The Supreme Court Commission on the Rules of Professional Conduct

Appointed by the Supreme Court of New Jersey

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Public Hearing

May 21, 2002

IN ATTENDANCE:

Hon. Stewart G. Pollock, Chair
Thomas F. Campion, Jr., Esq., Vice Chair
Professor Michael P. Ambrosio
Keith M. Endo, Counsel to the Commission
Hon. Alan B. Handler
Professor John D. Leubsdorf
De Miller, Jr., Esq.
Hon. Jack M. Sabatino

Opening Remarks by
Justice Stewart G. Pollock

Testimony By
Daniel M. Waldman, President of the State Bar Association
Michael R. Griffinger, former trustee of the New Jersey State Bar Association
Frederick J. Dennehy, Chairman of the Professional Responsibility Committee of the State Bar
Allan H. Gordon, Chancellor of the Philadelphia Bar Association

Justice Pollock:

It is 2:00 p.m. on May 21, the appointed hour for the hearing on the Rules of Professional Conduct. Let me introduce to you, if I may, the members of the Commission who are here. We may be joined by others later. Starting on my far right is Profession Michael Ambrosio from Seton Hall Law School, Justice Alan Handler, De Miller, Thomas Campion who is the Vice Chair of the Commission. On my immediate left is Keith Endo who is the Counsel to the Commission and to his left is Barbara Moore, his assistant.

We have several people who have asked to speak today. What I'd like to do is call on Mr. Waldman because I understand you have a busy schedule. If you'd like to lead off - as I understand it you have some other commitments this afternoon. If you're prepared, come right up to the podium.

Mr. Daniel M. Waldman:

Good afternoon, sorry I walked in, stormed in like that Justice. My name is Danny Waldman. For another day, I'm the President of the State Bar Association. The bar has several individuals speaking before you today on various topics and I'm here to discuss two issues - one, whether the *Clark* prohibition should be extended and two, whether the New Jersey Supreme Court

should retain, modify, or delete the bona fide office rule.

The bona fide office rule, the bona fide office issue is before you today as a result of an inquiry submitted to the Court by the Philadelphia Bar Association in which the Association proposed establishing a New Jersey office that would be utilized by association members licenced in New Jersey but whose offices are in Philly. The New Jersey State Bar Association has repeatedly expressed concerns about this proposal for several reasons - most notably, that the proposal violates the spirit and intent to the bona fide office rule which we believe serves an important purpose.

The intent of the rule as expressed by the Supreme Court in *In Re Kasson* and *In Re Sackman* is to assure competence, accessibility and accountability of lawyers practicing in New Jersey for the benefit of clients, the courts, counsel and parties. Admittedly, whether the rule achieved these intentions was questioned by the Third Circuit in *Tolchin v. The Supreme Court of New Jersey*, but even that Court agreed that the rule at a minimum insured the accessibility of lawyers practicing in New Jersey.

The New Jersey State Bar Association which represents New Jersey lawyers from a divergence of backgrounds and firms urges you to recommend retention of the rule for several practical reasons. Entering the legal profession and holding oneself out to the public as a lawyer with all the requisite fiduciary responsibilities requires a high level of commitment.

The legal profession is not like other businesses where entrepreneurs can set their own hours, place limits on their involvement in the business and operate from various geographic locations. Lawyers do not simply sell products or market services. They act as counselors and confidants, help to make life-altering decisions and provide a shoulder to lean on. They are their clients' advocates and protectors.

As such, lawyers are rightfully held to high fiduciary standards. The requirements of the bona fide office rule recognize this higher level of commitment. The rule reflects the fact that lawyers act in the public interest and as officers of the court.

No one can practice law in New Jersey unless they make a bonafide commitment to their clients that they are, they or a responsible person on their staff will be available to clients,

adversaries and the courts during reasonable times to address emergent issues that arise. This commitment goes beyond just being responsive to clients' needs. It requires a commitment to the entire legal system. That means those practicing law in New Jersey must be reasonably available, not to just to their own clients, but to the courts and their adversaries as well to help maintain public confidence in the system.

Contact by cell phone simply won't cut it. When an individual hires a New Jersey lawyer with a New Jersey address, it is reasonable for that individual to expect that the lawyer or staff can be reached at the New Jersey address and phone number during normal business hours.

The bona fide office rule ensures that the individual's expectation will be met. Without the rule, however, it would be very easy for a lawyer to establish a New Jersey address and phone number simply to attract New Jersey clients. In reality, that address could simply be a maildrop or a rarely used satellite office and the phone number could just be a bounce through to somewhere else - all unbeknownst to the individual hiring the attorney. Unbeknownst that is until the individual needs to sign documents at the attorney's office or wants to meet with the attorney on an emergent basis at an unscheduled time or

a certified mail or fed-ex package requires a signature that can't obtained from an empty office, or an adversary's attorney wants to personally serve the individual's attorney and the individual's attorney can't be located.

