

**DISCIPLINARY RULES**  
In Effect Through 12/31/97

**CANON ONE**

**A LAWYER SHOULD ASSIST IN MAINTAINING THE  
INTEGRITY AND COMPETENCE OF THE LEGAL PROFESSION.**

**DR 1-101 Maintaining Integrity and Competence of the Legal Profession.**

- (A) A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with his application for admission to the bar.
- (B) A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute.

**DR 1-102 Misconduct.**

- (A) A lawyer shall not:
  - (1) Violate a Disciplinary Rule.
  - (2) Circumvent a Disciplinary Rule through actions of another.
  - (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
  - (5) Engage in conduct that is prejudicial to the administration of justice.
  - (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

**DR 1-103 Disclosure of Information to Authorities.**

- (B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers of judges.

## CANON TWO

### A LAWYER SHOULD ASSIST THE LEGAL PROFESSION IN FULFILLING ITS DUTY TO MAKE LEGAL COUNSEL AVAILABLE.

#### **DR 2-101 Publicity and Advertising.**

- (A) A lawyer shall not, on behalf of himself, his partner or associate, or any other lawyer affiliated with him or his firm, knowingly use or participate in the use of any form of public communication containing a deceptive statement or claim.
- (B) Any public communication for the purpose of publicity or advertising shall contain the name of the lawyer, law firm, law partnership, professional corporation, or group of lawyers responsible for the communication.

#### **DR 2-102 Professional Notice, Letterheads, Offices and Law Lists.**

- (A) A lawyer or law firm shall not knowingly use or participate in the use of a professional card, professional announcement card, office sign, letterhead, telephone directory listing, law lists, legal directory listing, or a similar professional notice or device which includes a deceptive statement or claim.

#### **DR 2-103 Solicitation of Professional Employment.**

- (A) In soliciting professional employment, a lawyer shall not coerce or harass a prospective client and shall not make a deceptive statement or claim.
- (B) A lawyer shall not solicit professional employment if:
  - (1) The lawyer knows or reasonably should know that the physical, mental, or emotional state of the prospective client is such that there is a substantial potential that the person cannot exercise reasonable judgment in employing a lawyer, provided, however, that this prohibition shall not apply to solicitation, not for a fee; or
  - (2) The prospective client has made known to the lawyer a desire not to be solicited.
- (C) A lawyer shall not solicit professional employment for a fee from a prospective client by written communication, audio or video cassette, or other electronic materials, directed to such prospective client unless:

- (1) each such communication is clearly labeled "advertising" on its face and on any envelope or container; and
  - (2) The lawyer retains a copy of such communication for two years.
- (D) A lawyer shall not solicit professional employment for a fee from a prospective client in person or by personal communication by telephone, electronic device, or otherwise.
- (E) A lawyer shall not pay any person or organization to solicit professional employment for the lawyer from a prospective client. However, this disciplinary rule does not prohibit a lawyer or a partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm from requesting referrals from a lawyer referral service operated, sponsored, or approved by a bar association or from cooperating with any other qualified legal assistance organization.

#### **DR 2-105**

- (A) Lawyers may hold themselves out publicly as specialists in particular services, fields, and areas of law if the holding out does not include a deceptive statement or claim. Such holding out includes (1) a statement that the lawyer concentrates in, specializes in, is certified in, has expertise in, or limits practice to a particular service, field, or area of law, (2) directory listings by particular service, field, or area of law, and (3) any other association of the lawyer's name with a particular service, field, or area of law.
- (B) Lawyers who hold themselves out as "certified" in a particular service, field, or area of law must name the certifying organization and must state that the certifying organization is "a private organization, whose standards for certification are not regulated by the Commonwealth of Massachusetts," if that is the case, or, if the certifying organization is a governmental body, must name the governmental body.
- (C) Except as provided in this subparagraph, lawyers who associate their names with a particular service, field, or area of law imply an expertise and shall be held to the standard of performance of specialists in that particular service, field, or area. Lawyers may limit responsibility with respect to a particular service, field, or area of law to the standard of an ordinary lawyer by holding themselves out in a fashion that does not imply expertise, such as by advertising that they "handle" or "welcome" cases, "but are not specialists in" a specific service, field, or area of law.

**DR 2-106 Fees for Legal Services.**

- (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
- (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence, experienced in the area of the law involved, would be left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
  - (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
  - (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
  - (3) The fee customarily charged in the locality for similar legal services.
  - (4) The amount involved and the results obtained.
  - (5) The time limitations imposed by the client or by the circumstances.
  - (6) The nature and length of the professional relationship with the client.
  - (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
  - (8) Whether the fee is fixed or contingent.
- (C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee, except as permitted by Supreme Judicial Court Rule 3:05.

**DR 2-107 Division of Fees Among Lawyers.**

- (A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:
  - (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
  - (3) The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client.

- (B) This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

**DR 2-108 Agreements Restricting the Practice of a Lawyer.**

- (A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.
- (B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.

