients by attorneys are, at least under some circumstances, permissible.

III

We turn first to the Ohio Supreme Court's finding that appellant's Dalkon Shield advertisement (and his acceptance of employment resulting from it) ran afoul of the rules against self-recommendation and accepting employment resulting from unsolicited legal advice. Because all advertising is at least implicitly a plea for its audience's custom, a broad reading of the rules applied by the Ohio court (and particularly the rule against self-recommendation) might suggest that they forbid all advertising by attorneys--a result obviously not in keeping with our decisions in *Bates* and *In re R.M.J.* But the Ohio court did not purport to give its rules such a broad reading: it held only that the rules forbade soliciting or accepting legal employment through advertisements containing information or advice regarding a specific legal problem.

The interest served by the application of the Ohio self-recommendation and solicitation rules to appellant's advertisement is not apparent from a reading of the opinions of the Ohio Supreme Court and its Board of Commissioners. The advertisement's information and advice concerning the Dalkon Shield were, as the Office of Disciplinary Counsel stipulated, neither false nor deceptive: in fact, they were entirely accurate. The advertisement did not promise readers that lawsuits alleging injuries caused by the Dalkon Shield would be successful, nor did it suggest that appellant had any special expertise in handling such lawsuits other than his employment in other such litigation. Rather, the advertisement reported the indisputable fact that the Dalkon Shield

has spawned an impressive number of lawsuits and advised readers that appellant was currently handling such lawsuits and was willing to represent other women asserting similar claims. In addition, the advertisement advised women that they should not assume that their claims were time-barred--advice that seems completely unobjectionable in light of the trend in many States toward a "discovery rule" for determining when a cause of action for latent injury or disease accrues. The State's power to prohibit advertising that is "inherently misleading," thus cannot justify Ohio's decision to discipline appellant for running advertising geared to persons with a specific legal problem.

Because appellant's statements regarding the Dalkon Shield were not false or deceptive, our decisions impose on the State the burden of establishing that prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest. The extensive citations in the opinion of the Board of Commissioners to our opinion in *Ohralik* suggest that the Board believed that the application of the rules to appellant's advertising served the same interests that this Court found sufficient to justify the ban on in-person solicitation at issue in *Ohralik*. We cannot agree. Our decision in *Ohralik* was largely grounded on the substantial differences between face-to-face solicitation and the advertising we had held permissible in *Bates*. In-person solicitation by a lawyer, we concluded, was a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud. In addition, we noted that in-person solicitation presents unique regulatory difficulties because it is "not visible or otherwise open to public scrutiny." These unique features of in-person solicitation by lawyers, we held, justified a prophylactic rule prohibiting lawyers from engaging in such solicitation for pecuniary gain, but we were careful to point out that "in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services."

It is apparent that the concerns that moved the Court in *Ohralik* are not present here. Although some sensitive souls may have found appellant's advertisement in poor taste, it can hardly be said to have invaded the privacy of those who read it. More significantly, appellant's advertisement--and print advertising generally--poses much less risk of overreaching or undue influence. Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the personal presence of a trained advocate. In addition, a printed advertisement, unlike a personal encounter initiated by an attorney, is not likely to involve pressure on the potential client for an immediate yes-or-no answer to the offer of representation. Thus, a printed advertisement is a means of conveying information about legal services that is more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney. Accordingly, the substantial interests that justified the ban on in-person solicitation upheld in *Ohralik* cannot justify the discipline imposed on appellant for the content of his advertisement.

Nor does the traditional justification for restraints on solicitation--the fear that lawyers will "stir up litigation"--justify the restriction imposed in this case. In evaluating this proffered justification, it is important to think about what it might mean to say that the State has an interest in preventing lawyers from

stirring up litigation. It is possible to describe litigation itself as an evil that the State is entitled to combat: after all, litigation consumes vast quantities of social resources to produce little of tangible value but much discord and unpleasantness. "[A]s a litigant," Judge Learned Hand once observed, "I should dread a lawsuit beyond almost anything else short of sickness and death."

But we cannot endorse the proposition that a lawsuit, as such, is an evil. Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith and on the basis of accurate information regarding his legal rights that he has suffered a legally cognizable injury turns to the courts for a remedy: "we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride. The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights. Accordingly, it is not sufficient justification for the discipline imposed on appellant that his truthful and nondeceptive advertising had a tendency to or did in fact encourage others to file lawsuits.

The State does not, however, argue that the encouragement of litigation is inherently evil, nor does it assert an interest in discouraging the particular form of litigation that appellant's advertising solicited. Rather, the State's position is that although appellant's advertising may itself have been harmless--may even have had the salutary effect of informing some persons of rights of which they would otherwise have been unaware--the State's prohibition on the use of legal advice and information in advertising by attorneys is a prophylactic rule that is needed to ensure that attorneys, in an effort to secure legal business for themselves, do not use false or misleading advertising to stir up meritless litigation against innocent defendants. Advertising by attorneys, the State claims, presents regulatory difficulties that are different in kind from those presented by other forms of advertising. Whereas statements about most consumer products are subject to verification, the indeterminacy of statements about law makes it impractical if not impossible to weed out accurate statements from those that are false or misleading. A prophylactic rule is therefore essential if the State is to vindicate its substantial interest in ensuring that its citizens are not encouraged to engage in litigation by statements that are at best ambiguous and at worst outright false.

