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## Wyoming Rules of Professional Conduct: A Comparative Analysis

Ann B. Stevens

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University of Wyoming

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## Wyoming Rules of Professional Conduct: A Comparative Analysis

*Ann B. Stevens\**

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## I. INTRODUCTION

Effective January 12, 1987, Wyoming lawyers are required to conform their professional conduct to the Wyoming Rules of Professional Conduct for Attorneys at Law (Wyoming Rules).<sup>1</sup> The Wyoming Rules generally follow the Model Rules of Professional Conduct (Model Rules), adopted by the American Bar Association (ABA) in 1983.<sup>2</sup> Between June 1985 and January 1986, the Model Rules were reviewed by the Wyoming Bar Grievance Committee (Grievance Committee), at the direction of the Wyoming Supreme Court.<sup>3</sup> The Grievance Committee proposed a number of revisions, all of which were adopted by the court. The Wyoming Rules replace the Wyoming Code of Professional Responsibility (Wyoming Code)<sup>4</sup> which

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1. 725-729 P.2d Wyoming Reporter XXXIII, XXXIV-CI (1986). The Wyoming Rules of Professional Conduct for Attorneys at Law were adopted by the Wyoming Supreme Court on November 7, 1986. *Id.* The Rules became effective January 12, 1987. *Id.* The Rules are found in WYO. STAT. CT. RULES, following a new tab, "Professional Conduct." [All future footnotes to the Wyoming Rules of Professional Conduct for Attorneys at Law will be cited as WYOMING RULES.].

2. See generally *LawScope*, ABA Annual Meeting, 69 A.B.A. J. 1365 (1983).

3. The Wyoming Bar Grievance Committee reviewed the Model Rules of Professional Conduct at meetings on June 9, July 15, August 21, October 21, 1985 and January 15, 1986. A public hearing to receive comments on the Model Rules was held in Casper, Wyoming on October 21, 1985. A hearing for members of the bar was held at the Wyoming State Bar Convention on August 21, 1985 in Laramie, Wyoming. The minutes from the Wyoming Bar Grievance Committee meetings and hearings are available in the LAND AND WATER LAW REVIEW office. The author served as the Reporter for the Grievance Committee in its review of the Model Rules and its preparation of recommended rules for the Wyoming Supreme Court.

4. The Wyoming Code of Professional Responsibility was formerly found at Rule 20, Rules Providing for the Organization and Government of the Bar Association of the Attorneys at Law of the State of Wyoming. [All future footnotes to the Wyoming Code of Professional Responsibility will be cited as WYOMING CODE.].

was adopted in 1972,<sup>5</sup> and was based on the American Bar Association's Model Code of Professional Responsibility (Model Code).<sup>6</sup> [Since most of the provisions in the Wyoming Code and Model Code are the same, future references simply refer to the Code except where a specific reference is required.]

This article begins with a brief discussion of why the Model Rules were created, the history of their drafting and adoption, and some basic differences between the Code and the Model Rules in format and approach. It then focusses on the substantive differences between the two sets of rules. A few rules are also discussed that have not changed significantly but are confusing or have been overlooked in the past. The article also points out the differences between the Model Rules and the Wyoming Rules. Generally, the rules are discussed in the order in which they appear in the Model Rules and the Wyoming Rules.

#### A. HISTORY

The American Bar Association adopted the Model Rules, the basis of the newly adopted ethical rules in Wyoming, only fourteen years after the adoption of the Model Code. Why did the ABA promulgate a whole new set of rules so soon after the Code? One possible reason is Watergate.<sup>7</sup> The Watergate affair was permeated with lawyers engaged in very questionable conduct. Even though many were eventually disbarred, there was a perception that more needed to be done about the unethical behavior of lawyers.<sup>8</sup>

Another factor may have been the concern of the ABA leadership about the changing demographics of the bar membership and the changes in delivery of legal services.<sup>9</sup> The seventies saw a large influx of new young lawyers, rising numbers of poverty and public interest lawyers, as well as increased government participation in the delivery of legal services.<sup>10</sup> More lawyers competing, more inexperienced lawyers and lawyers in new

5. 493-501 P.2d Wyoming Reporter XX (1972) (Adopted by the Wyoming Supreme Court on September 18, 1972 and effective January 1, 1973). A small number of changes were made in the Model Code of Professional Responsibility as adopted by the Wyoming Supreme Court. *Id.* [Since the provisions of the Wyoming Code of Professional Responsibility and the Model Code of Professional Responsibility are substantially the same, future citation to Code shall refer to both, except if specifically designated otherwise.]

6. The Model Code was adopted by the ABA House of Delegates in 1969. *Association's House of Delegates Meets in Dallas, August 11-13*, 55 A.B.A. J. 970, 972 (1969).

7. See Lindgren, *The Model Rules: A Forward*, 1980 AM. B. FOUND. RESEARCH J. 923, 924.

8. Twenty-nine lawyers were subjected to disciplinary actions as a result of Watergate. *N.O.B.C. Reports on Results of Watergate-Related Charges Against Twenty-Nine Lawyers*, 62 A.B.A. J. 1337 (1976). President Nixon was disbarred in New York. *In re Nixon*, 53 A.D.2d 178, 385 N.Y.S.2d 305 (1976). The Kutak Commission was appointed because of dissatisfaction with the Model Code in part because of Watergate. J. ARONSON, J. DEVINE, & W. FISCH, *PROFESSIONAL RESPONSIBILITY* 31 (1985).

9. Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUND. RESEARCH J. 953, 956.

10. *Id.*

areas of the law may have caused the ABA leadership to conclude that more had to be done to regulate lawyer conduct.<sup>11</sup>

The Commission on Evaluation of Professional Standards (Kutak Commission) was established by the ABA in 1977.<sup>12</sup> It was directed to evaluate "whether existing standards of professional conduct provided comprehensive and consistent guidance for resolving the increasingly complex ethical problems in the practice of law."<sup>13</sup> The Kutak Commission decided that amendments to the Code would not sufficiently clarify the ethical duties of lawyers.<sup>14</sup> As a result, a new set of rules was drafted. After two and one half years of studying, discussing, drafting and redrafting, a "discussion draft" was distributed in January 1980.<sup>15</sup> Comments were sought from lawyers, the public, local and state bar associations and committees within the ABA.<sup>16</sup> The draft revised or replaced nearly every rule in the Code.<sup>17</sup>

A final draft, with revisions based on these comments, was submitted to the ABA House of Delegates in 1982. The format of the rules, black letter rules followed by official comments, was adopted at the mid-year meeting of the House of Delegates in January, 1982. The black letter rules themselves were to be considered at the ABA Annual Meeting. It was decided to start with the controversial rules. The House adopted only the first rule discussed, the fee rule, during that meeting. At the mid-year meeting in February, 1983, all of the other rules were revised, adopted or dropped. After that, the Commission and a Committee of the House of Delegates produced a new draft of the comments, designed to conform to changes the House had made in the rules. They also changed the black letter rules where necessary to assure conformity among the rules. The Preamble, Scope and Comments were debated at the Annual Meeting in August, 1983. The entire document was adopted by the House of Delegates, as amended at that meeting.<sup>18</sup>

Robert J. Kutak, the second chairman of the Kutak Commission, cautioned in 1980 that the Commission had not decided to create an entire new body of substantive law.<sup>19</sup> Rather, the Model Rules incorporated rules

11. *Id.*

12. Kutak, *Coming: The Model Rules of Professional Conduct*, 66 A.B.A. J. 47 (1980).

13. CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES, v (1987) [hereinafter CENTER FOR PROFESSIONAL RESPONSIBILITY].

14. *Id.*

15. See generally Kutak, *Evaluating the Proposed Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RESEARCH J. 1016.

16. *Id.*

17. Lindgren, *supra* note 7, at 924.

18. CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra* note 13, at 1-2.

19. Kutak, *supra* note 15, at 1021-22; Kutak, *supra* note 12, at 47. Lindgren observes that it is not clear whether the Model Rules are post-Watergate reform or just a codification of existing law. Lindgren, *supra* note 7, at 924. It appears that the Model Rules were not intended to be affected by the law under the Model Code. The Scope section of the Model Rules states that the research notes, which included explicit comparisons to the Code, were not included because it was not intended that the Code would affect interpretation of the Model Rules. MODEL RULES Scope.

from the Model Code.<sup>20</sup> They also codified legal principles established by case law.<sup>21</sup> In addition, certain rules spelled out the specific implications of some of the general concepts in the Model Code.<sup>22</sup> Finally, he admitted that the Commission did attempt to resolve some controversial areas under the Model Code. He asserted, however, that the emphasis was on codifying and clarifying established rules and principles.<sup>23</sup>

## B. FORMAT

The Model Rules have a different format than the Model Code. The Model Code is made up of nine basic canons, each followed by a body of disciplinary rules and ethical considerations. The nine canons are very general. The disciplinary rules under each canon are intended to set the minimum level of lawyer conduct.<sup>24</sup> If disciplinary rules are violated, the bar disciplinary authority can impose sanctions. The ethical considerations, which follow each group of disciplinary rules, are intended to be aspirational, to set ethical goals to which a lawyer should aspire.<sup>25</sup>

The Model Rules adopt the format of black letter rules, each followed by a comment to interpret it. This was a format already established by the Restatements. The Kutak Commission did not intend to include aspirational standards, confining the Model Rules to the minimum standards of conduct that could subject a lawyer to discipline. Kutak described it as the "necessary, but not the entire, content of ethical lawyer behavior."<sup>26</sup>

The change in format creates the impression that a major change has occurred. The Kutak Commission did view the change as significant, again

20. Kutak, *supra* note 12.

21. Kutak, *supra* note 15, at 1022.

22. *Id.* at 1019; e.g., MODEL RULES Rule 1.13.