Admittedly, with such technological advances as cell phones, pagers, e-mails and the like, people are generally more accessible than ever before. But what does accessibility really mean. I urge you not to underestimate the importance of personal contact in legal matters. It may be true that a Philadelphia attorney may be just as accessible in the broad sense of the term to a south Jersey client as an attorney from central and north Jersey by telephone or electronic connection. By deleting the bona fide office rule however, the doors to New Jersey's legal profession and courts will open not to just Philadelphia or Manhattan attorneys, but to all New Jersey licensed attorneys regardless of where they practice.

Will this really serve the public interest or advance the administration of justice? Although perhaps an extreme example, a New Jersey real estate attorney could conceivably have a closing with an attorney in Pittsburgh who is admitted to practice here. If the attorney in Pittsburgh is representing the buyer, would the seller's attorney have to travel from Jersey to

Pittsburgh for the closing and charge the seller for travel costs as well as the real estate closing fee?

While the elimination of the bona fide office rule may expand the choice of attorneys for some, is that the point? The State Bar Association would hate to see quality and true service sacrificed in favor of a policy based on expanding the roster of available attorneys.

The elimination of the bona fide office rule could have ramifications for solely in-state attorneys as well. Without a requirement that a New Jersey attorney have an office it would become nearly impossible to track certain lawyers. While being reachable by telephone, e-mail or beeper would make the attorney responsive, if an attorney has a vacant office or a home office that is empty during the day, where would overnight packages be delivered or how would personal service be accomplished? How would a judge contact a lawyer if necessary? What impact would this have on the operation of our courts?

By requiring an investment in a New Jersey practice, the rule ensures that the attorney will have more than just an occasional practice in Jersey. Theoretically, this should motivate the attorney to become more familiar with New Jersey

laws, rules and procedures. It should motivate the attorney to join local bar groups and participate in the surrounding community. All of this should boost the confidence of the public in the ability of their attorney to adequately handle a New Jersey matter.

Then, there are the professional responsibility issues that the elimination of the bona fide office rule would raise. Where and how would attorneys without a New Jersey office satisfy their *Madden* pro bono requirements? Wouldn't it be difficult to keep track of attorneys without an actual office when they made occasional appearances in the State? The bona fide rule ensures that attorneys can be held accountable to fulfill their professional obligations to the courts, their clients and the public.

Some have intimated that, in reality, the bona fide office rule is a protectionist measure and serves to limit the availability of legal services in this State. To my knowledge, however, there has been no public outcry that there are not enough lawyers in the State. The Bar Association has not received a single complaint that an individual has not been able to find an attorney to handle his or her matter. We have heard, however, from a number of attorneys unwilling and sometimes

unable to make the investment in an New Jersey office but want the benefit of New Jersey clients. The bona fide office rule should not be changed or eliminated to satisfy the hunger for clients and revenue of a few attorneys at the expense of public confidence in the bar in our State's justice system.

On the extension of *State v. Clark*, as the Commission is aware, the New Jersey Supreme Court held in *State v. Clark* that municipal prosecutors are prohibited from simultaneously serving as defense counsel in Superior Court in the same county in which they serve as municipal prosecutor. The New Jersey State Bar Association appeared in that case as amicus and argued unsuccessfully that there was no reason to impose such a blanket prohibition on municipal prosecutors. It was our position that no conflict of interest or appearance of impropriety results from a municipal prosecutor's practice of criminal law within the county.

The State Bar fully supports the Commission's decision not to recommend that the *Clark* prohibition be extended to cover the members of the municipal prosecutor's law firm. As noted in your report, the Supreme Court has the authority to regulate the conduct of part-time prosecutors through its rule-making authority and they have done so in *Clark*. However, Justice

Coleman's opinion focused on the unusual nature of the municipal prosecutor's role, the position of the municipal prosecutor within the law enforcement community, and the possibility that a dual role, including the representation of defendants in Superior Court, may serve to undermine the impartiality of the municipal prosecutor. These factors apply uniquely to the municipal prosecutor, thus making an extension of the *Clark* prohibition to firm members inappropriate.

It is also unnecessary. The RPCs adequately cover conflicts of interest and the appropriate rules can be applied if need be to address any conflict that may arise in a particular case involving a firm member.

The practical consequences of an extension of *Clark* to firm members would be devastating to municipalities. If all lawyers and firms of municipal prosecutors are barred from criminal defense work in the county, prosecutor positions will be abandoned across the State. The current reservoir of capable lawyers that municipalities draw upon will be emptied to the detriment of the municipalities and the criminal justice system.

I urge the Commission to maintain its stated position on this issue. I thank you so much for making me giving me this

opportunity to go first so that I can attend to other responsibilities.

Justice Pollock: Thank you very much Mr. Waldman. If any member of the Commission cares to pose a question or two would you be willing to receive it?

Mr. Waldman: We have Sharon Valsano here ready to go.

Justice Handler: On the last point, is it the Bar Association's position that they support the *Clark* recommendation of the Commission?

Mr. Waldman: To not extend to the firm?

Justice Handler: Not extended to the firm but apply a prohibition if the firm associate is going to be dealing with a case in the same municipality as the municipal prosecutor or dealing with the same witnesses and so forth.