**DR 2-109 Acceptance of Employment.**

- (A) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to:
  - (1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person.
  - (2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

**DR 2-110 Withdrawal from Employment.**

- (A) In general.
  - (1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.
  - (2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

- (3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.
- (4) An attorney must make available to a former client, within a reasonable time following the client's request for his or her file, the following:
  - (a) All papers, documents, and other materials the client supplied to the attorney. The attorney may at his or her own expense retain copies of any such materials.
  - (b) All pleadings and other papers filed with or by the court or served by or upon any party. The client may be required to pay any copying charge consistent with the attorney's actual cost for these materials, unless the client has already paid for such materials.
  - (c) All investigatory or discovery documents for which the client has paid the attorney's out-of-pocket costs, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence. The attorney may at his or her own expense retain copies of any such materials.
  - (d) If the attorney and the client have not entered into a contingent fee agreement, the client is entitled only to that portion of the attorney's work product (as defined in paragraph (f) below) for which the client has paid.
  - (e) If the attorney and the client have entered into a contingent fee agreement, the attorney must provide copies of the attorney's work product (as defined in paragraph (f) below). The client may be required to pay any copying charge consistent with the attorney's actual cost for the copying of these materials.
  - (f) For purposes of this Disciplinary Rule, work product shall consist of documents and tangible things prepared in the course of the representation of the client by the attorney or at the attorney's direction by his or her employee, agent, or consultant, and not described in paragraphs (b) or (c) above. Examples of work product include without limitation legal research, records of witness interviews, reports of negotiations, and correspondence.
  - (g) Notwithstanding anything in this Disciplinary Rule to the contrary, an attorney may not refuse, on grounds

of nonpayment, to make available materials in the client's file when retention would prejudice the client unfairly.

(B) Mandatory Withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

- (1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.
- (2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.
- (3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.
- (4) He is discharged by his client.

(C) Permissive Withdrawal.

If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

- (1) His client:
  - (a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.
  - (b) Personally seeks to pursue an illegal course of conduct.
  - (c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.
  - (d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.
  - (e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the

judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

- (f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.
- (2) His continued employment is likely to result in a violation of a Disciplinary Rule.
- (3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.
- (4) His mental or physical condition renders it difficult for him to carry out the employment effectively.
- (5) His client knowingly and freely assents to termination of his employment.
- (6) He believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

### **CANON THREE**

#### **A LAWYER SHOULD ASSIST IN PREVENTING THE UNAUTHORIZED PRACTICE OF LAW.**

##### **DR 3-101 Aiding Unauthorized Practice of Law.**

- (A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.
- (B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

##### **DR 3-102 Dividing Legal Fees with a Non-Lawyer.**

- (A) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:
  - (1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.
  - (2) A lawyer who undertakes to complete unfinished legal business of deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation

which fairly represents the services rendered by the deceased lawyer.

- (3) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

**DR 3-103 Forming a Partnership with a Non-Lawyer.**

- (A) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

**CANON FOUR**

**A LAWYER SHOULD PRESERVE THE  
CONFIDENCES AND SECRETS OF A CLIENT.**

**DR 4-101 Preservation of Confidences and Secrets of a Client.**

- (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
- (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
  - (1) Reveal a confidence or secret of his client.
  - (2) Use a confidence or secret of his client to the disadvantage of the client.
  - (3) Use a confidence or secret of his client for the advantage of himself or of a third person unless the client consents after full disclosure.
- (C) A lawyer may reveal:
  - (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
  - (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
  - (3) The intention of his client to commit a crime and the information necessary to prevent the crime.

- (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.
- (D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.
- (E) A lawyer participating in a lawyer assistance program, as hereinafter defined, shall treat the person so assisted as a client for the purposes of this rule. Lawyer assistance means assistance provided to a lawyer, judge, other legal professional, or law student by a lawyer participating in an organized nonprofit effort to provide assistance in the form of (a) counseling as to practice matters (which shall not include counseling a law student in a law school clinical program) or (b) education as to personal health matters, such as the treatment and rehabilitation from a mental, emotional or psychological disorder, alcoholism, substance abuse, or other addiction, or both. A lawyer named in an order of the Supreme Judicial Court or the Board of Bar Overseers concerning the monitoring or terms of probation of another attorney shall treat that other attorney as a client for the purposes of this rule. Any lawyer participating in a lawyer assistance program may, pursuant to the provisions of DR 4-101(D) require a person acting under the lawyer's supervision or control to sign a non-disclosure form approved by the Supreme Judicial Court. Nothing in this paragraph shall require any bar-association sponsored ethics advisory committee, the Office of Bar Counsel, or any other governmental agency advising on questions of professional responsibility to treat persons so assisted as clients for the purposes of this rule.

## **CANON FIVE**

### **A LAWYER SHOULD EXERCISE INDEPENDENT PROFESSIONAL JUDGMENT ON BEHALF OF A CLIENT.**

#### **DR 5-101 Refusing Employment When the Interest of the Lawyer May Impair His Independent Professional Judgment.**

- (A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

- (B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
  - (1) If the testimony will relate solely to an uncontested matter.
  - (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
  - (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
  - (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

**DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.**

- (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).
- (B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

**DR 5-103 Avoiding Acquisition of Interest in Litigation.**

- (A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:
  - (1) Acquire a lien granted by law to secure his fee or expenses.
  - (2) Contract with a client for a reasonable contingent fee in a civil case.