23. Kutak, *supra* note 15, at 1022-23.

24. MODEL CODE Preliminary Statement.

25. *Id.* However, some states adopted the Code without the preliminary statement. See Kutak, *supra* note 15, at 1017-18 n.4. The preliminary statement itself is ambiguous. It also states that the lawyer can rely on the ethical considerations for guidance in specific situations, implying that the ethical considerations are interpretations of the disciplinary rules. CODE Preliminary Statement.

26. Kutak, *supra* note 12. The Scope section of the Model Rules addresses the function of the rules:

Some of the Rules are imperatives, cast in the terms 'shall' or 'shall not.' These define proper conduct for purposes of professional discipline. Others, generally cast in the term 'may,' are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive . . . .

### MODEL RULES Scope.

The purpose of the comments is described in the Scope section as follows: "The Comment accompanying each rule explains and illustrates the meaning and purpose of the Rule. . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." MODEL RULES Scope. It appears that the aspirational aspect of the Code's ethical considerations was intentionally omitted. However, the aspirational language of "should" appears in the pro bono rule, Rule 6.1, and in many comments of the Model Rules. See, e.g., MODEL RULES Rule 1.5 comment; MODEL RULES Rule 1.6 comment.

judging by the statements of its chairman.<sup>27</sup> The distinction in the Code between the disciplinary rules, as mandatory, and the ethical considerations, as aspirational, had not been clearly adhered to by the courts or by the bar committees issuing official ethical opinions.<sup>28</sup> This was not surprising because, on many issues, the disciplinary rules were vague or there were no rules on point.<sup>29</sup> The ethical considerations were used to fill the gap. Also, the language of the ethical considerations was sometimes very specific, suggesting prescribed behavior.<sup>30</sup> The Kutak Commission decided to try to eliminate the confusion by having more comprehensive rules and comments to aid in their interpretation, and by eliminating the ethical considerations.<sup>31</sup>

Commentators also saw significance in the change in format. Geoffrey Hazard, the reporter who served the Kutak Commission in its later deliberations, stated that the change continued the movement toward legal rules that govern and away from ethical precepts.<sup>32</sup> L. Ray Patterson, the first reporter of the Kutak Commission, in calling for new rules, said that there was a need for coercive rules in the wake of Watergate. Professional regulation is a matter of law, not ethics.<sup>33</sup> Another scholar viewed the Model Code as a transitional phase between the earlier Canons of Professional Ethics and the Model Rules.<sup>34</sup> The Canons were the predecessor of the Code and were viewed as unenforceable. He welcomed the change to a set of legal rules.<sup>35</sup>

27. Kutak, *supra* note 15, at 1017.

28. Formal Opinion 337 relies on the canons and ethical considerations, as well as the general rule on fraud and deceit to conclude that a lawyer must not record a conversation without the consent or prior knowledge of all parties. ABA Comm. on Professional Ethics and Grievances, Formal Op. 337 (1974). Examples of cases which rely on the ethical considerations as a source of mandatory rules are: Committee of Professional Ethics and Conduct v. Behnke, 276 N.W.2d 838, 840 (Iowa), *appeal dismissed*, 444 U.S. 806 (1979) (ethical consideration can provide sole ground for suspension); Florida Bar v. Dawson, 318 So. 2d 385 (Fla.), *cert. denied*, 423 U.S. 995 (1975) (lawyer disbarred for violating an ethical consideration). One commentator concluded: "[T]he ethical considerations vacillate between being statements of normal, professional practices, ethical norms of aspiration and mere explanatory amplification of the regulatory rules." Sutton, *How Vulnerable is the Code of Professional Responsibility?* 57 N.C.L. REV. 495, 508 (1979).

29. Kutak, *supra* note 15, at 1020.

30. *E.g.*, CODE EC 5-5 ("Other than in exceptional circumstances, a lawyer should insist that an instrument in which a client desires to name him beneficially be prepared by another lawyer selected by the client."); CODE EC 2-29 (regarding avoiding appointment by a court). The confusion is compounded by the fact that the ethical considerations, which are supposed to be aspirational, often repeat the rules contained in the disciplinary rules. *E.g.*, CODE EC 2-4, 2-8, 2-11, 7-4, 7-27.

31. Kutak, *supra* note 15, at 1018. See MODEL RULES SCOPE.

32. Hazard, *The Legal & Ethical Position of the Code of Professional Ethics*, in 5 SOCIAL RESPONSIBILITY: JOURNALISM, LAW, MEDICINE 5, 10 (L.W. Hodges ed. 1979).

33. See generally Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A. J. 639 (1977). Schwartz, *supra* note 9, at 959, concludes that a good body of legal rules is needed because a lawyer's geographical identity is no longer strong enough for informal ethical principles to be enforced by peer pressure.

34. The Canons of Professional Ethics, the first national code of ethics for lawyers, was adopted in 1908 by the American Bar Association (ABA).

35. Schwartz, *supra* note 9, at 953-54. The Canons, the first ethical standards established by the ABA, have been described as "largely unenforceable statements of etiquette defining conduct for a gentleman's society." Kutak, *supra* note 15, at 1017. They have

### C. COMPARISON

Certain of the Model Rules suggest that the drafters paid more attention to enforceability than their predecessors. For example, the Model Code required a lawyer to report to a disciplinary authority all violations of the rules by lawyers, unless the lawyer knew of the violation from privileged communication.<sup>36</sup> This rule was so broad that it was not likely to be enforced. The corresponding Model Rule requires only the reporting of a violation that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."<sup>37</sup> If the drafters indeed paid more attention to enforceability, this suggests that they intended the rules be legal rules, not just ethical guides.

Another basic difference between the Model Code and the Model Rules is that a single rule often relates to only one of a lawyer's roles, such as litigator or adviser.<sup>38</sup> One commentator characterized the Code as "simplistic", noting that the Code fails to fully recognize that the profession is not "unitary and monolithic."<sup>39</sup>

One of the basic criticisms of the Model Code was that it represents an outdated view that law practice consists entirely of individual lawyers representing individual clients.<sup>40</sup> The Model Rules attempt to address this criticism. Some of the new rules apply only to lawyers in one context, such as lawyers representing organizations.<sup>41</sup> In some cases one rule will contain a general provision and an exception for the lawyer acting in a specific context.<sup>42</sup> In other words, the Model Rules go beyond the Model Code in addressing the different roles that lawyers play, the different contexts in which they play them and the size and complexity of law firms.<sup>43</sup>

The Model Rules and the Wyoming Rules are divided into eight sections. The first section, containing about half of the total rules, governs the relationship between lawyer and client. Most of the rules in this sec-

also been described as "little more than a collection of pious homilies." Patterson, *supra* note 33, at 639. The Canons "ranged over questions of morality, matters of business regulation, detailed prescriptions of proper professional behavior in particular circumstances, and matters of etiquette." Schwartz, *supra* note 9, at 956.

36. CODE DR 1-102, 1-103(A).

37. MODEL RULES Rule 8.3(a).

38. See, e.g., MODEL RULES Rules 2.1, 2.2 & 2.3 (each concern a non-adversary role of the lawyer). See *infra* text accompanying notes 179-200 for a discussion of these rules.

39. Patterson, *supra* note 33, at 639.

40. Marshall, *The Control of the Public Lawyer*, in AMERICAN ASSEMBLY, LAW AND THE AMERICAN FUTURE, 167 (M. Schwartz ed. 1976). Geoffrey Hazard pointed out that the Code did not give adequate guidance to lawyers for organizations. G. HAZARD, ETHICS IN THE PRACTICE OF LAW 43-45 (1978).

41. See, e.g., MODEL RULES Rule 1.13.

42. See, e.g., MODEL RULES Rule 3.1.

43. This may encourage the development of separate ethical codes for different types of practice, a good development, according to one commentator. Schwartz, *supra* note 9, at 960-63. The Code directly addresses the responsibility of one member of a firm for the actions of other members only in the preliminary statement where it states: "A lawyer should ultimately be responsible for the conduct of his employees and associates in the course of the professional representation of the client." MODEL RULES Preliminary Statement. In contrast, Model Rules 5.1, 5.2 and 5.3 articulate these responsibilities and make their violation disciplinable. These rules are discussed *infra* text accompanying notes 322-29.



tion apply to all client relationships. The rules on confidentiality, fees, and conflict of interest are in this section. It also includes rules specific to disabled clients and government and organization lawyers. The second section addresses lawyer roles other than the role of advocate, such as adviser and intermediary. The third section covers the lawyer's duties to the court and opposing party in her role as advocate, particularly in litigation. It includes rules on meritless pleadings, perjured testimony and trial publicity. The fourth section addresses general duties to persons other than clients. The fifth section includes rules on a lawyer's responsibility for actions of her employees, associates and supervisors, as well as the rule on non-lawyer participation in law firms. The sixth section includes the rules on lawyers doing public service. The seventh section covers lawyer advertising, solicitation and firm names. The final section includes general provisions, such as the rule on what constitutes misconduct, a rule on jurisdiction, rules on reporting misconduct and on cooperation with disciplinary authorities, and the rule on public statements regarding judges.