Mr. Waldman: We accept the initial holding in *State v. Clark* and we would accept the recommendation that the conflict not be

extended to any member of the firm unless there truly is a conflict that surfaces or arises. I don't know if that answers your question.

Justice Handler: It verges on an answer. I think the Commission felt that the *Clark* prohibition shouldn't be extended to associates or partners of the municipal prosecutor, thereby basically freeing the associates to practice within the county with one narrow exception to that. And that is if the associate had a defense matter in the same municipality that the municipal prosecutor practices in....

Mr. Waldman: Exactly.

Justice Handler: Or would have a case dealing with witnesses, material witnesses that the municipal prosecutor may have otherwise been involved in, that narrow exception is acceptable?

Mr. Waldman: Yes, we accept that. Absolutely. Thank you.

Justice Pollock: Any other questions anyone cares to pose? If not, I thank Mr. Waldman. Sharon, I thank you. Since I made my opening comments, two other members of the Commission have joined us, Judge Jack Sabatino and Professor John Leubsdorf. Our next

speaker, at least the one that I recognize is Michael Griffinger. Michael, if you'd care to address the Commission, please proceed. And once again, would you mind if at the conclusion of your remarks, any member of the Commission could pose questions?

Mr. Griffinger: As long as they're softballs, Justice. I hope this is the end of a long road that many of you have trod with me to see the death knell of the appearance of impropriety rule. Not that it is a bad rule but it is, as this Commission has said in its report, one that is vague and has the potential for tactical abuse. I have appeared before a number of you previously - before the Supreme Court, with Professor Ambrosio and others. Tom Campion knows the history of the commissioning of studies of this rule. I think you have come to a wonderful conclusion that this State should not be the lone wolf in the Union that retains this rule because we do have sufficient guidance from the actual conflict rules that exist.

We did a little study even after my prior testimony before the Supreme Court, prior testimony before Justice Clifford's Commission, of more recent cases. I can give you a quick update.

First, we looked at federal cases. I'm happy to report that in virtually every case there was no finding of an appearance of

impropriety alone, separate and apart from an actual conflict of interest, either under RPC 1.7 or 1.9. What does that tell us? It tells us that it is an additive that a court will use from time to time to say that appearance of impropriety also appears in a given situation but that basically a potential breach of client confidentiality or that the substantial relationship between the cases make it clear that there is an actual conflict and so I think it is nice to have that vague fallback if if it were ever used independently and with a body of law that were meaningful, but it hasn't and that's true in the federal cases and in the state cases.

We did an update on the State cases in the last year or two and there are about four recent cases, all of them in the criminal sphere, only one of which does not discuss a breach of an ethical rule separate and apart from the appearance of impropriety. That's the Supreme Court decision in *State v. Loyal,* which is a rather lengthy opinion but basically involved a criminal defendant who was represented by a gentleman who also represented a recanting material witness for the State. After a long analysis of a lot of cases, the interrelationship of representation of a recanting witness and the criminal defendant struck the Court as an impropriety. While they didn't cite to a specific rule, it was clear that the confidences and the

relationship with the recanting witness was the driving force that warranted disqualification in that case. Other than that, every case down the line goes along with an actual conflict having been found if there's going be an invocation of the appearance of impropriety.

We talked about the tactical abuse, I'm happy to see that in your report because that was one of the main thrusts of my presentations in the past. That is what happens in the court room when an attorney feels he or she can utilize the appearance of impropriety standard to make a motion to disqualify in order to throw a roadblock in front of the other side in their pursuit of a result in a piece of litigation by having everybody go off on a tangent and deal with the ancillary issue. That still persists. I think that the appearance of impropriety rule continues to aid and abet that sort of tactic which I hope all you find unnecessary.

Certainly, if there is an actual conflict, then a disqualification motion is appropriate. But if one's going to hang one's hat strictly on the appearance of impropriety that is a very weak hatrack, I suggest, and one that should not be allowed to persist. People are entitled to counsel of their choice, particularly obviously in the criminal arena where we do

not want to run into 6th Amendment issues because of the appearance of impropriety rule.

So, for all those reasons and for the reasons that you concluded, I am happy that Professor Ambrosio who has had numerous views on this subject over the years, supports the abolition of the rule. We, on behalf of New Jersey State Bar and private bar members who were commissioned to assist in this effort, all urge you to stick with your conclusion and make that recommendation a finality. Thank you. Any questions?

Justice Pollock: All right, questions of Mr. Griffinger.

Professor Ambrosio: Just a comment. I have to tell Mr. Griffinger that it was Tom Campion and Justice Handler who really persuaded me on this issue. They deserve all the credit here.

Mr. Griffinger: I don't claim that my advocacy was a force.

Justice Handler: He's not taking cover.

Mr. Griffinger: Thank you very much.

Justice Pollock: Thank you very much. Now Allan Etish who was intending to address multijurisdictional practice could not make it so I told him could submit something in writing to us. Is Mr. Dennehy here?

Mr. Dennehy: Yes.

Justice Pollock: Would you care to come to the podium?