- (B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

**DR 5-104 Limiting Business Relations with a Client.**

- (A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.
- (B) Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

**DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Professional Judgment of the Lawyer.**

- (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
- (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
- (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
- (D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or

associate or any other lawyer affiliated with him or his firm may accept or continue such employment. A lawyer employed by the Public Counsel Division of the Committee for Public Counsel Services and a lawyer assigned to represent clients by the Private Counsel Division of that Committee are not considered to be associated. Lawyers are not considered to be associated merely because they have each individually been assigned to represent clients by the Committee for Public Counsel Services through its Private Counsel Division.

**DR 5-106 Settling Similar Claims of Clients.**

- (A) A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

**DR 5-107 Avoiding Influence by Others Than the Client.**

- (A) Except with the consent of his client after full disclosure, a lawyer shall not:
  - (1) Accept compensation for his legal services from one other than his client.
  - (2) Accept from one other than his client anything of value related to his representation of or his employment by his client.
- (B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.
- (C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
  - (1) A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
  - (2) A non-lawyer is a corporate director or officer thereof; or
  - (3) A non-lawyer has the right to direct or control the professional judgment of a lawyer.

**DR 5-108 Drafting Instruments in Which the Lawyer Has an Interest**

- (A) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

**CANON SIX**

**A LAWYER SHOULD REPRESENT A CLIENT COMPETENTLY.**

**DR 6-101 Failing to Act Competently.**

- (A) A lawyer shall not:
- (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.
  - (2) Handle a legal matter without preparation adequate in the circumstances.
  - (3) Neglect a legal matter entrusted to him.

**DR 6-102 Limiting Liability to Client.**

- (A) A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

**CANON SEVEN**

**A LAWYER SHOULD REPRESENT A CLIENT  
ZEALOUSLY WITHIN THE BOUNDS OF THE LAW.**

**DR 7-101 Representing a Client Zealously.**

- (A) A lawyer shall not intentionally:
- (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

- (2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102 and DR 5-105.
  - (3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).
- (B) In his representation of a client, a lawyer may:
- (1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.
  - (2) Refuse to aid or participate in conduct that he believes to be unlawful even though there is some support for an argument that the conduct is legal.

**DR 7-102 Representing a Client Within the Bounds of the Law.**

- (A) In his representation of a client, a lawyer shall not:
- (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
  - (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
  - (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
  - (4) Knowingly use perjured testimony or false evidence.
  - (5) Knowingly make a false statement of law or fact.
  - (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
  - (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
  - (8) Knowingly engage in other illegal conduct contrary to a Disciplinary Rule.
- (B) A lawyer who receives information clearly establishing that:
- (1) His client has, in the course of representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his

client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

- (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

**DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.**

- (A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.
- (B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

**DR 7-104 Communicating with One of Adverse Interest.**

- (A) During the course of his representation of a client, a lawyer shall not:
  - (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
  - (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

**DR 7-105 Threatening Criminal Prosecution.**

- (A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

**DR 7-106 Trial Conduct.**

- (A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the

course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

- (B) In presenting a matter to a tribunal, a lawyer shall disclose:
  - (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.
  - (2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.
- (C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
  - (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
  - (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.
  - (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
  - (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.
  - (5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.
  - (6) Engage in undignified or discourteous conduct which is degrading to a tribunal.
  - (7) Intentionally or habitually violate any established rule of procedure or of evidence.
  - (8) Engage in conduct manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation against a party, witness, counsel or other person. This Disciplinary Rule does not preclude legitimate advocacy when race, sex, national origin, disability, age, or sexual orientation, or another similar factor, is an issue in the proceeding.

**DR 7-107 Trial Publicity.**

- (A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:
  - (1) Information contained in a public record.
  - (2) That the investigation is in progress.
  - (3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
  - (4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
  - (5) A warning to the public of any dangers.
  
- (B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
  - (1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
  - (2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
  - (3) The existence of or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
  - (4) The performance or results of any examination or tests or the refusal or failure of the accused to submit to examinations or tests.
  - (5) The identity, testimony, or credibility of a prospective witness.
  - (6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

- (C) DR 7-107(B) does not preclude a lawyer during such period from announcing:
- (1) The name, age, residence, occupation, and family status of the accused.
  - (2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
  - (3) A request for assistance in obtaining evidence.
  - (4) The identity of a victim of the crime.
  - (5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
  - (6) The identity of investigating and arresting officers or agencies and the length of the investigation.
  - (7) At the time of the seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
  - (8) The nature, substance, or text of the charge.
  - (9) Quotations from or references to public records of the court in the case.
  - (10) The scheduling or result of any step in the judicial proceedings.
  - (11) That the accused denies the charges made against him.
- (D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.
- (E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of a sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

- (F) The foregoing provisions of DR 7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.
- (G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:
  - (1) Evidence regarding the occurrence or transaction involved.
  - (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
  - (3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
  - (4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
  - (5) Any other matter reasonably likely to interfere with a fair trial of the action.
- (H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:
  - (1) Evidence regarding the occurrence or transaction involved.
  - (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
  - (3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
  - (4) His opinion as to the merits of the claims, defenses, or positions of an interested person.
  - (5) Any other matter reasonably likely to interfere with a fair hearing.
- (I) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against

him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

- (J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107.