The changes the Grievance Committee made in the Model Rules, which were adopted by the Wyoming Supreme Court, are in the rules on attorney sharing of fees, confidentiality, government consent to conflicts of interest, meritless claims, *ex parte* communication, duties of the prosecutor, and specialty advertising. The article will identify the Wyoming changes and the reasons advanced for them.

## II. CLIENT-LAWYER RELATIONSHIP

It is refreshing to note that the Model Rules are better organized than the Code. The applicable rule is easier to locate and related rules are usually close by.<sup>44</sup> Following the Preamble, Scope and Terminology, the first set of rules, numbered 1.1-1.16, govern the relationship of lawyer to client. This contrasts with most of the other sections that focus more on duties to others. The first nine rules and the last two rules in this section are general rules that would apply in most client-lawyer relationships. They address competence, decisionmaking, communication, confidentiality, conflict of interest, fees and client property. Three rules in this section deal with conflicts of interest that arise in particular settings. Finally, a rule addressing the lawyer for the disabled client appears in this section.

The first rule, Rule 1.1, states that; "A lawyer shall provide competent representation to a client."<sup>45</sup> [Rule refers to Wyoming Rule unless otherwise indicated.] Unlike the Code, the Rule attempts to define competence. The Rule defines competence to include the "legal knowledge, skill, thoroughness and preparation" necessary for the representation.<sup>46</sup> The Comment makes clear that, with adequate preparation, or by associat-

44. The Code has been described as "adolescent," "contradictory" and "difficult to read." Patterson, *supra* note 33, at 639.

45. WYOMING RULES Rule 1.1.

46. *Id.* A statement in an ethical consideration of the Wyoming Code implies that the Wyoming Code had a subjective standard of competence: "[A] lawyer should act with competence and proper care in representing clients to the best of his ability." WYOMING CODE EC 6-1.

ing with an experienced lawyer, a novice lawyer, or a lawyer with no prior experience in the area of law, may be able to competently handle a case.<sup>47</sup> The amount of preparation necessary depends, in part, on what is at stake, according to the Comment. Matters of "lesser consequence" ordinarily require less attention.<sup>48</sup>

Rule 1.2(a) divides decisionmaking between the client and the lawyer. The Code did not have a rule on this subject.<sup>49</sup> The client is to decide the objectives of the representation and the lawyer is to decide the means, after consultation with the client. These two categories, objectives and means, are not self-explanatory. Are the objectives just the initial decision as to what action to take or what goal to seek? If so, after the client decides the goal the lawyer is free to proceed. However, the lawyer must continue to inform and consult with the client as to the means. The Rule and Comment provide some guidance on what decisions are the client's. The Rule is explicit that the client is to decide on settlement in civil matters. In criminal matters, the client decides whether to plead, have a jury trial, or testify. These decisions were already the client's under prior case law.<sup>50</sup>

The lawyer can exercise some control over the objectives of the litigation by agreement with the client. If the lawyer anticipates that the client may later decide to do something to which the lawyer would object, the lawyer can limit the objectives of the representation by agreement with the client, under 1.2(c).

Under Rule 1.2(a), the lawyer is to decide the means of obtaining the objectives, after consulting with the client. The Comment designates the lawyer as the decisionmaker on technical and legal tactical matters. However, the client is to decide when the issue is expense or the impact of an action on third parties. During litigation, the Comment refers the lawyer to the case law of the jurisdiction to find out if the lawyer or the client is to make decisions.<sup>51</sup> Rule 1.4, the rule on communication with the client, gives some clues as to when the client must be involved in decisionmaking during litigation. Under Rule 1.4, the lawyer is to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>52</sup> The duty to explain is thus tied to those decisions which are the client's. The Comment to Rule 1.4 advises the lawyer, in litigation, to explain her general trial strategy and consult the client on tactics that might injure or coerce others.

47. WYOMING RULES Rule 1.1 comment 2.

48. *Id.* at comment 5.

49. The disciplinary rules of the Code did not address the issue of who makes decisions, lawyer or client. The ethical considerations discuss the issue, however. CODE EC 7-7, 7-8.

50. A defendant decides whether to plead guilty, have a jury trial or testify in a criminal case. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). On right to testify see discussion of *Nix v. Whiteside*, 475 U.S. 157 (1986) (*infra* note 246). The client is to make decisions on claim settlement. *Hayes v. Eagle-Picken Industries*, 513 F.2d 892, 893-94 (10th Cir. 1975); *Northwest Realty Co. v. Perez*, 119 N.W. 2d 114, 115-16 (S.D. 1963).

51. WYOMING RULES Rule 1.2 comment 1.

52. *Id.* at Rule 1.4(b).

Ordinarily she is not expected to describe the strategy in detail, according to the Comment.<sup>53</sup>

The client may tell the lawyer that she is leaving the matter entirely in her hands. The Comment to Rule 1.4 indicates that the guiding principle in communicating with clients is to fulfill the client's expectations as to information.<sup>54</sup> This suggests that a lawyer could properly pursue the client's matter with very little communication, if that was the client's wish. However, the settlement decision is not delegable.<sup>55</sup>

Rule 1.4 also requires the lawyer to keep the client reasonably informed about the status of the matter. Absent instructions to the contrary, the pragmatic lawyer will communicate with her client regularly as to the progress of the matter. Studies indicate that a large proportion of complaints to bar disciplinary authorities are caused by the lawyer not communicating to the client as to the status of the matter.<sup>56</sup>

#### A. FEES

Rule 1.5 concerns legal fees, a subject vital to most lawyers. The standard in the new rules to evaluate the amount of legal fees is that they "shall be reasonable".<sup>57</sup> This standard is a change from the "illegal or clearly excessive" standard in the Code.<sup>58</sup> However, the Code defined a fee to be clearly excessive when an ordinarily prudent lawyer "would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."<sup>59</sup> Thus the Code imposed a reasonable standard as well. Rule 1.5 defines "reasonable" as the "conduct of a reasonably prudent and competent lawyer."<sup>60</sup> Perhaps under the Code the disciplinary authority had to be more convinced of the unreasonableness of the fee, but basically the standards are the same when their definitions are considered.

The eight factors in Rule 1.5 to be considered in evaluating a fee's reasonableness are taken verbatim from the Code.<sup>61</sup> The ability of the client to pay the fee is not a factor.

53. *Id.* at Rule 1.4 comment 2. [The LAND & WATER LAW REVIEW has adopted the convention that either "he" or "she" shall be used as the generic pronoun throughout one article.]

54. *Id.*

55. *Id.* at Rule 1.2 comment 5.

56. At least "breakdown in communication" is how the complaints are categorized by the disciplinary authorities. Marks & Cathcart, *Discipline Within the Legal Profession: Is it Self-Regulation?*, 1974 U. ILL. L.F. 193, 210. Over half of the complaints received by the disciplinary committee in Iowa are because a lawyer failed to properly communicate with the client. Gaudineer, *Ethics and Malpractice*, 26 DRAKE L. REV. 88, 115 (1977).

57. WYOMING RULES Rule 1.5(a).

58. CODE DR 2-106(A).

59. *Id.* at DR 2-106(B).

60. WYOMING RULES Terminology. The separate contingent fee rules state that certain contingent fees are presumptively reasonable. RULES GOVERNING CONTINGENT FEES FOR MEMBERS OF THE WYOMING STATE BAR Rule 5 (1987) [All future footnotes to the Rules Governing Contingent Fees for Members of the Wyoming State Bar will be cited as WYOMING CONTINGENT FEE RULES.].

61. CODE DR 2-106(B).

Rule 1.5(b) directs the lawyer to tell the client the basis or rate of fees early in the relationship. The preference for a written fee agreement in the Model Rules was stricken by the Wyoming Grievance Committee.<sup>62</sup> Some members were concerned that there are areas of Wyoming where requesting a written agreement would be viewed as an expression of the lawyer's distrust of the client. Also, the Grievance Committee decided to omit the preference for a written agreement because it believed that preferences were not appropriate in mandatory rules.<sup>63</sup>

A lawyer should set a realistic fee from the beginning. A later increase in the fee may be viewed as a product of overreaching by the lawyer, even if the services provided justify the increased fee. The client is put in the position of having to choose between agreeing to an increased fee or starting again with a new lawyer.

Rule 1.5(d)(1) bars a contingent fee in a domestic matter when the fee is contingent on certain aspects of the divorce.<sup>64</sup> First, a fee in a divorce must not be dependent on whether or not the lawyer is able to obtain a divorce for the client. With no-fault divorce, this is not a likely basis for a contingent fee in Wyoming. Secondly, the fee in a domestic relations matter must not be dependent on the amount of child support or alimony. The drafters apparently believed that a lawyer should not have an interest in these amounts when the amounts are set to meet the needs of the client and any children. Rule 1.5(d)(1) permits fees contingent on property settlements in domestic relations matters, as long as the property settlement is not in lieu of support or alimony. The disciplinary rules in the Code were silent on contingent fees in domestic relations matters.<sup>65</sup>

On the sharing of fees between lawyers not in the same firm, the Grievance Committee, and the Wyoming Supreme Court, in turn, adopted a position similar to the Code.<sup>66</sup> Under Wyoming Rule 1.5(e), in order for two lawyers not in the same firm to share a fee, they must share the responsibility for the case and the division of fees must be in proportion to the contribution of each lawyer. Under rejected Model Rule 1.5(e), either joint responsibility or division in proportion to services performed is enough to justify the sharing of fees between lawyers. The Wyoming Rule requires that the fees be divided in proportion to the lawyer's contribution. Contribution may include the reputation of the lawyer.<sup>67</sup> However, no lawyer

62. Note that written agreements are required for contingent fee agreements. WYOMING RULES Rule 1.5(c). The required contents are generally described in that rule and more specifically described in WYOMING CONTINGENT FEE RULES Rule 6.