Mr. Dennehy: Yes, thank you. Justice Pollock, Justice Handler, Judge Sabatino and all the members of the Commission. My name is Fred Dennehy. I'm the Chairman of the Professional Responsibility Committee of the State Bar. First, on behalf of the Professional Responsibility Committee, I would like to warmly thank all of you for the job that you did in preparing this preliminary report.

Those of us on the Professional Responsibility Committee who've had an opportunity to go through the rules and the paragraphs and the subparagraphs know that there are more than one hundred subparagraphs and so that you have more than one hundred discrete decisions to make. Also, you had to look at the Ethics 2000 Commission report on the ABA Rules which are in many ways substantially different from New Jersey's. Also that you

have to look at Ethics 2000's more than two hundred comments on those rules, official comments that might not have the force of law but are certainly going to be persuasive when these matters are litigated. So it's not immediately transparent, I think, to anyone who reads the preliminary report how much work was done, but we do want to thank you for all the effort you put into it and for the very, very fine result.

I wanted to make that clear because in giving testimony before the Commission it seemed to be a good idea to focus on the disagreements that the Professional Responsibility Committee does have with the Commission, not only the disagreements but some of the areas that we think might need some clarification? But again, with the vast majority of recommendations that you have made, we are in full and enthusiastic agreement.

First, among many, is with the Commission's desire to abolish the appearance of impropriety rule. Mr. Griffinger has spoken on that. We fully support everything that he said about the difficulties and abuses in the application of the appearance of impropriety.

And in that vein, with respect to RPC 1.7, the Professional Responsibility Committee also applauds what you have done with

(a) and (b), the recognition of the Commission that it is many times advantageous for a client to agree to be represented by a firm that has a potential conflict of interest and that it's up to the client to decide whether to take on that potential conflict of interest or not. I'm glad to see that the old rule that prevented a public entity from making a decision in that respect is now no longer in RPC 1.7(a) and 1.7(b) so a public entity, like any other private client, is free to make that decision if feels that it's good for it and if it's an open and informed decision.

There are certain recommendations of the Commission which our Professional Responsibility thought needed some clarification or minor modification. One of the matters that the Professional Responsibility Committee focused on was a new rule. It's RPC 1.8(l) which says, a lawyer employed as an attorney by public entity 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." So far no problem. Or, "would enable the lawyer to improperly influence the decision of a government agency or public official responsible for a decision in the matter."

Obviously, improper influence of an agency or an official is unethical and in fact criminal conduct.

I think our question is at what point does a lawyer become enabled to improperly influence an official or an agency. Where is that line reached? I think it's a little bit vague and the committee is concerned that 1.8(l) if it's adopted the way it reads now may be a just another version of the banished appearance of impropriety standard kind of sneaking in through another door.

One other matter that the Committee thought needed clarification was the new rule in RPC 1.9. Specifically, RPC 1.9(b)(3) says notwithstanding the other provisions of this subpart (b), consent shall not be sought from the client and screening shall not be permitted in any matter where the attorney had sole or primary responsibility for the matter in the previous firm. And this segues into what the Commission has recommended with respect to RPC 1.10, the imputation rule which, on the whole, we support wholeheartedly.

As I understand the way it's set up, if I'm an attorney at law firm A and I move to law firm B and law firm B has a matter against a client that my old firm law firm A used to represent,

as long as I wasn't solely responsible for that matter or as long as I didn't have primary responsibility for that matter, my firm can go ahead with that case. I can move to the new firm so long as I am screened from participation or from contact with anyone in my new firm who is handling that and as long as the former client is aware of it. I don't need the client's consent in order to do that. That's the new effect of RPC 1.10.

If the client does not consent, however, in 1.9 as I understand it, if the former representation was one in which I did have sole responsibility or I did have primary responsibility, it's not simply that the client has a veto power over my firm continuing to handle that matter or my gravitating to the new firm, it's that I can't even ask consent of that client. It seems to us that if the lawyers involved and all the clients involved are satisfied that this screening is going to be perfectly safe for the old client and if the old client is informed with full disclosure and consents knowingly, then there's no reason to have a faceless, nameless prohibition preventing everybody who agrees from doing what they want to do. So that's one clarification.

I think there are only two recommendations of the Commission with which the Professional Responsibility Committee has a major

concern, what I might say is a philosophical concern. The first one is in RPC 1.6 (b) and (c).

I know 1.6 has always been the most controversial rule whenever bodies have met to decide whether to reformulate the rules of professional conduct and to debate the rules of professional conduct. It seems that the controversy comes about because a lawyer has two duties - the duty of loyalty to his client on the one hand and the duty as an officer of the court to see that justice is done. Those two duties are never fully reconcilable.

I know that one former judge put it this way, a lawyer has only three duties, he has the duty to know everything about his client, he has the duty to keep everything confidential and he has the duty to disclose everything to the court. Now, New Jersey and the rest of the country as you know have balanced these two duties very differently.

The ABA model rule at this time, which is the rule that most states follow allows, an attorney to reveal confidential information only to prevent a client from committing an act that is reasonably likely to result in death or substantial bodily harm to someone. And the key there is that it is discretionary

with the attorney in most states. He does not have to reveal this. He may but he also may not.

