

REPORT OF THE NEW JERSEY SUPREME COURT COMMISSION ON THE RULES OF PROFESSIONAL CONDUCT

In January of 2001, the New Jersey Supreme Court appointed this Commission to review the Rules of Professional Conduct (RPCs) in light of the report of the American Bar Association's Commission on Evaluation of the Rules of Professional Conduct. The Court also directed the Commission to make recommendations on: the proposed RPCs, multijurisdictional and multidisciplinary practice, the retention of the "appearance-of-impropriety rule," the extension of the disqualification of a municipal prosecutor from criminal defense work to members and associates in the prosecutor's law firm, and the bona fide office requirement.

The Commission submits this report in discharge of its obligation to the Court, the profession, and the public-at-large.

Background:

The American Bar Association Commission on Evaluation of the Rules of Professional Conduct (the ABA Commission) issued its report on the Model Rules of Professional Conduct (MRPCs) in November of 2000. In August of 2001, the American Bar Association's House of Delegates considered and voted on the recommendations of the ABA Commission from MRPC 1.0 through MRPC 1.10. With a number of exceptions, the House of Delegates approved the ABA Commission's recommendations. The ABA Commission then submitted a report that included conforming amendments to the rules debated by the House in August. At the ABA midyear meeting in Philadelphia in February of 2002, the House of Delegates approved the final report of the ABA Commission with the exception of the Commission's proposals concerning MRPC 5.5, Unauthorized Practice of Law, and MRPC 8.5, Disciplinary Authority; Choice of Law, which were deferred for consideration together with the report of the Commission on Multijurisdictional Practice chaired by Wayne J. Positan.

In the interim, this Commission created seven subcommittees to review the proposed MRPCs: (1) the Steering Subcommittee, (2) the Conflict of Interest Subcommittee, (3) the Lawyer Client Confidences Subcommittee, 4) the Attorney Fees Subcommittee, (5) the Lawyers as Advocates Subcommittee, (6) the Internal Regulation of the Profession Subcommittee, and (7)

the Public Service Obligations Subcommittee. In March of 2002, the Commission published a preliminary report of its review of the RPCs and solicited comment on its report. In May of 2002, the Commission held a public hearing at the annual meeting of the New Jersey State Bar Association in Atlantic City on the work done to that point. Altogether, the Commission held ten meetings in which it considered the proposed MRPCs and other issues.

At the ABA annual meeting in Washington, D.C., in August of 2002, the House of Delegates adopted practically all of the substance of the Positan Commission's recommendations. The most significant of these recommendations concern multijurisdictional practice and admission on motion.

Following are this Commission's conclusions in respect of our Rules of Professional Conduct (RPCs). Generally, our existing standards have worked well since the adoption of the RPCs in 1984. The Commission, however, believes that current legal practice has expanded beyond state borders and that our RPCs, particularly, those governing multijurisdictional practice and disciplinary authority, should reflect these changes.

Certain issues merit specific mention. The discussion of: 1) the appearance-of-impropriety as an ethics infraction and the effect of a municipal prosecutor's disqualification occur following the discussion of RPC 1.7; 2) multijurisdictional practice and the bona fide office rule occur in the discussions of RPCs 5.5 and 8.5, and 3) multidisciplinary practice occurs in the discussion of RPC 7.2.

Proposed Changes:

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

The MRPC definition of "screened" proposed in the November 2000 report of the ABA Commission does not contain certain safeguards included in our Commission's recommendation. In particular, our Commission

recommends that screening be enforced by the "screened" attorney's firm through written procedures established pursuant to RPC 1.10(f).

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

RPC 1.1 - Competence (existing RPC). The Commission recommends no change to existing RPC 1.1, which carries forward the terms "gross negligence" and "pattern of negligence" to identify ethical deviations from professional conduct.

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

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

RPC 1.4 - Communication. The Commission recommends adoption of a new paragraph (a) of RPC 1.4 to impose a duty on lawyers to fully inform clients of how, when, and where they may communicate with their lawyer. The

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

RPC 1.5 - Fees. The Commission recommends the retention of RPC 1.5, but adds the requirement that lawyers must notify a client of a division of fee between lawyers who are not in the same firm. The Commission does not support the ABA Commission's proposal to require a client's consent to the division of a fee between lawyers who are not in the same firm.

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

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

RPC 1.7 - Conflict of Interest, Concurrent Conflict. The ABA Commission reorganized MRPC 1.7, Conflict of Interest ..., to clarify the rule. It also replaced "consent after consultation" with "informed consent" and added a

requirement that the informed consent be in writing. Our Commission recommends that the informed consent follow full disclosure and consultation. If a lawyer represents multiple clients, the consultation is to include an explanation of the common representation, including its advantages and risks.