63. Wyoming Bar Grievance Committee Meeting Minutes (June 9, 1985).

64. The separate contingent fee rules state that: "No contingent fee agreement shall be made . . . in respect of the procuring of a divorce, annulment of marriage or legal separation . . ." WYOMING CONTINGENT FEE RULES Rule 3. If this means that the fee cannot be contingent on the obtaining of the divorce, it is consistent with WYOMING RULES Rule 1.5(d)(1). If it means that no contingent fee arrangement is permitted in a divorce, it is more restrictive.

65. *But cf.* CODE EC 2-20 ("Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified.").

66. *See* CODE DR 2-107(A).

67. WYOMING RULES Rule 1.5 comment 4.

can collect a fee simply for referral, under Wyoming Rule 1.5(f). It states that, "A lawyer shall not pay or receive a fee or commission solely for referring a case to another lawyer."<sup>68</sup> This contrasts with the Comment to Model Rule 1.5 which states that a division of fees is most often used between a referring lawyer and a trial specialist. The Grievance Committee changed the Rule to discourage a referring lawyer from shopping around for the lawyer who would give her the largest referral fee, rather than the lawyer who would best represent the client.<sup>69</sup>

Model Rule 1.5(e) requires that the client be advised that the fees are being shared and that the client not object. The Grievance Committee decided that this duty was ambiguous and that the client must affirmatively consent.<sup>70</sup> Wyoming Rule 1.5(e) adopts this requirement, including a written agreement with the client in which the lawyers assume joint responsibility for the matter.<sup>71</sup> The lawyer is not required to disclose the share of the fee that each lawyer is to receive.<sup>72</sup>

## B. CONFIDENTIALITY

The model rule on disclosing a client's intent to harm others was hotly debated by the Kutak Commission and at the ABA House of Delegates.<sup>73</sup> In the process, all duties to disclose were removed and the permission to disclose was narrowed dramatically.<sup>74</sup> Model Rule 1.6(b)(1), as adopted by the A.B.A. House of Delegates, *permits* a lawyer to disclose client information regarding an intended criminal act *only* if it is necessary to prevent a crime by her client that "the lawyer believes is likely to result in imminent death or serious bodily harm."<sup>75</sup>

68. *Id.* at Rule 1.5(f). The separate contingent fee rules similarly require that the lawyers sharing fees in a contingent fee matter share malpractice responsibility and that no fee be paid merely for referral. They do not require that the fee be proportional to the contribution of the lawyer. WYOMING CONTINGENT FEE RULES Rule 5(d).

69. Wyoming Bar Grievance Committee Meeting Minutes (June 9, 1985).

70. WYOMING RULES Rule 1.5(e)(2). The separate contingent fee rules require that the sharing of fees with other counsel, and the terms of that sharing, be disclosed to the client. WYOMING CONTINGENT FEE RULES Rule 5(d). However, in contrast to WYOMING RULES Rule 1.5(e)(2), the Representation Agreement (whose provisions or substantially similar provisions are required under the Wyoming Contingent Fee Rules) gives the lawyer authority to employ associate counsel. No consent is required. WYOMING CONTINGENT FEE RULES Rule 6 (Representation Agreement, Introductory Paragraph).

71. WYOMING RULES Rule 1.5(e)(1), (2).

72. *Id.* at Rule 1.5 comment 4.

73. CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra* note 13, at 48-50. The confidentiality rule in the 1980 discussion draft of the Model Rules, *requires* that a lawyer disclose client information if it is necessary to prevent a client from committing a homicide or a crime that will cause serious bodily harm. MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.7(b) (Discussion Draft 1980). The confidentiality rule that the Commission submitted to the House of Delegates *permits* disclosure when necessary to prevent a client from "committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another." MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.6(b)(2) (Proposed Final Draft 1981).

74. CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra* note 13, at 48. The amendments of the American College of Trial Lawyers prevailed, limiting disclosure of intended crimes to crimes of bodily harm. The amendment also eliminated permission to disclose in cases where it is necessary to rectify the consequences of client fraud or crime in which the lawyer was involved. *Id.* at 48-50.

75. MODEL RULES Rule 1.6(b)(1).

Wyoming chose to preserve the Code provision permitting disclosure of a client's intent to commit any crime, not just those crimes likely to result in serious bodily injury.<sup>76</sup> The Grievance Committee decided that a lawyer should have more discretion to warn potential victims than the Model Rule permits.<sup>77</sup> The Comment does advise the lawyer to be cautious in concluding that her client is going to commit a crime.<sup>78</sup> Also, under the Rule, the lawyer is permitted to reveal the information only to the extent she reasonably believes necessary to prevent the crime. Neither the Wyoming Rule, nor the Model Rule, require any disclosure.

Rule 1.6 also adopts a very broad, general definition of client confidential information. Rule 1.6(a) prohibits the disclosure of any information "relating to representation of a client,"<sup>79</sup> unless one of the exceptions is met. Under the Code, to be confidential, the information had to be protected by the attorney-client privilege. Information is secret, under the Code, if the client requested it be kept secret, or information that, if disclosed, would be detrimental or embarrassing to the client.<sup>80</sup> Otherwise, the lawyer was free to disclose the information.

Rule 1.6 has an exception that may lead to the same result as the narrower definition of confidential under the Code. Rule 1.6(a) permits the lawyer to disclose information when disclosure is "impliedly authorized in order to carry out the representation."<sup>81</sup> If interpreted broadly, this would include disclosing most information that is not damaging or embarrassing, as was permitted by the Code. However, under Rule 1.6(a), a lawyer can reveal such neutral or beneficial information only to those involved in the legal matter.

The Comment to Rule 1.6 states that lawyers in a firm may disclose all client information to other lawyers in the firm, unless the client directs otherwise.<sup>82</sup> The firm as a whole is considered the client's lawyer so that information can pass freely among lawyers in the firm. However, the firm may want to restrict the flow of information between lawyers to avoid being disqualified for conflict of interest.<sup>83</sup>

### C. CONFLICT OF INTEREST

The Rules have one general conflict of interest rule, Rule 1.7, followed by a rule that specifies certain prohibited conflicts, Rule 1.8. Rule 1.9 is the rule on conflict with former clients and Rule 1.10 addresses the impu-

76. WYOMING RULES Rule 1.6(b)(1); CODE DR 4-101(C)(3).

77. Wyoming Bar Grievance Committee Meeting Minutes (June 9, 1985).

78. WYOMING RULES Rule 1.6 comment 13.

79. *Id.* at Rule 1.6(a). The confidentiality rule applies only to clients. In a recent Wyoming Supreme Court decision, the court discussed the question of who is a client. *Carlson v. Langdon*, 751 P.2d 344 (Wyo. 1988). The court found payment for services was not essential, and that the relationship could be implied and no formal contractual arrangement was necessary. *Id.* at 347. Further, the burden is on the lawyer to show that it was unreasonable for the individual to believe he was a client. *Id.* at 348.

80. CODE DR 4-101(A), (B)(1).

81. WYOMING RULES Rule 1.6(a).

82. *Id.* at Rule 1.6 comment 8.

83. See *infra* text accompanying note 127.

tation of one lawyer's conflict to others in her firm. Rule 1.11 and Rule 1.12 focus on conflicts that arise for lawyers going into and out of government employment or judicial positions. Finally, Rule 1.13 addresses specific conflicts that arise for lawyers representing organizations.

### 1. General Rule

Rule 1.7, governs conflicts of interest between two or more clients of one lawyer, and conflicts between a client and the personal interests of the lawyer. Rule 1.7 appears to have a lower standard than the Code for taking on a client, or continuing to represent a client, in spite of a potential conflict of interest with another client. Both the Rule and the Model Code require client consent after consultation. But the Code also required that it be *obvious* that the lawyer could adequately represent the interests of each client.<sup>84</sup> Rule 1.7 only requires that the lawyer *reasonably believe* that neither representation nor relationship will be adversely affected by the representation of both clients.<sup>85</sup>

If the "obvious" standard of the Code had been applied literally, a lawyer could not have represented clients with a potential conflict of interest. The fact of a potential conflict precludes, by definition, a situation where it is obvious that the client or clients can be adequately represented. However, the Code rule was applied occasionally to approve the representation of two clients with a potential conflict of interest.<sup>86</sup> The reasonable belief standard of Rule 1.7 appears to be more flexible. With client consent, it permits the lawyer to take on cases that present potential conflicts of interest if she reasonably believes that the representation and client relationships will not be adversely affected.

Rule 1.7 requires that a lawyer try to anticipate a conflict and, seeing one, decline representation. It directs that an evaluation be made before a lawyer agrees to represent a client. Early evaluation is also pragmatic.

84. CODE DR 5-105(C).

85. WYOMING RULES Rule 1.7(a)(1), (b)(1).

86. The Ninth Circuit rejected the contention that if a potential conflict existed between two clients then it is never "obvious" that they could be adequately represented. The court examined legislative history, the structure of the rule, and policy in reaching its conclusion. *United Sewage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1346-50 (9th Cir. 1981). *Accord*, *In re Farr*, 264 Ind. 153, 340 N.E.2d 777, 782-83(1976).