The State's argument that it may apply a prophylactic rule to punish appellant notwithstanding that his particular advertisement has none of the vices that allegedly justify the rule is in tension with our insistence that restrictions involving commercial speech that is not itself deceptive be narrowly crafted to serve the State's purposes. Indeed, in *In re R.M.J.* we went so far as to state that "the States may not place an absolute prohibition on certain types of potentially misleading information ... if the information also may be presented in a way that is not deceptive." The State's argument, then, must be that this dictum is incorrect--that there are some circumstances in which a prophylactic rule is the least restrictive possible means of achieving a substantial governmental interest.

We need not, however, address the theoretical question whether a prophylactic rule is ever permissible in this area, for we do not believe that the State has presented a convincing case for its argument that the rule before us is necessary to the achievement of a substantial governmental interest. The State's contention that the problem of distinguishing deceptive and nondeceptive legal advertising is different in kind from the problems presented by advertising generally is unpersuasive.

The State's argument proceeds from the premise that it is intrinsically difficult to distinguish advertisements containing legal advice that is false or deceptive from those that are truthful and helpful, much more so than is the case with other goods or services. This notion is belied by the facts before us: appellant's statements regarding Dalkon Shield litigation were in fact easily verifiable and completely accurate. Nor is it true that distinguishing deceptive from nondeceptive claims in advertising involving products other than legal services is a comparatively simple and straightforward process. A brief survey of the body of case law that has developed as a result of the Federal Trade Commission's efforts to carry out its mandate under § 5 of the Federal Trade Commission Act to eliminate "unfair or deceptive acts or practices in ... commerce," 15 U.S.C. § 45(a)(1), reveals that distinguishing deceptive from nondeceptive advertising in virtually any field of commerce may require resolution of exceedingly complex and technical factual issues and the consideration of nice questions of semantics. In short, assessment of the validity of legal advice and information contained in attorneys' advertising is not necessarily a matter of great complexity; nor is assessing the accuracy or capacity to deceive of other forms of advertising the simple process the State makes it out to be. The qualitative distinction the State has attempted to draw eludes us.

Were we to accept the State's argument in this case, we would have little basis for preventing the government from suppressing other forms of truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising. The First Amendment protections afforded commercial speech would mean little indeed if such arguments were allowed to prevail. Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful. The value of the information presented in appellant's advertising is no less than that contained in other forms of advertising--indeed, insofar as appellant's advertising tended to acquaint persons with their legal rights who might otherwise be shut off from effective access to the legal system, it was undoubtedly more valuable than many other forms of advertising. Prophylactic restraints that would be unacceptable as applied to commercial advertising generally are therefore equally unacceptable as applied to appellant's advertising. An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients.

Justice O'Connor, joined by then Chief Justice Burger and current Chief Justice Rehnquist, dissented.

. . . I dissent from Part III of the Court's opinion. In my view, the use of unsolicited legal advice to entice clients poses enough of a risk of overreaching and undue influence to warrant Ohio's rule.

Merchants in this country commonly offer free samples of their wares. Customers who are pleased by the sample are likely to return to purchase more. This effective marketing technique may be of little concern when applied to many products, but it is troubling when the product being dispensed is professional advice. Almost every State restricts an attorney's ability to accept employment resulting from unsolicited legal advice. At least two persuasive reasons can be advanced for the restrictions. First, there is an enhanced possibility for confusion and deception in marketing professional services. Unlike standardized products, professional services are by their nature complex and diverse. Faced with this complexity, a layperson may often lack the knowledge or experience to gauge the quality of the sample before signing up for a larger purchase. Second, and more significantly, the attorney's personal interest in obtaining business may color the advice offered in soliciting a client. As a result, a potential customer's decision to employ the attorney may be based on advice that is neither complete nor disinterested.

These risks are of particular concern when an attorney offers unsolicited advice to a potential client in a personal encounter. In that context, the legal advice accompanying an attorney's pitch for business is not merely apt to be complex and colored by the attorney's personal interest. The advice is also offered outside of public view, and in a setting in which the prospective client's judgment may be more easily intimidated or overpowered. For these reasons, most States expressly bar lawyers from accepting employment resulting from in person unsolicited advice. Some States, like the American Bar Association in its Model Rules Professional Conduct, extend the prohibition to employment resulting from unsolicited advice in telephone calls, letters, or communications directed to a specific recipient. Ohio and 14 other States go a step further. They do not limit their rules to certain methods of communication, but instead provide that, with limited exceptions, a "lawyer who has given unsolicited legal advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice."

The issue posed and decided in Part III of the Court's opinion is whether such a rule can be applied to punish the use of legal advice in a printed advertisement soliciting business. The majority's conclusion is a narrow one: "An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive ... advice regarding the legal rights of potential clients." As the Court notes, *Central Hudson* establishes that a State can prohibit truthful and nondeceptive commercial speech only if the restriction directly advances a substantial government interest. *In re R.M.J.* went further, stating that a State cannot place an absolute prohibition on certain types of potentially misleading information if the information may also be presented in a way that is not deceptive.