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

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

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

As an ethics concept, the appearance of impropriety is too vague to support discipline. In only one case,

was the standard the sole factor in the imposition of discipline, *IMO Doyle*, 149 N.J. 397 (1997). *Doyle* is a one-sentence order that reprimands a temporarily-suspended attorney for an unspecified appearance of impropriety.

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

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

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

RPC 1.8 - Conflict of Interest: Current Clients. The ABA Commission proposal for MRPC 1.8 clarifies the rules

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

Our Commission supports the foregoing changes with additional modifications requiring "full disclosure and consultation" prior to informed consent in paragraphs (b) and (g). The Commission also favors a modification of subparagraph (h)(1) to read:

- (h) A lawyer shall not:
 - (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client fails to act in accordance with the lawyer's advice and the lawyer nevertheless continues to represent the client at the client's request. Notwithstanding the existence of those two conditions, the lawyer shall not make such an agreement unless permitted by law and the client is independently represented in making the agreement; or

The Commission also recommends the addition of a new paragraph (l):

- (l) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client or would enable the lawyer to improperly influence the decision of a government agency or public official responsible for a decision in the matter.

The new provision places a lawyer employed by a public entity, whether as a lawyer or in some other role, under an obligation to assess whether client representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation or would enable the lawyer to improperly influence the decision of a government agency or public official, and to cure that risk if it exists.

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

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

RPC 1.11 - Successive Representation of Government and Private Parties. Our Commission also favors screening to prevent the attribution of personal conflicts to a lawyer who has served as a government lawyer or

public officer and, hence, favors the adoption of the ABA Commission's proposed MRPC 1.11 with some modification.

RPC 1.12 - Former Judge, Arbitrator, Mediator or Other Third-Party Neutral. Our RPC currently requires consent from all of the parties if a firm represents a party in connection with a matter in which a lawyer in the firm participated personally and substantially as a judge or other adjudicative officer, arbitrator, or law clerk. The proposed MRPC requires screening and notice to the parties in lieu of consent. The Commission favors the proposal and further recommends that RPC 1.12(d) be revised to read: "An arbitrator selected by a party in a multimember arbitration panel..." instead of the proposed MRPC language: "An arbitrator selected as a partisan of a party in a multimember arbitration panel...."

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

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

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

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

RPC 1.17 - Sale of Law Practice. MRPC 1.17 deals with the sale of a law practice. The ABA Commission proposes two changes to MRPC 1.17. The first is to drop subparagraph (b)'s requirement that the sale of a law practice be to a single buyer. The second change is the elimination of the buying attorney's right to refuse to

represent the seller's clients unless they agree to pay an increased fee. The second change brings MRPC 1.17(d) into

accord with New Jersey's equivalent provision. The Commission supports the recommendation to eliminate the single-buyer

requirement but otherwise favors keeping the language of our existing RPC.

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

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

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

RPC 2.3 - Evaluation for Use by Third Parties. MRPC 2.3 pertains to the circumstances under which a lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client. Our RPC 2.3 differs substantively from MRPC 2.3 in that it also requires a description in writing to the client of the conditions of the evaluation including any contemplated disclosure of information otherwise protected by RPC 1.6. Our Commission does not regard the ABA Commission's proposed changes to MRPC 2.3 as presenting any substantial differences. In any event, the proposed changes are improvements to the present text. The Commission recommends that they be incorporated into our RPC 2.3.

RPC 2.4 - Lawyer Serving as Third-Party Neutral (new). A lawyer who serves as an arbitrator or mediator in a dispute resolution may experience ethical problems arising out of the parties' possible confusion about the lawyer's role. The proposed new MRPC is designed to promote the parties' understanding of the role of a lawyer who acts in a neutral capacity. The Commission favors adoption of the MRPC with the slight modification that all parties be informed that the lawyer-neutral is not representing them.

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

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

RPC 3.3, Candor Toward the Tribunal (existing RPC). RPC 3.3(a)(5) requires a lawyer to disclose a material fact to a tribunal if the lawyer knows that the tribunal may be misled by the lawyer's failure to disclose. The Commission members have engaged in extensive discussions of the implications of RPC 3.3(a)(5) for lawyer-client relations.

Our Commission narrowly rejected a proposal to recommend deletion of RPC 3.3(a)(5) and to amend RPC 3.3(a)(1) to provide that "a lawyer shall not knowingly make a false or misleading statement of material fact or law to a tribunal." Although the Commission supports the retention of existing RPC 3.3, it recognizes the tension that the rule places on the attorney-client relationship in placing an affirmative duty on the attorney to disclose material facts that are adverse to the attorney's client.