CODE EC 5-15, states that there are "many instances where a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation." *Id.* A number of informal opinions have approved the representation of two clients with differing interests in litigation. ABA Comm. on Ethics and Professional Responsibility, *Informal Op.* 1370 (1976), advised that a lawyer could represent the insured and the subrogated interest of the insurer against third parties, under CODE DR 5-105(C), even though the two clients "views toward settlement may not be similar." The ABA Comm. on Ethics and Professional Responsibility, *Informal Op.* 1441 (1979), concludes that under certain conditions a lawyer may represent the manufacturer and the dealer, who are both defendants in a products liability case. In the ABA Comm. on Ethics and Professional Responsibility, *Informal Op.* 1495 (1982), the Committee considered the representation of one client in a suit on a commercial claim against a client the lawyer was defending in an unrelated personal injury matter. Though the Committee advised caution, it left open the possibility that both could be represented if each consented.

A lawyer who does not anticipate a conflict may get herself into a situation where she cannot represent either party.<sup>87</sup>

The Comment to Rule 1.7 specifies one situation where it is not reasonable for a lawyer to believe she can represent both parties. The Comment states that a lawyer cannot represent opposing parties in litigation. Also, a lawyer cannot normally represent one client in a case and simultaneously oppose that same client in litigation on an unrelated matter.<sup>88</sup>

## 2. *Specific Conflicts of Interest*

Rule 1.8 describes specific conflicts. Some sections absolutely prohibit the lawyer from acting and others require client consent for the lawyer to act. Section (a) applies to lawyers' business transactions with or affecting clients. The Code required the client's informed consent for lawyer's business transactions with clients where the client and the lawyer have differing interests and the client is relying on the lawyer's professional judgment.<sup>89</sup> Rule 1.8(a) applies more broadly to all transactions with a client and to any acquisition of an interest adverse to a client. The client does not have to rely on the lawyer's professional judgment for the Rule to apply.

Rule 1.8(a)(3) also adds an objective standard for evaluating the terms of such business transactions. It is not enough that the client be given adequate information about the terms before she consents. The terms of the transaction or acquisition must be fair and reasonable to the client. The Rule also requires that the terms be transmitted to the client in writing in a way that can be reasonably understood by the client, and that the client have an opportunity to seek the advice of independent counsel.<sup>90</sup>

Rule 1.8(b) restricts the lawyer's use of information relating to the representation of the client. Note that this Rule governs the use of client information, while Rule 1.6 governs the disclosure of client information. Clearly, a lawyer can use such information without disclosing it in violation of Rule 1.6. The Code prohibited use of client information to the lawyer's or a third person's advantage.<sup>91</sup> Model Rule 1.8(b) prohibits the use of such information to the disadvantage of a client. The Rule, as adopted in Wyoming, requires both. To violate the Rule, the lawyer must use information both to the advantage of herself or a third person and to the disadvantage of the client. The Grievance Committee decided that Model Rule 1.8(b) was too restrictive, requiring a lawyer to guess as to when the use of information would ultimately harm her client. Also, the Model Rule might restrict a lawyer's freedom to criticize another person since it prohibits any use of information to the disadvantage of a client.<sup>92</sup> The

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87. This is an application of the former client rule. WYOMING RULES Rule 1.9.

88. *Id.* at Rule 1.7 comment 7.

89. CODE DR 5-104(A).

90. WYOMING RULES Rule 1.8(a)(1), (2).

91. CODE DR 4-101(B)(3).

92. Wyoming Bar Grievance Committee Meeting Minutes (July 14, 1985).



Grievance Committee also added a clause to resolve an apparent conflict with Rule 1.6.<sup>93</sup>

Rule 1.8(c) elevated the ethical consideration in the Code to a mandatory rule.<sup>94</sup> The Rule prohibits a lawyer from preparing an instrument which gives a substantial gift to the lawyer or someone with a specified familial relationship to the lawyer.<sup>95</sup> The lawyer can prepare such an instrument where the client is a relative of the person who is to receive the gift.

Rule 1.8(e) is more liberal than the Code in allowing the lawyer to advance or pay litigation costs and expenses for a client. Rule 1.8(e)(2) permits the lawyer to pay court costs and litigation expenses on behalf of an indigent client, though indigent is not defined. The lawyer may also advance such costs and expenses to any client, with repayment contingent on the outcome of the litigation.<sup>96</sup> Under the Code, the lawyer could never pay expenses and costs and could only advance such expenses and costs if the client was ultimately liable.<sup>97</sup> The Rule, like the Code, forbids all other financial assistance to a client.

The Rules have a specific provision, Rule 1.8(i), on lawyers who are related to each other and represent opposing clients. If such opposing lawyers are parent and child, siblings or spouses, the Rule defines this as a potential conflict. Each client must be advised of the relationship and consent to the representation.

Under the Code, the general rule on client conflicts with the lawyer's personal interest was applied where related lawyers represented opposing clients.<sup>98</sup> Under the application of another general rule, if one lawyer could not represent a client because of her personal relationship with

93. Except as otherwise provided in Rule 1.6, a lawyer shall not make use of knowledge or information acquired by him through his professional relationship with his client or in the conduct of his client's business to the advantage or profit of himself or a third person, which is to the disadvantage of the client, *unless the client consents after consultation.* (emphasis added)

WYOMING RULES Rule 1.8. The Model Rules were later amended in a similar manner. Law. Manual on Prof. Conduct (ABA/BNA) 1:101 & 1:121 (1987).

94. CODE EC 5-5.

95. For the rule to apply, the relationship must be "parent, child, sibling or spouse." WYOMING RULES Rule 1.8(c).

96. *Id.* at Rule 1.8(e)(1). The separate contingent fee rules do not permit contingent repayment of costs. The contingent fee rules require that the agreement contain provisions that are the same or substantially similar to the form agreement which follows those rules. WYOMING CONTINGENT FEE RULES Rule 6. The form, Representation Agreement, requires, at paragraph V, that the client shall pay all out-of-pocket costs. If the costs are advanced, they must be paid not later than the end of the litigation "whether or not a recovery is obtained." Provisions which change the rights of the client under the form agreement are not effective unless the court approves. WYOMING CONTINGENT FEE RULES Rule 6. Perhaps an agreement that client payment of costs is contingent on the outcome would be construed to be a change in the rights of the lawyer, not the client.

97. CODE DR 5-103(B).

98. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 340 (1975). The Opinion looks to CODE DR 5-101(A), to evaluate the conflict of interest when a lawyer and her spouse represent clients with differing interests. See also Kentucky E-257, [1983 Transfer Binder], NAT. REP. LEGAL ETHICS PROF. RESP. (Mersky) (1, 1982) (Improper for one spouse to represent in a civil matter a person who the other spouse was prosecuting for a crime.).

opposing counsel, no one else in the lawyer's firm could represent the client.<sup>99</sup> Certain law schools had expressed concern that employment opportunities for related lawyers not be unduly restricted.<sup>100</sup> Rule 1.8(i) does not impute this potential conflict of interest to others in the firm. For example, a lawyer can represent a client when the opposing client is represented by a spouse of her partner, without telling the client or getting her consent. The partner's conflict is not imputed to the firm. However, if the non-related lawyer would feel such conflicting loyalties that she herself could not adequately represent the client, she must refuse to take the case under the general conflict of interest rule.<sup>101</sup>

### 3. Conflicts of Interest with Former Clients

The Code had no rule that expressly addressed representing a client whose legal matter opposed a former client. An ethical consideration stated that the lawyer has a duty not to disclose confidential information of a former client.<sup>102</sup> Case law developed the "substantial relationship" test<sup>103</sup> by which courts disqualified a lawyer from representing a client against a former client if the matter was substantially related to the former representation.<sup>104</sup> Rule 1.9 incorporates that standard. If the legal matters are substantially related and the former client and the potential client have interests which are materially adverse, the lawyer cannot represent the potential client unless the former client consents.<sup>105</sup>

The question is, "What is a substantially related matter?"<sup>106</sup> According to the Tenth Circuit Court of Appeals, matters are substantially related

99. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 340 (1975). The Opinion concludes that if one spouse is disqualified the entire firm is disqualified under CODE DR 5-105(D).

100. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 340 (1975). The Opinion noted that law schools were concerned about firms hesitating to hire applicants who are married to a lawyer or law student who might practice in the geographical area and create conflicts for the firm. *Id.*

101. WYOMING RULES Rule 1.7(b)(1).

102. CODE EC 4-6.

103. *T.C. Theatre v. Warner Brothers Pictures*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953); *Canon v. United States Acoustics Co.*, 398 F. Supp. 209, 223-24 (N.D. Ill. 1975), *aff'd in part and rev'd in part*, 532 F.2d 118 (7th Cir. 1976).

104. *T.C. Theatre*, 113 F. Supp. at 265, is often cited for the initial statement of the rule. To disqualify the other lawyer, "[t]he former client need show no more than that the matters embraced in the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client." *Id.* at 268. The substantial relationship test is used in *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 722 n.10. (1982), and in the cases *infra* note 106.

105. WYOMING RULES Rule 1.9(a). Consent is not permitted if the former client is a government entity. See *infra* text accompanying notes 136-38.