In New Jersey as things stand now, a lawyer must reveal information pertinent to a representation to prevent the client from doing something criminal, fraudulent or illegal that may result in death or substantially bodily harm, but also, harm to someone's property, also harm to the financial interest of someone and also may lead to perpetrating a fraud on a tribunal. And again, this is mandatory not discretionary. So in choosing to adopt this rule back in 1984, New Jersey really set itself apart from the other states in the union. It's a distinctly minority position, perhaps the most disclosure-oriented state in the country.

It obligates a lawyer in some cases to do things that are really counterintuitive and difficult to do in disclosing a confidence. Nonetheless, the Professional Responsibility Committee supports the retention of that rule that was adopted in 1984, but we do not support its extension to mandate disclosure to prevent any other person from committing such an act. That's the extension that we're concerned with. RPC 1.6(b) says a lawyer shall reveal such information to the proper authorities as soon as and to the extent the lawyer reasonably believes necessary to

prevent the client or another person from doing a litany of things I mentioned before. The Committee looks at this primarily from the point of view of the practicing lawyer. We say, suppose you have an environmental client who comes to you to see about the legality of emissions or discharge practices that he's considering implementing and you tell him, "No, we've looked at what you want to do and we think it is illegal" and he expresses skepticism. He says, "I don't know why I can't do it because Company XYZ who's five miles down the river has been doing it and they've been doing it for five years." Now under the extension that the Commission is considering, I wonder, first, what do I have to do if I learn that XYZ has been discharging illegally? Do I have to consider whether the information I've gotten from my client is sufficiently reliable and the potential harm to the public from that illegal discharge or emission is sufficiently severe so that I have an obligation to tell the authorities about what I understand to be the practices of Company XYZ, and if I don't, do I face liability if I haven't? I have to ask myself whether I have that obligation even if my own client who told me confidentially about the practices of his friend, Company XYX, definitely doesn't want me to disclose this to anyone and told it to me in confidence. It would appear, the way I read this rule, that that wouldn't make any difference, I'd still have to disclose it. I would ask whether I have the obligation to tell

the authorities about the practices of Company XYZ if Company XYZ happens to be my own client, not in the environmental sense, but it's a client, maybe in a construction contract or something like that. Do I have to blow the whistle on my own client on this?

And then I also wonder, am I privileged under the new recommendation of 1.6 which says that if a lawyer reveals information pursuant to 1.6(b) to the authorities, he also has the discretion to reveal that to somebody who may be affected by that and I wonder, under that new recommendation do I have the discretion to go to all the landowners that are situated around Company XYZ and tell them that they may be in some kind of health danger. Then am I able to go ahead and represent those landowners in a suit against XYZ, particularly where my client didn't want me to disclose things in the first place.

Just one more hypothetical not too far into the realm of paranoia, are we permitted to enter into a settlement agreement in a litigation where a defendant I have alleged is putting a harmful product out to the general public and I've brought a lawsuit on behalf of a number of clients against that defendant, if in the course of negotiations that defendant agrees to a very satisfactory financial settlement for all of my clients, five hundred clients, and they are delighted, they are ecstatic with

the offer, but the defendant insists either on confidentiality or a limited nondisclosure of a certain expert report or certain thing that was found in discovery, do I have to turn down the settlement? Remember, I have alleged in my lawsuit that he is putting out a product that is harmful to the general public, that can work bodily harm on the general public.

So among the questions that this proposed recommendation in 1.6 raises to me is whether I've got to mirandize my own client about the rules of the game, tell him in advance that any information he's going to give me about any third party or entity may be subject to mandatory disclosure by me. Will that prevent my client from presenting the full factual details of the case and will that be a problem for me?

Beyond that, it seems to me to place an enormous burden on an attorney to have to decide if there is a likelihood of bodily harm, injury to financial interest or property or fraud on a tribunal coming from a third person that the attorney doesn't know that much about. Lawyers in private practice are not prosecutors and not policemen and we think they should not be forced to make those decisions, let alone subject to liability if they call it wrong. At the very most, perhaps, a lawyer should

be privileged to disclose such information in certain circumstances but, we feel, not mandated to do so.

Finally, there will be situations in which the interest of one's own client who may be a completely innocent party in all of this is squarely opposed to the disclosure of such information to a third party. A lawyer, we can't forget, is an advocate for his client. He should have the trust of his client and he should not have to choose between deciding whether he's been conscripted as an attorney for the public at large or whether he supports the client who's chosen to place his trust in him.

I only have one other philosophical disagreement to air and this is on a matter that was not specifically recommended by the Commission but it was a matter that the Commission chose not to change. According to the preliminary report, it was a pretty close vote. This is RPC 3.3(a)(5) which says that a lawyer shall not knowingly fail to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be mislead by such failure.

The Professional Responsibility Committee last year in its own response to Ethics 2000 recommended the elimination of that subparagraph of the rule which I think is unique or is close to

unique to New Jersey. And it means that even if there's been no false testimony offered by the client or no representation by the lawyer, it seems to me that an attorney is under the obligation to clarify a situation for the tribunal if he believes that the tribunal may be acting under a mistaken impression. The lawyer, in other words, is bound to volunteer facts that will hurt his or her client's cause. He may have to take both sides of the debate.