Given these holdings, the Court rejects Ohio's ban on the legal advice contained in Zauderer's Dalkon Shield advertisements do not assume it is too

late to take legal action against the ... manufacturer." Surveying Ohio law, the majority concludes that this advice "seems completely unobjectionable." Since the statement is not misleading, the Court turns to the asserted state interests in restricting it, and finds them all wanting. The Court perceives much less risk of overreaching or undue influence here than in *Ohralik* simply because the solicitation does not occur in person. The State's interest in discouraging lawyers from stirring up litigation is denigrated because lawsuits are not evil, and States cannot properly interfere with access to our system of justice. Finally, the Court finds that there exist less restrictive means to prevent attorneys from using misleading legal advice to attract clients: just as the Federal Trade Commission has been able to identify unfair or deceptive practices in the marketing of mouthwash and eggs, the States can identify unfair or deceptive legal advice without banning that advice entirely. The majority concludes that "[t]he qualitative distinction the State has attempted to draw eludes us."

In my view, state regulation of professional advice in advertisements is qualitatively different from regulation of claims concerning commercial goods and merchandise, and is entitled to greater deference than the majority's analysis would permit. In its prior decisions, the Court was better able to perceive both the importance of state regulation of professional conduct, and the distinction between professional services and standardized consumer products. The States understandably require more of attorneys than of others engaged in commerce. Lawyers are professionals, and as such they have greater obligations. As Justice Frankfurter once observed, "[f]rom a profession charged with [constitutional] responsibilities there must be exacted ... qualities of truth-speaking, of a high sense of honor, of granite discretion." The legal profession has in the past been distinguished and well served by a code of ethics which imposes certain standards beyond those prevailing in the marketplace and by a duty to place professional responsibility above pecuniary gain. While some assert that we have left the era of professionalism in the practice of law, substantial state interests underlie many of the provisions of the state codes of ethics, and justify more stringent standards than apply to the public at large.

The Court's commercial speech decisions have repeatedly acknowledged that the differences between professional services and other advertised products may justify distinctive state regulation. Most significantly, in *Ohralik*, the Court found that the strong state interest in maintaining standards among members of licensed professions and in preventing fraud, overreaching, or undue influence by attorneys justified a prophylactic rule barring in person solicitation. Although the antisolicitation rule in *Ohralik* would in some circumstances preclude an attorney from honestly and fairly informing a potential client of his or her legal rights, the Court nevertheless deferred to the State's determination that risks of undue influence or overreaching justified a blanket ban. At a minimum, these cases demonstrate that States are entitled under some circumstances to encompass truthful, nondeceptive speech within a ban of a type of advertising that threatens substantial state interests.

In my view, a State could reasonably determine that the use of unsolicited legal advice "as bait with which to obtain agreement to represent [a client] for a fee," poses a sufficient threat to substantial state interests to justify a blanket prohibition. As the Court recognized in *Ohralik*, the State has a

significant interest in preventing attorneys from using their professional expertise to overpower the will and judgment of laypeople who have not sought their advice. While it is true that a printed advertisement presents a lesser risk of overreaching than a personal encounter, the former is only one step removed from the latter. When legal advice is employed within an advertisement, the layperson may well conclude there is no means to judge its validity or applicability short of consulting the lawyer who placed the advertisement. This is particularly true where, as in appellant's Dalkon Shield advertisement, the legal advice is phrased in uncertain terms. A potential client who read the advertisement would probably be unable to determine whether "it is too late to take legal action against the ... manufacturer" without directly consulting the appellant. And at the time of that consultation, the same risks of undue influence, fraud, and overreaching that were noted in *Ohralik* are present.

The State also has a substantial interest in requiring that lawyers consistently exercise independent professional judgment on behalf of their clients. Given the exigencies of the marketplace, a rule permitting the use of legal advice in advertisements will encourage lawyers to present that advice most likely to bring potential clients into the office, rather than that advice which it is most in the interest of potential clients to hear. In a recent case in New York, for example, an attorney wrote unsolicited letters to victims of a massive disaster advising them that, in his professional opinion, the liability of the potential defendants is clear. Of course, under the Court's opinion claims like this might be reached by branding the advice misleading or by promulgating a state rule requiring extensive disclosure of all relevant liability rules whenever such a claim is advanced. But even if such a claim were completely accurate--even if liability were in fact clear and the attorney actually thought it to be so--I believe the State could reasonably decide that a professional should not accept employment resulting from such unsolicited advice. Ohio and other States afford attorneys ample opportunities to inform members of the public of their legal rights. Given the availability of alternative means to inform the public of legal rights, Ohio's rule against legal advice in advertisements is an appropriate means to assure the exercise of independent professional judgment by attorneys. A State might rightfully take pride that its citizens have access to its civil courts, while at the same time opposing the use of self-interested legal advice to solicit clients.

In the face of these substantial and legitimate state concerns, I cannot agree with the majority that Ohio DR 2-104(A) is unnecessary to the achievement of those interests. The Ohio rule may sweep in some advertisements containing helpful legal advice within its general prohibition. Nevertheless, I am not prepared to second-guess Ohio's longstanding and careful balancing of legitimate state interests merely because appellant here can invent a less restrictive rule. As the Iowa Supreme Court recently observed, "[t]he professional disciplinary system would be in chaos if violations could be defended on the ground the lawyer involved could think of a better rule." Because I would defer to the judgment of the States that have chosen to preclude use of unsolicited legal advice to entice clients, I respectfully dissent from Part III of the Court's opinion.