**DR 7-108 Communication with or Investigation of Jurors.**

- (A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of a venire from which the jury will be selected for the trial of the case.
- (B) During the trial of a case:
  - (1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.
  - (2) A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.
- (C) DR 7-108(A) and (B) do not prohibit a lawyer from communicating with veniremen or jurors in the course of official proceedings.
- (D) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not initiate any communication with a member of the jury without leave of court granted for good cause shown. If a juror initiates a communication with such a lawyer, directly or indirectly, the lawyer may respond provided that the lawyer shall not ask questions of or make comments to a member of that jury that are intended only to harass or embarrass the juror or to influence his actions in future jury service. In no circumstances shall such a lawyer inquire of a juror concerning the jury's deliberation processes.
- (E) A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or juror.
- (F) All restrictions imposed by DR 7-108 upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.

- (G) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge.

**DR 7-109 Contact with Witnesses.**

- (A) A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.
- (B) A lawyer shall not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.
- (C) A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:
  - (1) Expenses reasonably incurred by a witness in attending or testifying.
  - (2) Reasonable compensation to a witness for his loss of time in attending or testifying.
  - (3) A reasonable fee for the professional services of an expert witness.

**DR 7-110 Contact with Officials.**

- (A) A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal except as permitted by Section (C)(4) of Canon 5 of the Code of Judicial Conduct.
- (B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:
  - (1) In the course of official proceedings in the cause.
  - (2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.
  - (3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.
  - (4) As otherwise authorized by law.

## **CANON EIGHT**

### **A LAWYER SHOULD ASSIST IN IMPROVING THE LEGAL SYSTEM.**

#### **DR 8-101 Action as a Public Official.**

- (A) A lawyer who holds public office shall not:
  - (1) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.
  - (2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.
  - (3) Accept any thing of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.

#### **DR 8-102 Statements Concerning Judges and Other Adjudicatory Officers.**

- (A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.
- (B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

## **CANON NINE**

### **A LAWYER SHOULD AVOID EVEN THE APPEARANCE OF PROFESSIONAL IMPROPRIETY.**

#### **DR 9-101 Avoiding Even the Appearance of Impropriety.**

- (A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.
- (B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.
- (C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

**DR 9-102 Preserving Identity of Funds and Property of a Client.**

- (A) All funds held in trust by a lawyer or law firm, other than advances for costs and expenses, shall be deposited in accounts maintained (i) in the state in which the law office is situated, or (ii) elsewhere with the written consent of the client; provided, however, that all funds required to be deposited in an IOLTA account by section C of this rule must be maintained in this Commonwealth. The accounts shall be clearly identified as "trust accounts," "escrow accounts," "client funds accounts," "conveyancing accounts," or "IOLTA accounts," or with words of similar import indicating the fiduciary nature of the account. Such accounts are referred to herein and in DR 9-103 as "trust accounts." Lawyers or law firms maintaining trust accounts shall take all steps necessary to inform the depository institution of the purpose and identity of such accounts. Funds held in trust include funds held for clients and in any other fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor, or otherwise. Whenever "client" or "clients" is referred to in this Disciplinary Rule, it shall be intended to refer to any person or entity on whose behalf a lawyer or law firm holds funds in trust. Trust accounts in this Commonwealth shall be maintained only in financial institutions that are in accordance with DR 9-103. No funds belonging to the lawyer or law firm shall be deposited in trust accounts except as follows:
- (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
  - (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm must be withdrawn at the earliest reasonable time after the lawyer's or law firm's interest in that portion becomes fixed. If the right of the lawyer or law firm to receive such portion is disputed by the client, the disputed portion shall not be withdrawn until the dispute is resolved.
- (B) A lawyer shall:
- (1) Promptly notify a client of the receipt of his or her funds, securities, or other properties.
  - (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
  - (3) Maintain complete records of the handling, maintenance and disposition of all trust funds, securities and other

properties of a client coming into the possession of the lawyer from the time of receipt to the time of final distribution; preserve such records for a period of six years after final distribution of such trust funds, securities or other properties; and render appropriate accounts to the client regarding them.

- (4) Promptly pay or deliver to a client as requested by or otherwise due the client the trust funds, securities, or other properties in the possession of the lawyer or law firm which the client is entitled to receive.
- (C) Each lawyer who has a law office in this Commonwealth and who holds trust funds shall deposit such funds, as appropriate, in one of two types of interest-bearing accounts: either (i) a pooled account ("IOLTA account") for all trust funds which in the judgment of the lawyer are nominal in amount, or are to be held for a short period of time, or (ii) for all other trust funds, an individual account with the interest payable as directed by the client. The foregoing deposit requirements apply to funds received by attorneys in connection with real estate transactions and loan closings; provided, however, that a trust account in a lending bank in the name of an attorney representing the lending bank and used exclusively for depositing and disbursing funds in connection with that particular bank's loan transactions shall not be required but is permitted to be established as an IOLTA account. All IOLTA accounts shall be established in compliance with the following provisions:
- (1) the IOLTA account shall be established with any bank, savings and loan association, or credit union authorized by Federal or State law to do business in Massachusetts and insured by the Federal Deposit Insurance Corporation or similar State insurance programs for State-chartered institutions. At the direction of the lawyer, funds in the IOLTA account in excess of \$100,000 may be temporarily reinvested in repurchase agreements fully collateralized by U.S. Government obligations. Funds in the IOLTA account shall be subject to withdrawal upon request and without delay.
  - (2) Lawyers or law firms creating and maintaining an IOLTA account shall direct the depository institutions:
    - (a) To remit interest or dividends, net of any service charges or fees, on the average monthly balance in the account, or as otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to a tax-exempt recipient disburser entity (hereinafter "charitable entity") selected by the lawyer