The hypothetical that comes up to me at 2:00 in the morning is I'm defending somebody on a drunk driving charge and it's his fourth offense he's told me as his attorney. We go through the trial and that attorney is found guilty and it comes time for the municipal court judge to sentence him and the municipal court judge has a very busy schedule and he's shuffling through his papers and he's looking at something that appears to be the abstract of driving and he says, "All right Mr. Smith I sentence you to six months without a license" which I believe is the sentence for a first offense. He hasn't asked me, "Counsel is this your client's first offense?" He hasn't asked my client, "Client, is that your first offense?" He's assuming it. Do I have the obligation to say, "I'm sorry, judge. You're sentencing my client to six months but this is his fourth offense. He

should be sentenced to a loss of license for ten years or whatever it is."

I think the rule and believe me I understand the reasons both for the Commission's views on 1.6(b) and on this rule because I understand the good that it can serve but it forces an attorney into almost a schizophrenic position-playing the role of both the advocate for his own client and and the watchdog for the tribunal and maybe even for his adversary who has neglected to bring something up. An attorney who prepares his case is bound to learn to learn facts that are going to hurt his client's cause. Is the attorney obliged to disclose those facts in the course of litigation even if he's not requested to by the opposing counsel? Again, does he have the duty to mirandize his own client?

It seems to me that if he does, the rule may encourage a client to withhold harmful information right from the getgo and an attorney who does not know the complete truth from his own client is less likely to be able to protect his own client and also less likely to assist the court in preventing perjury. Again, I note that the Commission examined the potential removal of this subparagraph and it was narrowly defeated. Nevertheless, the Professional Responsibility urges the Commission to

reconsider that point. It seems simply too far afield from our notion of advocacy to be retained. Those are all the comments I have.

Justice Pollock: Thank you for your penetrating questions and hypotheticals. Are there questions from the members of the panel? Judge Sabatino.

Judge Sabatino: I have a few questions I wanted to ask you on specifics, the very last one about 3.3(a)(5).

Mr. Dennehy: Yes.

Judge Sabatino: There was some discussion on the Commission about eliminating that but revising the earlier part of 3.3 to make it a violation not only to lie to a tribunal but also to make misleading statements - from an intermediate position to deal with half-truths. If we took your drunk driving hypothetical for example. If the judge asked the defense lawyer are there any prior violations and the response was, "Well, judge you have the one shown on the abstract," but not volunteer the remainder of the information, would you be able to live with a rule that would proscribe misleading statements but not require affirmative disclosures in situations of silence?

Mr. Dennehy: More than able to live with it Judge, I would support that. I would support completely, prohibitions on misleading statements by the attorney.

Judge Sabatino: The other thing that I wanted to ask you about was when you talked about public entities having the right to consent to conflicts, you used the phrase you'd be satisfied provided that it would be an open and informed decision by the client. I was curious what you meant by the word "open" with regard to a public entity waiving a conflict.

Mr. Dennehy: I may be going a little bit beyond what the Professional Responsibility Committee has decided on this point. I certainly mean that it should be an informed decision, there's no doubt about that by the public entity. I would personally be in favor of it being an open decision, that the public entity represents a whole body of individuals. In many cases, it's the right thing to do, the strategic thing to do, the intelligent thing to do, to accept the potential conflict but it ought to be out there on the table. It will be there for the constituents to understand.

Judge Sabatino: What if the disclosure of their reasons for waiving the conflict would put them at some litigation

disadvantage or some disadvantage in the transaction.

Mr. Dennehy: I certainly don't think they would have to do that but I think what they're doing should be available to their constituents and again that's my position alone.

Judge Sabatino: And the last one I wanted to ask you about on 1.6 with regard to revealing confidences over concern a third party might do something evil.

Mr. Dennehy: Yes.

Judge Sabatino: In that situation, if a client were under threat or pressure from that third party and was afraid to go public and told the lawyer the information in confidence and said, "But please don't tell anyone because I'm afraid this person is going to retaliate against me," would the lawyer have the discretion, given the nature of the prospective harm, would the lawyer still have the discretion to override his or her client if the lawyer thought the public good would be served by the disclosure even against the will of the client?

Mr. Dennehy: As I read the Commission's recommended RPC 1.6, I don't believe he would have the discretion to do that. I did

suggest in my presentation that there there might be a rule allowing an attorney the discretionary ability under certain circumstances to make these disclosures and I think the hypothetical, Judge that you presented, would be one such.

Judge Sabatino: Thank you.

Justice Pollock: Mr. Campion.

Mr. Campion: There are two points I would like discuss with you Fred. First, in your discussion of 1.8, you were talking about written consent to settlements in cases where there were class actions or multiple parties. You indicated that there would be certain impracticalities in getting written consent.

Mr. Dennehy: That's in 1.6.