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

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

RPC 3.6 - Trial Publicity. MRPC 3.6 begins, "A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement..." By comparison, our RPC begins, "A lawyer shall not make an extrajudicial statement..." The MRPC's limitation of the prohibition to a lawyer who has participated in the investigation or litigation of a matter may be prompted by constitutional free speech concerns. *IMO Hinds*, 90 N.J. 604 (1986), involved a disciplinary proceeding against an attorney for making out-of-court statements that publicly criticized a trial judge's conduct of an on-going criminal trial. The predecessor rule to RPC

3.6 prohibited a lawyer "associated" with a criminal matter from making an extrajudicial statement that was reasonably likely to interfere with a fair trial. The *Hinds* opinion states that ordinarily speech restrictions will withstand constitutional scrutiny only if they are limited to prohibition of speech that creates a clear and present danger. The clear and present danger formulation, however, is not constitutionally compelled when the subject of the restriction is the extrajudicial speech of attorneys participating in criminal trials. The prohibition of DR 7-107(D) (the predecessor rule to RPC 3.6) does not apply unless the speech is made by an attorney "associated with" the criminal trial. This Commission favors the limitation of RPC 3.6's speech restrictions to a lawyer who is associated with a matter because of the concerns expressed in *Hinds*.

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

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

RPC 3.9 - Advocate in Nonadjudicative Proceedings. The only textual change to MRPC 3.9 is the replacement of "legislative or administrative tribunal" with "legislative body or administrative agency." "Tribunal" is defined in proposed RPC 1.0(n) as "a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body

acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter." Our Commission supports the change because it clarifies that RPC 3.9 applies to a lawyer's representation of a client in only nonadjudicative proceedings of a legislative body or administrative agency.

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

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

RPC 4.4 - Respect for Rights of Third Persons. RPC 4.4 addresses respect for the rights of third persons. The ABA Commission proposes a new subparagraph (b), which obligates a lawyer who receives a document that was sent inadvertently to promptly notify the sender. Our Commission is in favor of the proposal and also recommends

extending the rule to obligate the recipient to stop reading the document on ascertaining that the document was inadvertently sent and to return the document to the sender.

RPC 5.1 - Responsibilities of Partners, Supervisory Lawyers and Law Firms. Our Commission recommends amending the title of RPC 5.1 to reflect that its coverage extends beyond the individual lawyer and further amending RPC 5.1(a) to include lawyers who practice in a corporate legal department. Otherwise, the Commission supports the retention of our RPC.

RPC 5.2 - Responsibilities of a Subordinate Lawyer (same). MRPC 5.2 and RPC 5.2 are identical. The ABA Commission and our Commission recommend no changes to MRPC 5.2 and RPC 5.2 respectively.

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

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

RPC 5.5 - Unauthorized Practice of Law. Over the course of the Commission's discussion on multijurisdictional practice, the Commission concluded that the national trend is towards multijurisdictional practice and it is difficult,

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

Paragraph (a) of proposed RPC 5.5 prohibits a lawyer from practicing law in a jurisdiction when the lawyer is not authorized to do so or from assisting another in doing so. This paragraph is substantively unchanged from existing RPC 5.5.

Paragraph (b) of proposed RPC 5.5 prohibits a lawyer who is not admitted to practice here from: 1) establishing an office or other systematic and continuous presence in this jurisdiction for the practice of law except as authorized by law or 2) holding out to the public that the lawyer is admitted to practice here.

Proposed paragraph (c) broadly accommodates four sets of circumstances under which a lawyer who is not admitted here but is admitted and is in good standing in another state jurisdiction may provide legal services in New Jersey.

Proposed RPC 5.5(c)(1) permits an out-of-state attorney to render legal services temporarily in association with a New Jersey attorney who actively participates in the matter.

Proposed RPC 5.5(c)(2) permits an out-of-state attorney to provide legal services if the services are reasonably related to pending litigation here and the lawyer or the person that the lawyer is assisting is admitted pro hac vice or reasonably expects to be so admitted. The provision authorizes the kind of investigatory and discovery activity that often accompanies litigation in which a lawyer is admitted pro hac vice.

Proposed RPC 5.5(c)(3) permits an out-of-State lawyer to provide legal services temporarily in connection with an arbitration, mediation, or other alternative dispute resolution proceeding here or in another jurisdiction if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission.

Proposed RPC 5.5(c)(4) permits an out-of-State lawyer to provide legal services if the services arise out or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and the practice here is no more than occasional. Our Commission believes that the level of service permissible under this provision should be significantly lower than under the three other provisions of paragraph (c). The rationale is that it is easier to keep track of the ethical behavior of a lawyer who is working in association with a New Jersey-admitted attorney or whose work has some direct connection to a formal adjudicative proceeding.

Nonetheless, lawyers who are not admitted here still should have limited opportunity to provide advice or engage in transactional services in New Jersey without undertaking all of the formal responsibilities and obligations of a lawyer who is admitted in this jurisdiction. The Commission also believes that if the lawyer provides such services on a recurring basis or for an extended period of time as when the lawyer is representing a client in a single lengthy negotiation, such services are not occasional and do not fall within proposed RPC 5.5(c)(4).