Which analysis is more persuasive? Why?

B. Targeted Direct Mail

SHAPERO V. KENTUCKY BAR ASSOCIATION
486 U.S. 466 (1988)

Justice BRENNAN announced the judgment of the Court and delivered the opinion of the Court as to Parts I and II and an opinion as to Part III in which Justice MARSHALL, Justice BLACKMUN, and Justice KENNEDY join.

This case presents the issue whether a State may, consistent with the First and Fourteenth Amendments, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems.

I

In 1985, petitioner applied to the Kentucky Attorneys Advertising Commission for approval of a letter that he proposed to send "to potential clients who have had a foreclosure suit filed against them." The proposed letter read as follows:

It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by ORDERING your creditor [sic] to STOP and give you more time to pay them.

"You may call my office anytime from 8:30 a.m. to 5:00 p.m. for FREE information on how you can keep your home.

"Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is FREE, there is NO charge for calling."

[The Commission, although not finding the letter to be false or misleading, deemed it impermissible under both an older solicitation rule and under a newly enacted rule that was identical to Model Rule 7.3. The Kentucky Court upheld the Commission's and the Ethics Committee's determinations that dissemination of the letter would violate the Rule and subject Shapero to potential discipline. The Supreme Court granted certiorari "to resolve whether such a blanket prohibition is consistent with the First Amendment" and reversed.]

II

Lawyer advertising is in the category of constitutionally protected commercial speech. The First Amendment principles governing state regulation of lawyer solicitations for pecuniary gain are by now familiar: "Commercial speech that is not false or deceptive and does not concern unlawful activities ... may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." Since state regulation of commercial speech "may extend only as far as the interest it serves," state rules that are designed to prevent the "potential

for deception and confusion ... may be no broader than reasonably necessary to prevent the "perceived evil."

In *Zauderer*, application of these principles required that we strike an Ohio rule that categorically prohibited solicitation of legal employment for pecuniary gain through advertisements containing information or advice, even if truthful and nondeceptive, regarding a specific legal problem. We distinguished written advertisements containing such information or advice from in-person solicitation by lawyers for profit, which we held in *Ohralik*, a State may categorically ban. The "unique features of in-person solicitation by lawyers [that] justified a prophylactic rule prohibiting lawyers from engaging in such solicitation for pecuniary gain," we observed, are "not present" in the context of written advertisements.

Our lawyer advertising cases have never distinguished among various modes of written advertising to the general public. Thus, Ohio could no more prevent Zauderer from mass-mailing to a general population his offer to represent women injured by the Dalkon Shield than it could prohibit his publication of the advertisement in local newspapers. Similarly, if petitioner's letter is neither false nor deceptive, Kentucky could not constitutionally prohibit him from sending at large an identical letter opening with the query, "Is your home being foreclosed on?," rather than his observation to the targeted individuals that "It has come to my attention that your home is being foreclosed on." The drafters of Rule 7.3 apparently appreciated as much, for the Rule exempts from the ban "letters addressed or advertising circulars distributed generally to persons ... who are so situated that they might in general find such services useful."

The court below disapproved petitioner's proposed letter solely because it targeted only persons who were "known to need [the] legal services" offered in his letter, rather than the broader group of persons "so situated that they might in general find such services useful." Generally, unless the advertiser is inept, the latter group would include members of the former. The only reason to disseminate an advertisement of particular legal services among those persons who are "so situated that they might in general find such services useful" is to reach individuals who actually "need legal services of the kind provided [and advertised] by the lawyer." But the First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable.

The court below did not rely on any such theory. Rather, it concluded that the State's blanket ban on all targeted, direct-mail solicitation was permissible because of the "serious potential for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services." By analogy to *Ohralik*, the court observed:

Such solicitation subjects the prospective client to pressure from a trained lawyer in a direct personal way. It is entirely possible that the potential client may feel overwhelmed by the basic situation which caused the need for the specific legal services and may have seriously impaired capacity for good judgment, sound reason and a natural protective self-interest. Such a condition is full of the possibility of undue influence, overreaching and intimidation.

Of course, a particular potential client will feel equally "overwhelmed" by his legal troubles and will have the same "impaired capacity for good judgment" regardless of whether a lawyer mails him an untargeted letter or exposes him to a newspaper advertisement--concededly constitutionally protected activities--or instead mails a targeted letter. The relevant inquiry is not whether there exist potential clients whose "condition" makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility.

Thus, respondent's facile suggestion that this case is merely "*Ohralik* in writing" misses the mark. In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference. Our decision in *Ohralik* that a State could categorically ban all in-person solicitation turned on two factors. First was our characterization of face-to-face solicitation as "a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud." Second, "unique ... difficulties," would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban because such solicitation is "not visible or otherwise open to public scrutiny." Targeted, direct-mail solicitation is distinguishable from the in-person solicitation in each respect.

Like print advertising, petitioner's letter--and targeted, direct-mail solicitation generally--"poses much less risk of overreaching or undue influence" than does in-person solicitation. Neither mode of written communication involves "the coercive force of the personal presence of a trained advocate" or the "pressure on the potential client for an immediate yes-or-no answer to the offer of representation." Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and the "reader of an advertisement ... can 'effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes,' " A letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded. In short, both types of written solicitation "conve[y] information about legal services [by means] that [are] more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney." Nor does a targeted letter invade the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery.