Mr. Campion: We have it in 1.8. Well, be that as it may, so that I make sure that I do understand your position, it occurred to me that there would not be an ultimate problem with class actions since there would be court approval and so whether you have the approval of all members of the class beforehand or not, it would become moot. But with respect to the multiple-party situation, I would think that prudence would demand that since

you're going get their consent, at least in the spoken form to whatever the massive settlement was, the group settlement was, that, in one form or another, these people would commit to writing and if there became a problem with an errant plaintiff, that you can find some way to bring that matter to the attention of the court. So that was my conclusion as to that now.

On the other point you raised about screening and the attorney who had sole or primary responsibility switching firms, that point was discussed at length in several meetings of the Committee. We saw that if we bought into screening, that we needed to have certain additional protections that we put in, one of them being appropriate written consents on certain occasions. It appeared to us, and this is now from all places on the spectrum, that if the attorney for the plaintiff or the attorney leading the transaction for one party actually goes to the other firm, that that would simply be too much. We were interested, many of us, in screening to make sure that younger lawyers were protected so that if they were with a large firm and tried to go with somebody else, they didn't have this thing hanging around their neck. But we thought if the main man or woman switches sides, that that simply wouldn't do. And so that's how we came up with that particular position. It was not idly reached.

Justice Pollock: Professor Ambrosio

Professor Ambrosio: Your concern, Fred, with the scope of 1.6(b) emanates from the notion that the lawyer may have to make a judgment in the face of knowledge of potential harm by a person other than the client, but why would you not want to emphasize the notion that it's only to the extent the lawyer reasonably believes is necessary to prevent the future harm. What little harm comes from the client's actions or the actions of a third party, do you really want a lawyer to stand silent in the face of impending threat to life, bodily integrity or financial ruination in the face of conduct that says to the extent the lawyer reasonably believes and of course, the lawyer can investigate and find foundations in fact for the belief, but it's the position of your Committee that lawyers can remain silent in the face of substantial information which will cause substantial harm?

Mr. Dennehy: Where there is substantial believable information that would likely cause substantial harm to members or people, that's where I personally feel and I'm not sure here whether I'm representing the Committee, that a rule allowing disclosure of the actions of third party, but making it discretionary with the attorney to take care of precisely those situations that you're hypothesizing now. But there are so many cases in which the line

is so close that it really puts an enormous burden on the attorney to decide if he has to disclose it - we feel.

Professor Ambrosio: Do do you see the possibility here that the lawyer in dealing with the client or with a third person need not make a disclosure to proper authorities but can actually get the conduct to stop by indicating the obligation to do so. So, just like with a client, you don't have to necessarily report them for their wrongdoing. You can say look, "I have an obligation to report you if you continue this conduct, stop doing it." You say to the plant down the road, "I'm a lawyer, I have a public responsibility not to remain silent in the face of serious wrongdoing with consequences to the public and to individuals, stop doing it otherwise it triggers my rule" and wouldn't that serve the public interest in a substantial way?

Mr. Dennehy: I could see how it could serve the public interest in a substantial way but I think it would serve the public interest in just as substantial a way if there were sufficient circumstances to warrant that kind of action by the attorney if he said, "I have the discretion under the rules to do this and I'm going to exercise that discretion if you continue to behave in this fashion."

Professor Ambrosio: What if I told you that most people who have the discretion feel it's easier not to exercise it?

Mr. Dennehy: Well, I think that's one case in which we have to rely on the high-mindedness of our attorneys.

Professor Ambrosio: I trust you Fred but I'm not too sure I trust a lot of other people.

Justice Pollock: Professor Leubsdorf, I think you have a question.

Professor Leubsdorf: Right, I'm talking about proposed 1.8(l).

Mr. Dennehy: Yes.

Professor Leubsdorf: You were in a sense right on target when you suggested that it's the appearance of impropriety. The idea behind it, at least my idea behind it, was that in removing the appearance of impropriety rule, we have a substantial body of law - mainly ethics opinions that that deal with municipal and other local government lawyers - which has been based on that and that although we don't like appearance of impropriety, don't want to sweep away that whole body of law so this provision was meant as

a sort of hook on which that existing law could be placed. So the question really is, and you may not be able to answer it you know on the spot but, if you can think of some other way of accomplishing that in other language than the language you've used, at least I would be glad to consider that.

Mr. Dennehy: Yeah, I think that the Committee was not opposed to the direction that 1.8(l) was heading. It was just in its current version it seem to have the problems that the old appearance of impropriety had of vagueness, difficulty of application, but I'll work on it.

Justice Pollock: It also has a difficulty of a split infinitive. Any other questions or comments? Well let me thank you for your very thoughtful presentation and response to the questions posed by the members of the Commission. Thank you.

Mr. Dennehy: Thank you for giving me the opportunity.

Justice Pollock: You better find a chair. Chief Justice, thank you for joining us. Our next speaker or our next person that asked to be recognized is Mr. Allan Gordon. Is he here yet?

Mr. Gordon: Yes.

Justice Pollock: Mr. Gordon, welcome.

Mr. Gordon: Thank you Justice. Members of the Commission, I'm Allan Gordon, I am the Chancellor of the Philadelphia Bar Association. First, let me thank you for your courtesy in allowing me to appear before you today. I consider it a privilege. I am delighted to be here and will be happy to answer any questions that you may have. I know that you have a busy schedule so I will try to keep this brief, I think it is a really solitary issues. It does not take nearly the philosophical thought that was just presented.