or law firm from among those charitable entities designated by the Supreme Judicial Court, for use in (1) improving the administration of justice or (2) delivering civil legal services to those who cannot afford them.

- (b) To transmit with each remittance to the charitable entity a statement showing the name of the lawyer or law firm which deposited the funds; and
  - (c) At the same time to transmit to the depositing lawyer or law firm, with a copy to the IOLTA Implementation Committee or its designee, a report showing the amount paid to the charitable entity, the rate of interest applied, and the method by which the interest was computed.
- (3) Lawyers shall certify their compliance with this rule as required by 4:02, subsection (2).
- (4) This court shall appoint members of a permanent IOLTA Committee to fixed terms on a staggered basis. The representatives appointed to the Committee shall oversee the implementation of an IOLTA program, including:
- (a) the education of lawyers as to their obligation to create and maintain IOLTA accounts under DR 9-102(C);
  - (b) the encouragement of the banking community and the public to support the IOLTA program;
  - (c) the obtaining of tax rulings and other administrative approval for a comprehensive IOLTA program as appropriate;
  - (d) the preparation of such guidelines and rules, subject to court approval, as may be deemed necessary or advisable for the operation of a comprehensive IOLTA program;
  - (e) establishment of standards for reserve accounts by the recipient charitable entities for the deposit of IOLTA funds which the charitable entity intends to preserve for future use; and
  - (f) reporting to the court in such manner as the court may direct.
- (5) Any charitable entity designated by the Supreme Judicial Court hereunder may engage in attorney recruitment

efforts. All charitable entities, other than Massachusetts Legal Assistance Corporation, shall pay to Massachusetts Legal Assistance Corporation not less than fifty percent (50%) of the IOLTA funds received less expenses properly allocable to such share. Massachusetts Legal Assistance Corporation will retain for its use in the furthering of its corporate purpose all of the IOLTA funds received by it, by direct solicitation and from other charitable entities.

- (6) Each charitable entity shall submit an annual report to the Court describing its IOLTA activities for the year and providing a statement of the source and application of IOLTA funds received pursuant to this rule.

### **DR 9-103. Dishonored Check Notification**

- (A) Agreement to Provide Dishonored Check Reports Required.
  - (1) A lawyer or law firm shall maintain trust accounts (as defined in DR 9-102(A)) only in financial institutions which have filed with the Board of Bar Overseers an agreement, in a form provided by the Board, to report to the Board in the event any properly payable instrument is presented against any trust account that contains insufficient funds, and the financial institution dishonors the instrument for that reason.
  - (2) Any such agreement shall apply to all branches of the financial institution and shall not be cancelled except upon thirty days notice in writing to the Board.
  - (3) The Board shall publish annually a list of financial institutions which have signed agreements to comply with this Disciplinary Rule, and shall establish rules and procedures governing amendments to the list.
- (B) **Dishonored Check Reports.** The dishonored check notification agreement shall provide that all reports made by the financial institution shall be identical to the notice of dishonor customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors. Such reports shall be made simultaneously with the notice of dishonor and within the time provided by law for such notice, if any.
- (C) **Consent by Lawyers.** Every lawyer practicing or admitted to practice in this Commonwealth shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

(D) **Definitions.**

- (1) "*Financial institution*" - includes (i) any bank, savings and loan association, credit union, or savings bank, and (ii) with the written consent of the client, any other business or person which accepts for deposit funds held in trust by lawyers.
- (2) "*Notice of dishonor*" - refers to the notice which a financial institution is required to give, under the laws of this Commonwealth, upon presentation of an instrument which the institution dishonors.
- (3) "*Properly payable*" - refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this Commonwealth.

**DEFINITIONS**

**AS USED IN THE DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY:**

- (1) "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.
- (2) "Law firm" includes a professional legal corporation.
- (3) "Person" includes a corporation, an association, a trust, a partnership, and any other organization or legal entity.
- (4) "Professional legal corporation" means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.
- (5) "State" includes the District of Columbia, Puerto Rico, and other federal territories and possessions.
- (6) "Tribunal" includes all courts and all other adjudicatory bodies.
- (7) "A bar association" includes a bar association of specialists as referred to in DR 2-105(A).
- (8) "Qualified legal assistance organization" means a legal aid, public defender, or military assistance office; a lawyer referral service operated, sponsored, or approved by a bar association; or a bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries, provided the office, service, or organization receives no profit from the

rendition of legal services, is not designed to procure financial benefit or legal work for a lawyer as a private practitioner, does not infringe the individual member's freedom as a client to challenge the approved counsel or to select outside counsel at the client's expense, and is not in violation of any applicable law.