Admittedly, a letter that is personalized (not merely targeted) to the recipient presents an increased risk of deception, intentional or inadvertent. It could, in certain circumstances, lead the recipient to overestimate the lawyer's familiarity with the case or could implicitly suggest that the recipient's legal problem is more dire than it really is. Similarly, an inaccurately targeted letter could lead the recipient to believe she has a legal problem that she does not actually have or, worse yet, could offer erroneous legal advice.

But merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech. The State can regulate such abuses and minimize mistakes through far less restrictive and more precise

means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, giving the State ample opportunity to supervise mailings and penalize actual abuses. The "regulatory difficulties" that are "unique" to in-person lawyer solicitation, solicitation that is "not visible or otherwise open to public scrutiny" and for which it is "difficult or impossible to obtain reliable proof of what actually took place," do not apply to written solicitations. The court below offered no basis for its "belie[f] [that] submission of a blank form letter to the Advertising Commission [does not] provid[e] a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation. Its concerns were presumably those expressed by the ABA House of Delegates in its comment to Rule 7.3:

"State lawyer discipline agencies struggle for resources to investigate specific complaints, much less for those necessary to screen lawyers' mail solicitation material. Even if they could examine such materials, agency staff members are unlikely to know anything about the lawyer or about the prospective client's underlying problem. Without such knowledge they cannot determine whether the lawyer's representations are misleading." .

The record before us furnishes no evidence that scrutiny of targeted solicitation letters will be appreciably more burdensome or less reliable than scrutiny of advertisements. As a general matter, evaluating a targeted advertisement does not require specific information about the recipient's identity and legal problems any more than evaluating a newspaper advertisement requires like information about all readers. If the targeted letter specifies facts that relate to particular recipients (e.g., "It has come to my attention that your home is being foreclosed on"), the reviewing agency has innumerable options to minimize mistakes. It might, for example, require the lawyer to prove the truth of the fact stated (by supplying copies of the court documents or material that led the lawyer to the fact); it could require the lawyer to explain briefly how he or she discovered the fact and verified its accuracy; or it could require the letter to bear a label identifying it as an advertisement, or directing the recipient how to report inaccurate or misleading letters. To be sure, a state agency or bar association that reviews solicitation letters might have more work than one that does not. But "[o]ur recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."

III

The validity of Rule 7.3 does not turn on whether petitioner's letter itself exhibited any of the evils at which Rule 7.3 was directed. Since, however, the First Amendment overbreadth doctrine does not apply to professional advertising, we address respondent's contentions that petitioner's letter is particularly overreaching, and therefore unworthy of First Amendment protection. In that regard, respondent identifies two features of the letter before us that, in its view, coalesce to convert the proposed letter into "high pressure solicitation, overbearing solicitation," which is not protected. First, respondent asserts that the letter's liberal use of underscored, uppercase letters (e.g., "Call NOW, don't wait"; "it is FREE, there is NO charge for calling") "fairly shouts at

the recipient ... that he should employ Shapero." Second, respondent objects that the letter contains assertions (e.g., "It may surprise you what I may be able to do for you") that "stat[e] no affirmative or objective fact," but constitute "pure salesman puffery, enticement for the unsophisticated, which commits Shapero to nothing."

The pitch or style of a letter's type and its inclusion of subjective predictions of client satisfaction might catch the recipient's attention more than would a bland statement of purely objective facts in small type. But a truthful and nondeceptive letter, no matter how big its type and how much it speculates can never "shou[t] at the recipient" or "gras[p] him by the lapels," as can a lawyer engaging in face-to-face solicitation. The letter simply presents no comparable risk of overreaching. And so long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient. Moreover, the First Amendment limits the State's authority to dictate what information an attorney may convey in soliciting legal business. "[T]he States may not place an absolute prohibition on certain types of potentially misleading information ... if the information may also be presented in a way that is not deceptive," unless the State "assert[s] a substantial interest" that such a restriction would directly advance. Nor may a State impose a more particularized restriction without a similar showing. Aside from the interests that we have already rejected, respondent offers none.

To be sure, a letter may be misleading if it unduly emphasizes trivial or "relatively uninformative fact[s]," or offers overblown assurances of client satisfaction. . . . Respondent does not argue before us that petitioner's letter was misleading in those respects. Nor does respondent contend that the letter is false or misleading in any other respect. Of course, respondent is free to raise, and the Kentucky courts are free to consider, any such argument on remand.

The judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice WHITE, with whom Justice STEVENS joins, concurring in part and dissenting in part.

I agree with Parts I and II of the Court's opinion, but am of the view that the matters addressed in Part III should be left to the state courts in the first instance.

Justice O'CONNOR, with whom THE CHIEF JUSTICE and Justice SCALIA join, dissenting.

Relying primarily on *Zauderer*, the Court holds that States may not prohibit a form of attorney advertising that is potentially more pernicious than the advertising at issue in that case. I agree with the Court that the reasoning in *Zauderer* supports the conclusion reached today. That decision, however, was itself the culmination of a line of cases built on defective premises and flawed reasoning. As today's decision illustrates, the Court has been unable or unwilling to restrain the logic of the underlying analysis within reasonable bounds. The resulting interference with important and valid public policies is so

destructive that I believe the analytical framework itself should now be reexamined.