106. The Second Circuit has held that the issues in the former case and the current case must be virtually identical for a lawyer to be disqualified. *Government of India v. Cook Indus.*, 569 F.2d 737, 739-40 (2d. Cir. 1978). The Seventh Circuit has decided that if confidential information received on a company's financial condition might be relevant to the pending matter, the matters are substantially related and the lawyer is disqualified. *Analytica v. NPD Research*, 708 F.2d 1263 (7th Cir. 1983). In *Analytica*, the challenged lawyer had received information on a company's profitability, sales prospects and general market strength, in

if the "factual contexts of the two representations are similar or related."<sup>107</sup> This test was adopted and applied by the Wyoming Supreme Court in the recent case of *Carlson v. Langdon*.<sup>108</sup> The underlying case was a dispute between a mother and son over a lease agreement between them which was drafted by A.B. The mother needed to pay off a note to Citizen's Bank. She proposed to sell the leased property to pay off the note. Her son believed that sale was not permitted under the lease. He sued the Bank for tortious interference with the contractual relationship and A.B. appeared and answered for the Bank.<sup>109</sup> On a writ of certiorari, the Wyoming Supreme Court reversed the trial court's denial of the son's motion to disqualify A.B. Basing its decision on Rule 1.9, the court reasoned that there was a substantial relationship between the factual contexts of the two matters because the content and effect of the agreement was an issue in the current litigation.<sup>110</sup> The trial court's denial was partly based on the probability that the parole evidence rule would keep A.B. from testifying about the agreement.<sup>111</sup> The Wyoming Supreme Court found that the common factual context lead to an assumption that the son disclosed confidential information to A.B. Because of this and because the parties' intent at the time of the agreement was an important issue, A.B. was disqualified.<sup>112</sup>

The former client can consent to any adverse representation under Rule 1.9(a). To get effective consent, the lawyer must disclose the circumstances, including her intended role on behalf of the new client.<sup>113</sup>

The case law on conflict of interest with a former client does not arise out of disciplinary proceedings. It arises in litigation where a party moves to disqualify the opposing party's counsel because of conflict with a former client.<sup>114</sup> At the point that the issue is raised, the lawyer who may be disqualified has often put in thousands of hours of preparation. Therefore, the motions to disqualify are hotly contested. Although not bound to apply the ethical rules, courts often turn to them as guides in making the disqualification decision.<sup>115</sup> Courts will probably continue to use the rules as guides, despite the following disclaimer in the Scope section of the Rules:

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order to value stock. Judge Posner, writing for the court, said that this information was "potentially germane" to the pending antitrust suit against the company. The lawyer was disqualified. *Id.* at 1267.

107. *Smith v. Whatcott*, 757 F.2d 1098, 1100 (10th Cir. 1985) (citing *Trust Corp v. Piper Aircraft*, 701 F.2d 85, 87 (9th Cir. 1983) (quoting *Trone v. Smith*, 621 F.2d 994, 998 (9th Cir. 1980)).

108. 751 P.2d 344 (Wyo. 1988).

109. *Id.* at 344-45.

110. *Id.* at 349.

111. *Id.* at 347.

112. *Id.* at 349-50.

113. WYOMING RULES Rule 1.9 comment 4.

114. See generally, *T.C. Theatre*, 113 F. Supp. at 265; *Westinghouse Elec. Co. v. Gulf Oil Co.*, 588 F.2d 221 (7th Cir. 1978); *Kitchin v. United States*, 592 F.2d 900 (5th Cir.), cert. denied, 444 U.S. 843 (1979). The cases cited *infra* note 115 are disqualification cases.

115. See, e.g., *Freeman*, 689 F.2d at 721; *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 607-10 (8th Cir.), cert. denied, 436 U.S. 905 (1977); *International Business Machines Corp. v. Levin*, 579 F.2d 271, 280-81 (3rd Cir. 1978); *Jelco*, 646 F.2d at 1344-52.

The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist . . . has standing to seek enforcement of the Rule.<sup>116</sup>

The Comment to Rule 1.7 also shows some sensitivity to the misuse, as a trial strategy, of motions to disqualify. Opposing counsel is directed not to raise the issue unless the conflict is "such as clearly to call into question the fair or efficient administration of justice."<sup>117</sup> Even then, caution is advised because a motion to disqualify can be "misused as a technique of harassment."<sup>118</sup>

#### 4. *Imputing a Lawyer's Conflicts of Interest to Her Firm*

Rule 1.10 governs imputation of one lawyer's conflicts to other lawyers associated with her. The Code rule simply stated that if an individual lawyer could not represent a client, neither could any lawyer affiliated with her.<sup>119</sup> If this Code provision was applied literally, when a lawyer left a firm she took all of the conflicts of each lawyer in the former firm to her new firm. The number of clients who presented a conflict of interest would multiply geometrically as lawyers changed firms. Rule 1.10 narrows imputation of conflicts. It has separate provisions regarding the firm's conflicts when a new lawyer joins the firm, when a lawyer leaves the firm and when all events take place while the lawyer with the conflict is still in the same firm.

A firm cannot undertake representation in a matter if a lawyer in the firm has a conflict, under the general conflict rule<sup>120</sup> or the former client conflict rule<sup>121</sup>, that arose while the lawyer was employed at this same firm.<sup>122</sup> That conflict is imputed to the entire firm. Isolating the lawyer with the conflict will not permit the firm to take on the legal matter.

If a lawyer joins a new firm, the conflicts with her former clients or her former firm's clients are only imputed to the new firm under certain conditions. The client or potential client of her current firm must have materially adverse interests to the former client and the matters must be substantially related. So far the conditions are simply those of the former client rule. In addition, the lawyer who has just joined the firm must have acquired material information regarding the former client that is protected under the confidentiality rule.<sup>123</sup> For example, under this section of Rule 1.10, a firm can probably represent a client against a person

116. WYOMING RULES Scope.

117. *Id.* at Rule 1.7 comment 14.

118. *Id.*

119. CODE DR 5-105(D).

120. WYOMING RULES Rule 1.7.

121. *Id.* at Rule 1.9(a). Part of a related rule prohibits a lawyer from violating the rules through the acts of another. *Id.* at Rule 8.4(a).

122. *Id.* at Rule 1.10(a). The prohibitions of WYOMING RULES Rule 1.8(c), regarding gift instruments, and WYOMING RULES Rule 2.2, on intermediaries, are also imputed to the firm by this rule.

123. *Id.* at Rule 1.10(b).

who is represented by the former firm of one of its lawyers, if the lawyer who changed firms had limited involvement in only the legal issues of the former case. Assume a lawyer who has changed firms was involved only in legal research on the matter at the former firm and had no access to factual information. Her presence in the firm she has moved to would probably not disqualify her current firm.

A similar provision applies to the firm that the lawyer has left. Under certain conditions, the firm can take on a matter materially adverse to a former client who was represented by a lawyer who has now left the firm. If the current and former legal matters are substantially related, the lawyers remaining in the firm must not have any information from the former matter that is protected by the confidentiality rule and that is material to the current matter.<sup>124</sup> This probably includes protected information in the firm's files, as well as information that members of the firm received personally.<sup>125</sup> Confidential information about the former client in the firm's files would disqualify the firm.

Both of the provisions just discussed on lawyers entering or leaving a firm have the common condition that the lawyer not have acquired confidential information on a former legal matter. The question that has arisen in the case law is whether it can be inferred from the circumstances that a lawyer acquired such information or whether there must be actual proof that the lawyer has such confidential information.<sup>126</sup> The Comment to Rule 1.10 states that knowledge of confidential information can be inferred. If you prove that the lawyer had access to all of the firm's files and regularly participated in firm discussions of all clients' affairs, it can be inferred that she was privy to confidential information on all of the firm's cases. According to the Comment, the burden of proof is on the firm whose representation is being questioned to show that the lawyer who is the source of the alleged conflict did not acquire protected information.<sup>127</sup>

All of these imputed conflicts can be waived by the affected client under the conditions set forth in the basic conflict of interest rule.<sup>128</sup> For example, the client who was represented in the past by a lawyer who has now left a firm could consent to the firm representing a client who now opposes her.

The "firm" to which conflicts are imputed is defined broadly in the Comment, but not in Rule 1.10 itself.<sup>129</sup> It includes lawyers in a private firm, in the legal department of a corporation or other organization and

124. *Id.* at Rule 1.10(c).

125. This suggests that there is another reason for destroying files besides saving space.

126. *Westinghouse Elec. Co.*, 588 F.2d at 225 (It was reasonable to infer that the confidences allegedly given would have been given to a lawyer representing the client in that type of case.); *See also Kitchin*, 592 F.2d 900, 904 (The court of appeals decision is *per curiam* but it includes the district court opinion as an appendix.). The co-counsel relationship does not create an inference of shared confidences, according to the Eighth Circuit Court of Appeals. *Fred Weber, Inc.*, 566 F.2d at 609-10.

127. WYOMING RULES Rule 1.10 comment 11.

128. *Id.* at Rule 1.7, 1.10(d).

129. *Id.* at Rule 1.10 comments 1-5.

in a legal services organization.<sup>130</sup> It may also include lawyers who share office space, depending on circumstances discussed in the Comment.<sup>131</sup>

##### 5. *Conflicts of Interest for Government Lawyers and Former Government Lawyers*

Rule 1.11 addresses conflicts regarding current and former government lawyers. Two sections limit imputation of conflicts when a lawyer leaves government employment and joins a private firm.<sup>132</sup> The drafters were again following the case law that had developed. In the cases, the courts had not absolutely forbidden firms who hired a former government lawyer from representing a person in a matter that the lawyer had worked on as a government lawyer.<sup>133</sup> The policy reason not to impute the conflict to the firm in all cases was to assist government lawyers in finding employment after they left government. The courts reasoned that the best lawyers would be reluctant to take government jobs if firms in their specialty would not hire them after their government experience, for fear that the firm would then be disqualified from many cases.<sup>134</sup> It is not clear whether applying the general rule on imputation actually would have hampered employment opportunities. However, the courts accepted the policy reason and permitted the firm of a former government lawyer to take a case involving a matter she worked on while in government, if she was screened from involvement in the case and from sharing fees in the case.<sup>135</sup> If she is screened, the firm can undertake the representation. Rule 1.11(a) adopts this holding from the case law.