\* "Confidence" and "secret" are defined in DR 4-101(A).

## **STANDARDS RELATING TO THE PROSECUTION FUNCTION**

(as in effect prior to adoption of the Rules of Professional Conduct  
Repealed effective 1/1/98 and 1/1/99)

### **PF 1 Relations with the Courts and the Bar.**

It is unprofessional conduct for a prosecutor intentionally to misrepresent matters of fact or law to the court.

It is unprofessional conduct for a prosecutor to engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before him. It is unprofessional conduct for a prosecutor to engage in unauthorized ex parte discussions with any Chief Justice, presiding judge, assignment judge or person with the power of making assignment of a judge to preside over a criminal hearing, proceeding or trial for the purpose of obtaining or precluding the assignment of any particular judge to preside over a particular criminal matter

### **PF 2 Prompt Disposition of Criminal Charges.**

It is unprofessional conduct intentionally to misrepresent facts or otherwise to mislead the court in order to obtain a continuance.

### **PF 3 Investigative Function of Prosecutor.**

(a) It is unprofessional conduct for a prosecutor knowingly to use illegal means to obtain evidence or information or to employ, instruct, or encourage others to use such means.

(b) A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. It is unprofessional conduct for the prosecutor to advise any person or cause any person to be advised to decline to give to the defense information which he has the right to give. A prosecutor may properly inform such a person that he has no duty to submit to an interview or to answer questions propounded by defense counsel, and may advise him that, if he decides to talk to counsel for the defense and does so, he (except when responding to lawful process) may

impose reasonable conditions, such as those designed to ensure his own safety and the accuracy of any recording of his statements.

(c) It is unprofessional conduct for a prosecutor to secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena or similar judicial process unless he is authorized to do so.

**PF 4 Relations with Prospective Witnesses.**

It is unprofessional conduct to compensate a witness, other than an expert, for giving testimony, but it is not improper to make payments to or for a witness for the reasonable expenses of attendance upon court, including transportation and loss of income, provided there is no attempt to conceal the fact of reimbursement or other proper payments. Payment of expenses for relocation or protection of a witness or his family, where required for the safety of one or more of them, or payment to or for the benefit of such a witness or his family for protection or support in such circumstances, shall not be deemed (unless there is other controlling evidence) compensation for the giving of testimony within the meaning of this rule. It is the intention of this rule, in those cases where the safety of a witness or of the family of a witness is involved, to require no more than revelation of the fact of such reimbursement or payment, and not to require disclosure of the details thereof.

**PF 5 Relations with Expert Witness.**

It is unprofessional conduct for a prosecutor to fix the amount of the fee of an expert witness contingent upon the testimony he will give or the result in the case.

**PF 6 Discretion in the Charging Decision.**

It is unprofessional conduct for a prosecutor to institute or cause to be instituted criminal charges when he knows that the charges are not supported by probable cause.

**PF 7 Disclosure of Evidence by Prosecutor.**

(a) It is unprofessional conduct for a prosecutor to fail to make timely disclosure to the defense of the existence of evidence, known to him, supporting the innocence of the defendant. He should, at the earliest feasible opportunity, disclose evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment.

(b) It is unprofessional conduct for a prosecutor intentionally to avoid pursuit of evidence because he believes it will damage the prosecution's case or aid the accused.

**PF 8 Availability for Plea Discussions.**

(a) It is unprofessional conduct for a prosecutor to engage in plea discussions directly with an accused before the accused has a reasonable opportunity to obtain counsel, or to engage in such discussions with an accused who is represented by counsel except with that counsel's approval. If the accused has elected to proceed without counsel and a form established by Supreme Judicial Court Rule 1:01A or Mass. R. Crim. P. 8 has been duly filed, the prosecutor may properly discuss disposition of the charges directly with the accused. The prosecutor would be well advised, however, to request that a lawyer be designated by the court or some appropriate central agency, such as a legal aid or defender office or bar association, to be present at such discussions.

(b) It is unprofessional conduct for a prosecutor knowingly to make false statements or representations in the course of plea discussions with defense counsel or the accused.

**PF 9 Fulfillment of Plea Discussions.**

It is unprofessional conduct for a prosecutor to make any promise or commitment concerning the sentence which will be imposed or concerning a suspension of sentence. He may properly advise the defense what position he will take concerning disposition.

**PF 10 Relations with Jury.**

It is unprofessional conduct for a prosecutor to communicate privately with persons summoned for jury duty or impaneled as jurors concerning the case prior to or during the trial. The prosecutor should avoid the reality or appearance of any such improper communications.

A juror improperly approached by counsel or any other person should communicate the circumstances to the judge promptly. A prosecutor or a defense lawyer receiving such a report should refer the juror to the judge forthwith.

**PF 11 Opening Statement.**

It is unprofessional conduct for a prosecutor to allude in his opening statement to any evidence unless there is a reasonable basis for believing in good faith that such evidence will be tendered and admitted in evidence.