I

Zauderer held that the First Amendment was violated by a state rule that forbade attorneys to solicit or accept employment through advertisements containing information or advice regarding a specific legal problem. I dissented from this holding because I believed that our precedents permitted, and good judgment required, that we give greater deference to the States' legitimate efforts to regulate advertising by their attorneys. Emphasizing the important differences between professional services and standardized consumer products, I concluded that unsolicited legal advice was not analogous to the free samples that are often used to promote sales in other contexts. First, the quality of legal services is typically more difficult for most laypersons to evaluate, and the consequences of a mistaken evaluation of the "free sample" may be much more serious. For that reason, the practice of offering unsolicited legal advice as a means of enticing potential clients into a professional relationship is much more likely to be misleading than superficially similar practices in the sale of ordinary consumer goods. Second, and more important, an attorney has an obligation to provide clients with complete and disinterested advice. The advice contained in unsolicited "free samples" is likely to be colored by the lawyer's own interest in drumming up business, a result that is sure to undermine the professional standards that States have a substantial interest in maintaining.

Zauderer dealt specifically with a newspaper advertisement. Today's decision--which invalidates a similar rule against targeted, direct-mail advertising--wraps the protective mantle of the Constitution around practices that have even more potential for abuse. First, a personalized letter is somewhat more likely "to overpower the will and judgment of laypeople who have not sought [the lawyer's] advice." For people whose formal contacts with the legal system are infrequent, the authority of the law itself may tend to cling to attorneys just as it does to police officers. Unsophisticated citizens, understandably intimidated by the courts and their officers, may therefore find it much more difficult to ignore an apparently "personalized" letter from an attorney than to ignore a general advertisement.

Second, "personalized" form letters are designed to suggest that the sender has some significant personal knowledge about, and concern for, the recipient. Such letters are reasonably transparent when they come from somebody selling consumer goods or stock market tips, but they may be much more misleading when the sender belongs to a profession whose members are ethically obliged to put their clients' interests ahead of their own.

Third, targeted mailings are more likely than general advertisements to contain advice that is unduly tailored to serve the pecuniary interests of the lawyer. Even if such mailings are reviewed in advance by a regulator, they will rarely be seen by the bar in general. Thus, the lawyer's professional colleagues will not have the chance to observe how the desire to sell oneself to potential customers has been balanced against the duty to provide objective legal advice. An attorney's concern with maintaining a good reputation in the professional community, which may in part be motivated by long-term pecuniary interests, will therefore provide less discipline in this context than in

the case of general advertising.

Although I think that the regulation at issue today is even more easily defended than the one at issue in *Zauderer*, I agree that the rationale for that decision may fairly be extended to cover today's case. Targeted direct-mail advertisements--like general advertisements but unlike the kind of in-person solicitation that may be banned under *Ohralik*--can at least theoretically be regulated by the States through prescreening mechanisms. In-person solicitation, moreover, is inherently more prone to abuse than almost any form of written communication. *Zauderer* concluded that the decision in *Ohralik* was limited by these "unique features" of in-person solicitation, and today's majority simply applies the logic of that interpretation of *Ohralik* to the case before us.

II

Attorney advertising generally falls under the rubric of "commercial speech." Political speech, we have often noted, is at the core of the First Amendment. One reason for the special status of political speech was suggested in a metaphor that has become almost as familiar as the principle that it sought to justify: "[W]hen men have realized that time has upset many fighting faiths, they may come to believe ... that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution." Traditionally, the constitutional fence around this metaphorical marketplace of ideas had not shielded the actual marketplace of purely commercial transactions from governmental regulation.

In *Virginia Pharmacy Bd.*, however, the Court concluded that the First Amendment protects the communication of the following so-called "idea": "I will sell you the X prescription drug at the Y price." The Court argued that the public interest requires that private economic decisions be well informed, and it suggested that no satisfactory line could be drawn between ideas about public affairs and information relevant to such private decisions. The dissent observed that the majority had overstated the difficulties of distinguishing public affairs from such matters as the "decision ... to purchase one or another kind of shampoo." The dissent also foresaw that the logic of *Virginia Pharmacy* would almost necessarily extend to advertising by physicians and attorneys. This prediction soon proved correct, and subsequent decisions have radically curtailed the power of the States to forbid conduct that I believe "promote[s] distrust of lawyers and disrespect for our own system of justice."

The latest developments, in *Zauderer* and now today, confirm that the Court should apply its commercial speech doctrine with more discernment than it has shown in these cases. Decisions subsequent to *Virginia Pharmacy* and *Bates*, moreover, support the use of restraint in applying this doctrine to attorney advertising. We have never held, for example, that commercial speech has the same constitutional status as speech on matters of public policy, and the Court has consistently purported to review laws regulating commercial speech under a significantly more deferential standard of review.

Expression concerning purely commercial transactions has come within the ambit of the [First] Amendment's protection only recently.... To require a parity

of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

A standardized legal test has been devised for commercial speech cases. Under that test, such speech is entitled to constitutional protection only if it concerns lawful activities and is not misleading; if the speech is protected, government may still ban or regulate it by laws that directly advance a substantial governmental interest and are appropriately tailored to that purpose. Applying that test to attorney advertising, it is clear to me that the States should have considerable latitude to ban advertising that is "potentially or demonstrably misleading," as well as truthful advertising that undermines the substantial governmental interest in promoting the high ethical standards that are necessary in the legal profession.