Paragraph (d)(1) permits a lawyer who is employed by a client to provide services to the client or its organizational affiliates. It does not authorize the provision of personal legal services to the employer's officers and employees. The paragraph applies to in-house corporate lawyers and others who are employed to render legal services to their employers.

The Bona Fide Office Rule. In pertinent part, paragraph (a) of Rule 1:21-1 provides:

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

in paragraph (d) of this Rule, maintains a bona fide office for the practice of law in this State regardless of where the attorney is domiciled.... An attorney who practices law in this State and fails to maintain a bona fide office in this State shall be deemed to be in violation of RPC 5.5(a). An attorney who is not domiciled in this State, but who meets all the qualifications for the practice of law set forth herein must designate the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto, in the event that service cannot otherwise be effectuated pursuant to the appropriate Rules of Court....

The Commission opposes an in-State bona fide office requirement. The Commission also believes that a lawyer who holds a plenary license to practice in this State and is otherwise qualified to practice in New Jersey should be required to have a bona fide office in this State or in another state. The lawyer should be required to fully inform prospective clients of: 1) how, when, and where the lawyer is accessible to the client, and 2) where files are kept. One member of the Commission proposed that a lawyer be required to inform a client of the foregoing in writing, perhaps in the retainer agreement.

If the Court adopts the Commission's recommendations for RPC 5.5, Rule 1:21-1 also should be modified to reflect the RPC 5.5

circumstances under which an attorney who does not hold a plenary license here is permitted to practice.

The proposed Rule 1:21-1 would provide:

Except as provided below or in RPC 5.5(c) or (d), no person shall practice law in this State unless that person is an attorney holding a plenary license to practice in this State, has complied with the Rule 1:26 skills and methods course requirement in effect on the date of the attorney's admission, is in good standing, and, except as provided in paragraph (d) of this Rule, maintains a bona fide office for the practice of law in this State or another state regardless of where the attorney is domiciled.... An attorney who practices law in this State and fails to maintain a bona fide office in this State or another state shall be deemed to be in violation of RPC 5.5(a) unless the attorney's services fall within RPC 5.5(c) or (d) and the attorney is in compliance with RPC 5.5(e). An attorney who is not domiciled in this State, but who meets all the qualifications for the practice of law set forth herein must designate the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto, in the event that service cannot otherwise be effectuated pursuant to the appropriate Rules of Court....

Admission on Motion. The Commission determined not to recommend any action on the Positan Commission's Recommendation 206G, Admission on Motion, which was approved by the ABA Houses of Delegates in August 2002. The Commission believed that action on the proposal should await the State's experience with multijurisdictional practice under proposed RPCs 5.5 and 8.5 and its experience with the abolition of the in-State bona fide office requirement.

RPC 5.6 - Restrictions on Right to Practice (same). MRPC 5.6 and RPC 5.6 are identical. The ABA Commission and this Commission recommend retention of the MRPC and RPC, respectively.

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

RPC 6.2 - Accepting Appointments, RPC 6.3 - Membership in Legal Services Organization, RPC 6.4 - Law Reform Activities Affecting Client Interests (existing RPCs). Our Commission favors leaving RPC 6.2, RPC 6.3, and RPC 6.4 unchanged. They are virtually identical to the corresponding MRPCs and have worked well in practice.

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

RPC 7.1 - Communications Concerning a Lawyer's Services (existing RPC). The original MRPC 7.1 prohibits:

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

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

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

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

services."

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

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

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

RPC 7.5 - Firm Names and Letterheads (existing RPC). The proposed MRPC 7.5(b) states that a law firm may use the same name or other professional designation" The ABA Commission proposes to add "other professional designation" to the Rule to clarify that the Rule applies to website addresses and other ways of identifying law firms in connection with their use of electronic media.

Following the report of its Committee on Attorney Advertising, our Court adopted a revised and renumbered DR 2-105 in 1984. RPC 7.5 is far more detailed and specific than proposed

MRPC 7.5. Our Commission recommends retention of our present rule.

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

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

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

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

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

solicits a political contribution that constitutes a bribe or other crime.

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

RPC 8.1 - Bar Admission and Disciplinary Matters (same). The ABA Commission recommends no changes to the text of MRPC 8.1. Likewise, the Commission recommends no changes to the identical text of RPC 8.1.

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

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

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

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

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

The Commission's belief that New Jersey practice currently reflects the nationwide trend to multijurisdictional practice underlies the Commission's recommendation to put lawyers who provide or offer to provide legal services in New Jersey under New Jersey's disciplinary authority.

Respectfully submitted,

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