With the consent of the appropriate government agency, a lawyer may represent a private client in a matter she worked on as a public officer

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130. *Id.* at comments 1-3. It is unclear whether different units of a government funded legal services office can represent opposing parties. The question is important because often a poor person has no other choice for counsel. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1309 (1975), concluded that two legal services offices could represent opposing clients when the only connection was that the funds for one office had to be funneled through the other office, with the latter office paying all budgeted expenses. The Opinion distinguishes situations where both offices are part of one program. *Id.* In ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1814 (1978), the Committee decided that two public defender offices, under the control of one chief public defender, could not properly represent co-defendants. In *Borden v. Borden*, 277 A.2d 89, 91 (D.C. 1971), the court concluded that two neighborhood offices of one legal services organization could not represent opposing clients. However, in dicta, the court in *Flores v. Flores*, 598 P.2d 893, 896-97 (Alaska 1979), concluded that different units of a legal services program could oppose each other, if proper procedures were instituted.

131. WYOMING RULES Rule 1.10 comment 1.

132. *Id.* at Rule 1.11(a)(1), (2).

133. *Kesselhaut v. United States*, 555 F.2d 791 (Ct. Cl. 1977); *Armstrong v. McAlpin*, 625 F.2d 433, 445 (2nd Cir. 1980) (en banc), vacated on other grounds, 449 U.S. 1106 (1981); *Sierra Vista Hospital, Inc. v. United States*, 639 F.2d 749 (Ct. Cl. 1981). See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975).

134. *Kesselhaut*, 555 F.2d at 793; *Armstrong*, 625 F.2d at 443. Formal Op. 342, *supra* note 133.

135. *Kesselhaut*, 555 F.2d at 793; *Armstrong*, 625 F.2d at 442. See also *Sierra Vista*, 639 F.2d at 751-52 (The files were kept in a separate room and then moved to a different city and the lawyers who had been involved with the case were instructed to have no contact with it. The opinion is silent as to sharing of fees.)

or employee.<sup>136</sup> Without this consent, the representation would violate Model Rule 1.11(a). However, the Grievance Committee removed the consent provision.<sup>137</sup> The Committee decided that a government agency should not be able to consent to a conflict of interest with the government.<sup>138</sup>

Rule 1.11(b) states that a former government lawyer who acquired confidential government information about a person may not take certain cases against that person. Rule 1.11(a) applies only where the former government lawyer "participated personally and substantially" in the government legal matter.<sup>139</sup> The receipt of "confidential government information,"<sup>140</sup> which is defined as information that the government would be prohibited from disclosing to the public under applicable statutes, triggers Rule 1.11(b). The former government lawyer may not represent a private client in a matter in which the information could be used to the disadvantage of the person it concerns. In other words, she cannot exploit that information on behalf of her private client. This may place broader restrictions on a former government lawyer than on a private lawyer changing firms. For example, the lawyer who worked for a regulatory agency is likely to have such confidential information about many persons with whom she did not have a client-lawyer relationship. As with Rule 1.11(a), the firm that a former government lawyer joins can take cases that the lawyer cannot take, under Rule 1.11(b), if the former government lawyer is screened.

Some commentators have proposed that the same screening of the lawyer with the conflict should permit private firms to take cases when the conflict is based on the lawyer's work at another firm.<sup>141</sup> However, the Model Rules and the courts have accepted screening as a solution to conflicts only for the conflicts of former government lawyers.<sup>142</sup>

136. MODEL RULES Rule 1.11(a).

137. WYOMING RULES Rule 1.11(a). This change also necessitated a change to MODEL RULES Rule 1.9(a) as that rule permits a former client to consent to a lawyer representing an adverse party. WYOMING RULES Rule 1.9(a) permits former client consent except when the former client is a government entity.

138. Wyoming Bar Grievance Committee Meeting Minutes (October 21, 1985).

139. WYOMING RULES Rule 1.11(a). The Grievance Committee concluded that "matter" was not broad enough to prohibit a lawyer who drafted regulations from advising a later private client about those regulations. Wyoming Bar Grievance Committee Meeting Minutes (Oct. 21, 1985).

140. WYOMING RULES Rule 1.11(e).

141. See, e.g., *Developments, Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1365-67 (1981). Comment, *The Chinese Wall Defense to Law Firm Disqualification*, 128 U. PA. L. REV. 677, 702 (1980).

142. "[W]e do not recognize the wall theory as modifying the presumption that actual knowledge of one or more lawyers in a firm is imputed to each member of that firm." *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1321 (7th Cir.) (footnote omitted), cert. denied, 439 U.S. 955 (1978). See also *Fund of Funds, Ltd. v. Arthur Anderson & Co.*, 567 F.2d 225, 229 n.10 (2nd Cir. 1977) (agreeing with dicta in the lower court's opinion that structural separations are not sufficient to isolate conflicts within a firm). Most statements on this issue are dicta as the opinions usually rely on the fact that a breakdown occurred in the alleged separation. This was true in both of the cases cited.

In one case the court accepted screening of a lawyer who joined a firm which opposed his former private client. *NFC Inc. v. General Nutrition, Inc.*, 562 F. Supp. 332, 335 (D. Mass. 1983). In *Cheng v. GAF*, 631 F.2d 1052 (2nd Cir. 1980), vacated on other grounds and remanded mem., 450 U.S. 903 (1981), the firm that was disqualified argued that the lawyer

Rule 1.11 restricts government lawyers in another way. A government lawyer must not negotiate for a private job with a party, or the lawyer for a party, in a matter in which the government lawyer is participating.<sup>143</sup> Such negotiation creates an impermissible conflict for the government lawyer.

Rule 1.12 applies to judges, other adjudicative officers, arbitrators and law clerks. It applies restrictions similar to Rule 1.11 on negotiating for private employment while holding such positions and on conflicts in subsequent private practice.<sup>144</sup>

### 6. Conflicts of Interest for Lawyers Representing Organizations

Unlike the Code, the Wyoming and Model Rules include a special rule on the legal representation of organizations.<sup>145</sup> Rule 1.13 applies to the representation of corporations, other kinds of private organizations and government organizations.<sup>146</sup> Rule 1.13 deals with two basic issues. Rule 1.13(e) addresses when the lawyer for an organization can represent the constituents of the organization, such as officers. Rule 1.13(b) creates a duty for the organization lawyer if she believes that an organization's officers or employees are violating or intending to violate a legal obligation. This whistleblowing aspect of the Rule generated controversy when the rules were drafted and revised.<sup>147</sup>

Rule 1.13(a) defines the client as "the organization, acting through its duly authorized constituents", when a lawyer is employed or retained by an organization.<sup>148</sup> Rule 1.13(e) directs the reader to Rule 1.7, the general

with prior involvement had been successfully screened. Among other things, he was in another department of the firm. The court did not reject the possibility of screening but found that the firm was too small for it to be effective. *Id.* at 1058. The court also distinguished the former government lawyer from the lawyer who moves from one private firm to another. *Id.* at 1058 n.7. (The United States Supreme Court vacated the court of appeals decision on the basis that the order was not subject to an interlocutory appeal. The court of appeals dismissed the appeal. 659 F.2d 1058 (2d Cir. 1981). However, the law firm was later disqualified by the trial court and the court of appeals affirmed the disqualification, on the basis of its earlier opinion. *Cheng v. GAF Corp.*, 747 F.2d 97 (2nd Cir. 1984). *See also Smith v. Whatcott*, 757 F.2d at 1098; *Carlson v. Langdon*, 751 P.2d 344 (Wyo. 1988).

143. WYOMING RULES Rule 1.11(c)(2). WYOMING RULES Rule 1.11(c)(1) also restricts a government lawyer's involvement with matters with which she was involved in prior employment.

144. *Id.* at Rule 1.11(a), (c)(2).

145. *Id.* at Rule 1.13. CODE EC 5-18 addresses the identity of the client when the lawyer represents an organization.

146. The Comment to WYOMING RULES Rule 1.13 includes each type of organization in its discussion. It points out that the Rule may apply differently to lawyers for government agencies because the identity of the client is less clear and because the government lawyer may have a higher duty than other organizational lawyers to report wrongdoing. *Id.* at comment 2, 7.

147. CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra* note 13, at 87-91.

148. WYOMING RULES Rule 1.13(a). The Kutak Commission proposed draft stated that the lawyer represented the organization "as distinct from" its officers and other constituents. The draft was amended by the House of Delegates, as proposed by the American College of Trial Lawyers, to state that the lawyer represented the organization "including" officers and other constituents "as a group, except where the interests of any one or more of the



conflict of interest rule, to determine whether the lawyer can represent a constituent of the organization and the organization itself.<sup>149</sup> In other words, the lawyer is to treat the organization and the constituent as two separate clients and determine if the representation of either will be materially limited by her obligations to the other. If the representation of either will be materially limited, then the lawyer can only represent the organization, since it is the existing client. Rule 1.13 also requires the lawyer to clarify that the organization is her client when dealing with directors, officers, employees or shareholders, if it is apparent that the interests of the organization are adverse to these individuals.<sup>150</sup> In other words, the lawyer cannot use a constituent's misperception that the lawyer is representing her to get confidential information from her.