Some forms of advertising by lawyers might be protected under this test. Announcing the price of an initial consultation might qualify, for example, especially if appropriate disclaimers about the costs of other services were included. Even here, the inherent difficulties of policing such advertising suggest that we should hesitate to interfere with state rules designed to ensure that adequate disclaimers are included and that such advertisements are suitably restrained.

As soon as one steps into the realm of prices for "routine" legal services such as uncontested divorces and personal bankruptcies, however, it is quite clear to me that the States may ban such advertising completely. The contrary decision in *Bates* was in my view inconsistent with the standard test that is now applied in commercial speech cases. Until one becomes familiar with a client's particular problems, there is simply no way to know that one is dealing with a "routine" divorce or bankruptcy. Such an advertisement is therefore inherently misleading if it fails to inform potential clients that they are not necessarily qualified to decide whether their own apparently simple problems can be handled by "routine" legal services. Furthermore, such advertising practices will undermine professional standards if the attorney accepts the economic risks of offering fixed rates for solving apparently simple problems that will sometimes prove not to be so simple after all. For a lawyer to promise the world that such matters as uncontested divorces can be handled for a flat fee will inevitably create incentives to ignore (or avoid discovering) the complexities that would lead a conscientious attorney to treat some clients' cases as anything but routine. It may be possible to devise workable rules that would allow something more than the most minimal kinds of price advertising by attorneys. That task, however, is properly left to the States, and it is certainly not a fit subject for constitutional adjudication. Under the *Central Hudson* test, government has more than ample justification for banning or strictly regulating most forms of price advertising.

Solicitation practices like the "free sample" techniques approved by *Zauderer* and today's decision are even less deserving of constitutional

protection than price advertising for supposedly routine legal services. Applying the *Central Hudson* test to the regulation at issue today, for example, I think it clear that Kentucky has a substantial interest in preventing the potentially misleading effects of targeted, direct-mail advertising as well as the corrosive effects that such advertising can have on appropriate professional standards. Soliciting business from strangers who appear to need particular legal services, when a significant motive for the offer is the lawyer's pecuniary gain, always has a tendency to corrupt the solicitor's professional judgment. This is especially true when the solicitation includes the offer of a "free sample," as petitioner's proposed letter does. I therefore conclude that American Bar Association Model Rule of Professional Conduct 7.3 (1984) sweeps no more broadly than is necessary to advance a substantial governmental interest. The Kentucky Supreme Court correctly found that petitioner's letter could permissibly be banned under Rule 7.3, and I dissent from the Court's decision to reverse that judgment.

III

The roots of the error in our attorney advertising cases are a defective analogy between professional services and standardized consumer products and a correspondingly inappropriate skepticism about the States' justifications for their regulations. In *Bates*, for example, the majority appeared to demand conclusive proof that the country would be better off if the States were allowed to retain a rule that served "to inhibit the free flow of commercial information and to keep the public in ignorance." Although the opinion contained extensive discussion of the proffered justifications for restrictions on price advertising, the result was little more than a bare conclusion that "we are not persuaded that price advertising will harm consumers." Dismissing Justice Powell's careful critique of the implicit legislative factfinding that underlay its analysis, the *Bates* majority simply insisted on concluding that the benefits of advertising outweigh its dangers. In my view, that policy decision was not derived from the First Amendment, and it should not have been used to displace a different and no less reasonable policy decision of the State whose regulation was at issue.

Bates was an early experiment with the doctrine of commercial speech, and it has proved to be problematic in its application. Rather than continuing to work out all the consequences of its approach, we should now return to the States the legislative function that has so inappropriately been taken from them in the context of attorney advertising. The *Central Hudson* test for commercial speech provides an adequate doctrinal basis for doing so, and today's decision confirms the need to reconsider *Bates* in the light of that doctrine.

Even if I agreed that this Court should take upon itself the task of deciding what forms of attorney advertising are in the public interest, I would not agree with what it has done. The best arguments in favor of rules permitting attorneys to advertise are founded in elementary economic principles. Restrictions on truthful advertising, which artificially interfere with the ability of suppliers to transmit price information to consumers, presumably reduce the efficiency of the mechanisms of supply and demand. Other factors being equal, this should cause or enable suppliers (in this case attorneys) to maintain a price/quality ratio in some of their services that is higher than would otherwise prevail. Although one could probably not test this hypothesis empirically, it is inherently plausible. Nor is it implausible to imagine that one effect of restrictions on lawyer advertising, and perhaps sometimes an intended

effect, is to enable attorneys to charge their clients more for some services (of a given quality) than they would be able to charge absent the restrictions.

Assuming, *arguendo*, that the removal of advertising restrictions should lead in the short run to increased efficiency in the provision of legal services, I would not agree that we can safely assume the same effect in the long run. The economic argument against these restrictions ignores the delicate role they may play in preserving the norms of the legal profession. While it may be difficult to defend this role with precise economic logic, I believe there is a powerful argument in favor of restricting lawyer advertising and that this argument is at the very least not easily refuted by economic analysis.