As you know, for years, the Philadelphia Bar Association has stood in opposition to the New Jersey bona fide office rule. Let me explain our position, what we have proposed and what brings us here today. We originally opposed the rule in toto when the 3rd Circuit came down in the *Tolchin* case and said that there was a justifiable reason and rationale for the rule. We, of course, have to accept that position and so in an effort to provide for lawyers who are members of the New Jersey State Bar, lawyers who have taken your bar exam, lawyers who have complied with each and every one of your rules for continuing legal education and postgraduate study, who want to practice law in New Jersey but for economic reasons or whatever other reasons they may have, do

not see either the necessity or the desire to establish what your Court has identified as the criteria for a bona fide office in New Jersey.

My understanding was that there were three reasons that were argued by the State for the rationale for the rule. Reason number one was to assure competency of counsel in New Jersey and certainly we agree that that is a valid reason and the State of New Jersey, the courts of New Jersey have a right to be concerned.

The second reason was to assure that the lawyers who practice in New Jersey would be responsible and under the jurisdiction of your disciplinary rules and of your courts. We agree with that.

And the third reason and the only reason that the 3rd Circuit said was a valid reason was accessibility of the lawyer to the client. I respectfully submit to this Commission that in the year 2002, accessibility is not an issue. We are probably more accessible, perhaps too accessible to our clients today is one of the major complaints of lawyers that I hear as Chancellor of the Bar Association. You can't escape between cell phones, e-mails, faxes, telephones. Let's face it; we practice in a world

that doesn't require the lawyer to be down the street from the client. Most of our days as lawyers is spent not seeing a client face-to-face.

I practice in Philadelphia. I am not one of the lawyers who would benefit if the Supreme Court of New Jersey decided to abrogate the rule. I do not practice in New Jersey, I don't have a license to practice in New Jersey and have no intention of getting one at my age but it seems to me that I was able to get down here today, your Honor, a lot quicker than some of our brethren from north Jersey or central Jersey were able to get here.

There are thousands if not tens of thousands of New Jersey residents who work in Philadelphia, who work in New York. They should have the right of counsel of their choosing and not be limited by what I respectfully call an archaic rule, an archaic rule that says you have to have a box where you sit, where your file sits and that determines whether or not you are accessible to the client and whether or not you should have the right after passing the New Jersey bar examination, after complying with all the requirements to practice law in New Jersey.

Now we initially had presented a proposition that we thought

was an in between position. We said how about if the Philadelphia Bar Association rented space and we would provide that space to lawyers who are members of our association and who are also licensed to practice in New Jersey who want to become tenants in that space. We presented through our New Jersey counsel very specific, at least we thought, specific proposals as to how that would operate. The response that we got was it's good but not good enough, that while we don't see how in any way it violates the bona fide office rule, we still have problems with it because of conflict of interest, confidentiality, etc.

I am not here to withdraw that request formally, but I will tell you informally, I would hope that request never has to be met. I would hope that this Commission would see fit to recommend to the Supreme Court and that the Supreme Court would see fit to abrogate the rule.

I just believe down right here there is no reason for this rule anymore. It is protectionist. I don't say that in a disparaging way but that's all that it is. It is not benefitting the citizens of the State of New Jersey and I think that it is prejudicing lawyers who are members of your State licensed to practice in your State and should be allowed to practice in your State. And, I'll be happy to answer any questions.

Justice Pollock: Mr. Campion.

Mr. Campion: Mr. Gordon, when the President of the State Bar spoke, he was the first speaker today, one the points he raised was that New Jersey has a requirement for all lawyers who practice in this State to undergo certain pro bono work. Letters will arrive, you're appointed to represent John Smith in a municipal court matter in such and such a town. Now if the proposition that you advance, that is people remain in Philadelphia or wherever it may be, how is it or how would you propose that this obligation to take these assignments can somehow be effected. What would be the procedure that you would put in place?

Mr. Gordon: I believe that any lawyer who wants to practice in the State of New Jersey, who's licensed to practice and wants to practice in the State of New Jersey and who can't practice only because of this bona fide office rule should be subject to all of the rules and all of the requirements of every other lawyer in the State of New Jersey.

Mr. Campion: Well, I don't believe there's any registration as such for this program. You're simply known to be an attorney in the county and from time to time these letters arrive. Would you

suggest that there be some registration procedure for members of the Pennsylvania and New York Bar.

Mr. Gordon: If there is mandatory pro bono, I believe that these lawyers should also be required to take part in mandatory pro bono.

Mr. Campion: Thanks.

Justice Pollock: Any further questions of Mr. Gordon? Mr. Gordon, thank you. I hope you stay and enjoy the rest of the meeting. Is Dorothy Mataras here? Ms. Mataras submitted a letter to us indicating she would be here. Apparently, she is not. We will consider her letter and the supporting documents even in her absence. I think that completes the list of people who had indicated an interest in speaking in accordance with the notice that was sent out. So, unless the members of the Commission have any further comments, I think we've discharged our purpose and I thank you all for coming.