**PF 12 Presentation of Evidence.**

It is unprofessional conduct for a prosecutor knowingly to offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or to fail to seek withdrawal thereof promptly upon discovery of its falsity.

**PF 13 Argument to Jury.**

(a) The prosecutor may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence.

(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

**PF 14 Facts Outside the Record.**

It is unprofessional conduct for the prosecutor intentionally at trial to refer to or to argue on the basis of facts outside the record. The prosecutor, on appeal, should not refer to or argue on the basis of facts outside the record. Reference may be made at trial or on appeal to matters of common public knowledge based on ordinary human experience and to matters of which the court may take judicial notice.

**PF 15 Subpoena of Defense Attorney.**

It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness

**STANDARDS RELATING TO THE DEFENSE FUNCTION**

(as in effect prior to adoption of the Rules of Professional Conduct  
Repealed effective 1/1/98 and 1/1/99)

**DF 1 Intentional Misrepresentation.**

It is unprofessional conduct for defense counsel intentionally to misrepresent matters of fact or law to the court.

It is unprofessional conduct for defense counsel to engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before him. It is unprofessional conduct for defense counsel to engage in unauthorized ex parte discussions with any Chief Justice, presiding

judge, assignment judge or person with the power of making assignment of a judge to preside over a criminal hearing, proceeding or trial for the purpose of obtaining or precluding the assignment of any particular judge to preside over a particular criminal matter.

**DF 2 Delays: Punctuality.**

It is unprofessional conduct for defense counsel intentionally to misrepresent facts or otherwise to mislead the court in order to obtain a continuance.

**DF 3 Prohibited Referrals.**

It is unprofessional conduct for defense counsel to accept referrals from law enforcement personnel, bondsmen, or court personnel. This provision shall not be construed to forbid acceptance of referrals (1) by such persons through a bar association or bar referral service, or (2) through the Committee for Public Counsel Services pursuant to G.L. c. 211D.

**DF 4 Interviewing the Client.**

It is unprofessional conduct for defense counsel to instruct the client or to intimate to him in any way that he should not be candid in revealing facts with the purpose of affording defense counsel free rein to take action which would be precluded by defense counsel's knowing of such facts.

**DF 5 Fees.**

(a) It is unprofessional conduct for defense counsel to imply that compensation of defense counsel is for anything other than professional services rendered by him or by others for him.

(b) It is unprofessional conduct for defense counsel to enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

**DF 6 Conflict of Interest.**

Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants, or one of several persons under investigation by law enforcement authorities for the same transactions or series of

transactions, including any investigation by a grand jury, except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation. In some instances, as defined in Rule 3:07 of this court, accepting or continuing employment by more than one defendant in the same criminal case will constitute unprofessional conduct.

**DF 7 Advice and Service on Anticipated Unlawful Conduct.**

(a) It is unprofessional conduct for defense counsel to counsel his client in, or knowingly to assist his client to engage in, conduct which defense counsel knows to be illegal or fraudulent.

(b) It is unprofessional conduct for defense counsel to agree in advance of the commission of a crime that he will serve as counsel for a defendant, except as part of a bona fide effort to determine the validity, scope, meaning, or application of the law, or where the defense is incident to a general retainer for legal services to a person or enterprise engaged in legitimate activity.

**DF 8 Illegal Investigation.**

It is unprofessional conduct for defense counsel knowingly to use illegal means to obtain evidence or information or to employ, instruct, or encourage others to do so.

**DF 9 Relations with Prospective Witnesses.**

(a) It is unprofessional conduct for defense counsel to compensate a witness, other than an expert, for giving testimony, but it is not improper to make payments to or for a witness for the reasonable expenses of attendance upon court, including transportation and loss of income, provided there is no attempt to conceal the fact or reimbursement or other proper payments.

(b) Defense counsel should not discourage or obstruct communication between prospective witnesses and the prosecutor. It is unprofessional conduct to advise any person, other than a client, or cause such a person to be advised, to decline to give to the prosecutor or counsel for codefendants information which he has a right to give. Defense counsel may properly inform such a person that he has no duty to submit to an interview or to answer questions propounded by the prosecutor or by such counsel, and may advise him that if he talks with the prosecutor or with counsel for a codefendant, he (except when responding to lawful process) may impose reasonable conditions, such as those designed to ensure his own safety and the accuracy of any recording of his statements.

**DF 10 Conduct of Discussions.**

(a) It is unprofessional conduct for defense counsel to fix the amount of the fee of an expert contingent upon the testimony he will give or the result in the case.

(b) It is unprofessional conduct for defense counsel knowingly to make false statements or representations in the course of plea discussions with the prosecutor.

(c) It is unprofessional conduct for defense counsel to seek or accept concessions favorable to one client by an agreement which is calculated to be detrimental to the legitimate interests of any other client.

**DF 11 Relations with Jury.**

It is unprofessional conduct for defense counsel to communicate privately with persons summoned for jury duty or impaneled as jurors concerning the case prior to or during the trial. Defense counsel should avoid the reality or appearance of any such improper communications. As to the duty of defense counsel to whose attention is brought any improper approach to or by a juror, see PF 10.