One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional life. Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service, which in the legal profession can take a variety of familiar forms. This view of the legal profession need not be rooted in romanticism or self-serving sanctimony, though of course it can be. Rather, special ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably wield in a political system like ours.

It is worth recalling why lawyers are regulated at all, or to a greater degree than most other occupations, and why history is littered with failed attempts to extinguish lawyers as a special class. Operating a legal system that is both reasonably efficient and tolerably fair cannot be accomplished, at least under modern social conditions, without a trained and specialized body of experts. This training is one element of what we mean when we refer to the law as a "learned profession." Such knowledge by its nature cannot be made generally available, and it therefore confers the power and the temptation to manipulate the system of justice for one's own ends. Such manipulation can occur in at least two obvious ways. One results from overly zealous representation of the client's interests; abuse of the discovery process is one example whose causes and effects (if not its cure) is apparent. The second, and for present purposes the more relevant, problem is abuse of the client for the lawyer's benefit. Precisely because lawyers must be provided with expertise that is both esoteric and extremely powerful, it would be unrealistic to demand that clients bargain for their services in the same arm's-length manner that may be appropriate when buying an automobile or choosing a dry cleaner. Like physicians, lawyers are subjected to heightened ethical demands on their conduct towards those they serve. These demands are needed because market forces, and the ordinary legal prohibitions against force and fraud, are simply insufficient to protect the consumers of their necessary services from the peculiar power of the specialized knowledge that these professionals possess.

Imbuing the legal profession with the necessary ethical standards is a task that involves a constant struggle with the relentless natural force of

economic self-interest. It cannot be accomplished directly by legal rules, and it certainly will not succeed if sermonizing is the strongest tool that may be employed. Tradition and experiment have suggested a number of formal and informal mechanisms, none of which is adequate by itself and many of which may serve to reduce competition (in the narrow economic sense) among members of the profession. A few examples include the great efforts made during this century to improve the quality and breadth of the legal education that is required for admission to the bar; the concomitant attempt to cultivate a subclass of genuine scholars within the profession; the development of bar associations that aspire to be more than trade groups; strict disciplinary rules about conflicts of interest and client abandonment; and promotion of the expectation that an attorney's history of voluntary public service is a relevant factor in selecting judicial candidates.

Restrictions on advertising and solicitation by lawyers properly and significantly serve the same goal. Such restrictions act as a concrete, day-to-day reminder to the practicing attorney of why it is improper for any member of this profession to regard it as a trade or occupation like any other. There is no guarantee, of course, that the restrictions will always have the desired effect, and they are surely not a sufficient means to their proper goal. Given their inevitable anticompetitive effects, moreover, they should not be thoughtlessly retained or insulated from skeptical criticism. Appropriate modifications have been made in the light of reason and experience, and other changes may be suggested in the future.

In my judgment, however, fairly severe constraints on attorney advertising can continue to play an important role in preserving the legal profession as a genuine profession. Whatever may be the exactly appropriate scope of these restrictions at a given time and place, this Court's recent decisions reflect a myopic belief that "consumers," and thus our Nation, will benefit from a constitutional theory that refuses to recognize either the essence of professionalism or its fragile and necessary foundations. In one way or another, time will uncover the folly of this approach. I can only hope that the Court will recognize the danger before it is too late to effect a worthwhile cure.

1. Which is the better view? Why? Does the increasing tendency to view law as a business rather than a profession mandate the result reached by the majority? Is this desirable?

2. Is effective regulation possible? What about telephone calls? Are they closer to letters or in-person solicitation? What about use of the Internet? How, if at all, should such use be regulated?

3. What is the line between advertising and solicitation? Can an attorney hand out brochures or letters on the street? In front of the courthouse? Outside the arraignment courtroom of the Municipal Court? Can someone else do it on the attorney's behalf? Why or why not? See *Attorney Grievance Committee v. Gregory*, 536 A.2d 646 (Md. 1988).

C. What's Next?

Can a state prevent lawyers from sending letters to victims of accidents or disasters until after a thirty-day waiting period expires? The Court said “yes” in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). The Court stated:

We believe that the Florida Bar's 30-day restriction on targeted direct-mail solicitation of accident victims and their relatives withstands scrutiny under the three-part *Central Hudson* test that we have devised for this context. The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered. The Bar's proffered study [showing that members of the public view such letters as an invasion of privacy and as adversely affecting their opinions of the lawyers who send them], unrebutted by respondents below, provides evidence indicating that the harms it targets are far from illusory. The palliative devised by the Bar to address these harms is narrow both in scope and in duration. The Constitution, in our view, requires nothing more.

Does *Went for It* reflect a retrenchment by the Court and a move toward Justice O'Connor's views, or does it merely reflect an unwillingness to extend the first amendment any further than it has so far? Which is more desirable? More likely? Which view of advertising and solicitation is more consistent with your own views of the profession?

Look at the recent changes adopted in Missouri to its advertising and solicitation rules. See Missouri Supreme Court Rules 4-7.1 through 4-7.3 appearing at <http://www.courts.mo.gov/sup/index.nsf/da0f8eb4e845dc6d86256c0e00759846/3608230ed5cbe92786256f0b0062df37?OpenDocument>. Are these rules constitutional? Desirable? These are difficult issues that are not likely to be resolved to everyone's satisfaction any time soon.