**DF 12 Opening Statement.**

It is unprofessional conduct for defense counsel to allude in his opening statement to any evidence unless there is reasonable basis for believing in good faith that such evidence will be tendered and admitted in evidence.

**DF 13 Presentation of Evidence.**

(a) It is unprofessional conduct for defense counsel knowingly to offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or to fail to seek withdrawal thereof promptly upon discovery of its falsity. But this paragraph does not apply to the testimony of a defendant.

(b) Defense counsel who knows that the defendant, his client, intends to testify falsely may not aid his client in constructing his false testimony, and has a duty strongly to discourage the client from testifying falsely, advising him that such a course is unlawful, will have substantial adverse consequences, and should not be followed. If defense counsel discovers this intention before accepting the representation of the client, he should not accept it; if he discovers the intention before trial, he should withdraw from employment, seeking any required permission. An application to withdraw appearance on this ground should be made ex parte to a judge other than the judge

who will preside at the trial and should be heard in camera, and the record of proceeding except for an order granting leave to withdraw should be impounded.

**DF 14 Argument to the Jury.**

(a) In the closing argument to the jury, defense counsel may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for defense counsel intentionally to misstate the evidence.

(b) It is unprofessional conduct for defense counsel to express his personal belief or opinion in his client's innocence or his personal belief or opinion in the truth or falsity of any testimony or evidence, or, unless such an inference is warranted by evidence, to attribute the crime to another person.

**DF 15 Facts Outside the Record.**

It is unprofessional conduct for defense counsel intentionally at trial to refer to or to argue on the basis of facts outside the record. Defense counsel, on appeal, should not refer to or argue on the basis of facts outside the record. Reference may be made at trial or on appeal to matters of common public knowledge based on ordinary human experience and to matters of which the court can take judicial notice.

**S.J.C. RULE 3:05. CONTINGENT FEES**

- (1) In this rule, the term “contingent fee agreement” means an agreement, express or implied, for legal services of an attorney or attorneys (including any associated counsel), under which compensation, contingent in whole or in part upon the successful accomplishment or disposition of the subject matter of the agreement, is to be in an amount which either is fixed or is to be determined under a formula. The term “contingent fee agreement” shall not include an arrangement with a client, express or implied, that the client in any event is to pay to the attorney the reasonable value of his services and his reasonable expenses and disbursements.
- (2) Unless expressly prohibited by this rule, no written contingent fee agreement shall be regarded as champertous if made in an effort in good faith reasonably to comply with this rule.
- (3) No contingent fee agreement shall be made (a) in respect of the procuring of an acquittal upon or any favorable disposition of a criminal charge, (b) in respect of the procuring of a divorce,

annulment of marriage or legal separation or (c) in connection with any proceeding where the method of determination of attorneys' fee is otherwise expressly provided by statute or administrative regulations. Contingent fee arrangements concerning the collection of commercial accounts and of insurance company subrogation claims made in accordance with usual practices in respect of such cases shall not be regarded as champertous, and shall not be subject to paragraphs (4) and (5).

- (4) Each contingent fee agreement shall be in writing in duplicate. Each duplicate copy shall be signed both by the attorney and by each client. One signed duplicate copy shall be mailed or delivered to each client within a reasonable time after the making of the agreement. One such copy (and proof that the duplicate copy has been delivered or mailed to the client) shall be retained by the attorney for a period of three years after the completion or settlement of the litigation or the termination of the services, whichever event first occurs.
- (5) Each contingent fee agreement shall contain (a) the name and mail address of each client; (b) the name and mail address of the attorney or attorneys to be retained; (c) a statement of the nature of the claim, controversy, and other matters with reference to which the services are to be performed; (d) a statement of the contingency upon which compensation is to be paid, and whether and to what extent the client is to be liable to pay compensation otherwise than from amounts collected for him by the attorney; (e) a statement that reasonable contingent compensation is to be paid for such services, which compensation is not to exceed stated maximum percentages of the amount collected; and (f) a stipulation that the client, in any event, is to be liable for expenses and disbursements.

### **S.J.C. RULE 4:01 BAR DISCIPLINE**

#### **Section 3. Grounds for Discipline.**

- (1) Grounds for discipline. Each act or omission by an attorney, individually or in concert with any other person or persons, which violates any of the Canons of Ethics and Disciplinary Rules Regulating the Practice of Law (see Rule 3:07) or any of the Disciplinary Rules Applicable to Practice as a Prosecutor or as a Defense Lawyer (see Rule 3:08), shall constitute misconduct and shall be grounds for appropriate discipline even if the act or omission did not occur in the course of an attorney-client relationship or in connection with proceedings in a court. A violation of this Chapter 4 by an attorney, including without

limitation the failure without good cause to (a) comply with a subpoena validly issued under Section 22 of this Rule 4:01; (b) to respond to requests for information by the Bar Counsel or the Board of Bar Overseers made in the course of the processing of a complaint; or (c) to comply with procedures of the Board consistent herewith for the processing of a petition for discipline or for the imposition of public reprimand or admonition (See Section 4) shall constitute misconduct and shall be grounds for appropriate discipline.