The whistleblowing section of Rule 1.13 confirms that the individuals within the organization are not the client of the lawyer for an organization. This section of the Rule applies if the lawyer for an organization:

knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of the law which might reasonably be imputed to the organization . . . .<sup>151</sup>

If such employee or officer actions are "likely to result in substantial injury to the organization,"<sup>152</sup> the organization lawyer must act, if it is in the best interests of the organization. One remedy suggested by the Rule is for the organization lawyer to advise that a separate legal opinion be obtained. Another suggested lawyer action is to advise others within the organization of the illegal acts or planned illegal acts. If the employee or officer were the client, then telling others would not be permitted, under the confidentiality rule, unless a future crime was intended.<sup>153</sup> Since the client is the organization, telling others within the organization does not violate the confidentiality rules.

Though Rule 1.13 tells the lawyer to act cautiously, the lawyer for the organization must act when she knows of an officer's or employee's illegal actions or intended illegal actions. All corrective actions are to be

group may be adverse to the organization's interests." CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra* note 13, at 89. Finally, a House committee proposed the current client definition, which was then adopted by the House of Delegates. *Id.* at 89-92.

149. WYOMING RULES Rule 1.13(e). The Wyoming Code had a rule on this which was not included in the Model Code. It stated:

A lawyer may accept employment from any organization such as an association, club or trade organization to render legal services in any matter in which the organization as an entity is interested. This employment should not include the rendering of legal services to a member of such organization in respect to his individual affairs.

WYOMING CODE DR 3-104.

150. WYOMING RULES Rule 1.13(d).

151. *Id.* at Rule 1.13(b).

152. *Id.*

153. *Id.* at Rule 1.6(a), (b)(1).

taken within the organization. If the highest authority in the organization refuses to cure the problem, the lawyer may resign.<sup>154</sup>

The whistleblowing section of Rule 1.13 was criticized as forcing the lawyer to blow the whistle on her own client.<sup>155</sup> However, Hazard points out that the duty is limited to acting within the organization.<sup>156</sup>

#### D. DISABLED CLIENTS, CLIENT PROPERTY AND WITHDRAWAL

Representing disabled clients is addressed by Rule 1.14.<sup>157</sup> The Rule directs the lawyer to maintain a normal client-lawyer relationship as much as possible. The Comment cautions that there are varying degrees of legal disability. A lawyer should not jump to the conclusion that a guardian is needed just because a client does not meet the legal standards for competency. The client may be able to make necessary client decisions without being legally competent.<sup>158</sup> In addition, guardianship may have other, adverse consequences for the client which the lawyer must consider.<sup>159</sup>

There are two significant rule changes in regard to safekeeping of funds and property. First, Rule 1.15(a) explicitly requires the lawyer to protect the property of third parties, received in connection with the client representation. The Code rule addressed only the property and funds of clients.<sup>160</sup>

Secondly, the Wyoming Supreme Court voted, on November 16, 1987,<sup>161</sup> to amend Rule 1.15 to permit the deposit into interest bearing accounts of client funds in nominal amounts, or client funds to be held for a short period of time.<sup>162</sup> The lawyer is to decide what are nominal funds or funds to be held for a short period of time, using listed factors.<sup>163</sup> If an amount greater than five hundred dollars is deposited on behalf of one

154. *Id.* at Rule 1.13(c). The Kutak Commission proposed rule had more options for the lawyer in this situation. See *infra* note 156.

155. G. HAZARD & W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 239-240, 242 (1985).

156. *Id.* Under the Kutak Commission proposed MODEL RULES Rule 1.13(c), there was a provision requiring disclosure beyond the organization, in certain circumstances, if the highest officers in the organization did not act. CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra* note 6, at 88-89.

This section of WYOMING RULES Rule 1.13 is a specific application of the general rule that the lawyer shall not permit a person employing the lawyer to represent another, to direct her professional judgment. WYOMING RULES Rule 1.8(f). Here, the client of the lawyer is the organization. As a result, individuals in the organization cannot direct the lawyer's professional judgment, even if they are the officers who employed the lawyer.

157. The Code had no rule on this subject.

158. "[A] client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being." WYOMING RULES Rule 1.14 comment 1.

159. *Id.* at comment 3.

160. CODE DR 9-102.

161. *Supreme Court Adopts Plan for Interest on Lawyers' Trust Accounts*, X WYOMING LAWYER Dec. 1987 at 1, 16-17.

162. WYOMING RULES Rule 1.15(d), (e). The amendment to Rule 1.15, is reprinted in X WYOMING LAWYER, Dec. 16, 1987 at 16-17.

163. WYOMING RULES Rule 1.15(e)(1)(iii), (iv).

client, the Rule mandates that a specified notice be given to the client.<sup>164</sup> The depository institution is to remit the interest to the Wyoming State Bar Foundation, which is designated to distribute the money for specified charitable purposes.<sup>165</sup> Prior to the amendment such client funds could not be deposited in interest bearing accounts unless the interest was apportioned and delivered to each client, because the interest was client funds.<sup>166</sup> Apportioning and distributing the interest was generally more costly than the interest itself. Therefore, the money was deposited in non-interest bearing accounts. The import of the amendment is that use of the interest by the Wyoming State Bar Foundation for charitable purposes does not violate the rules on safekeeping of client funds.

Rule 1.16 states the permissive and mandatory bases for withdrawal from representation. Though the mandatory bases are essentially unchanged from the Code,<sup>167</sup> Rule 1.16(b) adds some broad bases for permissive withdrawal. For example, under Rule 1.16(b), a lawyer may withdraw whenever she can do so without material adverse effect on the interests of her client. Also, if the client insists on an objective that the lawyer considers imprudent, she can withdraw even if withdrawal will have an adverse effect on her client.<sup>168</sup> The financial basis for withdrawal is stated differently. Under the Code, a lawyer was permitted to withdraw if her client "[d]eliberately disregards an agreement or obligation to the lawyer as to expenses or fees".<sup>169</sup> This seems to focus on the client's intention. Rule 1.16(b)(4) contains a similar provision. It requires the lawyer to give the client a warning. However, another section of the Rule permits the lawyer to withdraw if "the representation will result in an unreasonable financial burden on the lawyer."<sup>170</sup> This focuses only on the consequences to the lawyer.<sup>171</sup>

Finally, Rule 1.16 permits a lawyer to withdraw for "other good cause."<sup>172</sup> Under the Code, the good cause exception applied only to cases before a tribunal and the lawyer had to believe in good faith that the

164. *Id.* at Rule 1.15(e)(1)(v).

165. *Id.* at Rule 1.15(e)(3), (4).

166. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 348 (1982). The Opinion concludes that for the attorney to use such interest for her own purposes would be to use client funds. In 1981, the Florida Supreme Court upheld a similar program for interest on small amounts of client funds. *In re Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981). The court found no taking of client funds, under the due process clause, because "no client is compelled to part with 'property' . . . since the program creates income where there was none before, and the income thus created would never benefit the client under any set of circumstances." *Id.* at 395.

167. WYOMING RULES Rule 1.16(a); CODE DR 2-110(B).

168. WYOMING RULES Rule 1.16(b)(3).

169. CODE DR 2-110(C)(1)(f).

170. WYOMING RULES Rule 1.16(b)(5).

171. This basis for withdrawal may apply in cases where the client has paid what he agreed to pay but the case requires more legal services than anticipated and the client is not able to pay more. Perhaps the client has only a breach of contract claim if the lawyer refuses to proceed.

172. WYOMING RULES Rule 1.16(b)(6). In contingent fee agreements, the Representation Agreement states bases for withdrawal from that type of representation. The Agreement, or substantially similar provisions, are required in contingent fee cases. WYOMING CONTINGENT FEE RULES Rule 6.

*tribunal* would find the existence of good cause for withdrawal.<sup>173</sup> Under Rule 1.16(b), the lawyer can decide for herself what constitutes good cause and can withdraw on this basis from any legal matter.

Although Rule 1.16(b) is more liberal on the grounds permitting withdrawal than the Code was, a lawyer who has appeared for a client in a court matter must have the permission of the court to withdraw under Wyoming court rules.<sup>174</sup> Model Rule 1.16(c) requires the lawyer to continue representation if ordered to do so by the court even if the circumstances meet the requirements for withdrawal under the Rule. Wyoming Rule 1.16(c) permits the lawyer to continue representation if ordered to do so but does not require it. The Committee decided that contempt was a sufficient sanction for failure to continue representation. If a lawyer wanted to appeal the contempt citation, believing that she had an adequate basis for withdrawal, the lawyer should not be subject to discipline as well.<sup>175</sup> In Wyoming, a lawyer must seek the court's permission to withdraw from any matter under the rules of the various courts.<sup>176</sup> Under the Model Rules, the lawyer whose request to withdraw was denied would face contempt and discipline if she refused to continue, even if she had a sound basis to withdraw under the Rule. Under Wyoming Rule 1.16(c), the lawyer can choose to risk contempt by refusing to continue the representation and not violate the Rule.

The difficult ethical issue raised by requiring that the court grant withdrawal is what to tell the court in requesting withdrawal. Information about the client that might persuade the court to grant withdrawal is likely to be confidential and to damage the client.

Take, for example, a lawyer who believes that the client intends to perjure herself. If the lawyer explains to the judge that this belief is the reason that she plans to withdraw, this will likely prejudice the client's interest. Even the lawyer who seeks to withdraw because her client refuses to cooperate with her, or refuses to pay her, may prejudice her client by disclosing these problems to the judge who will later decide the case on the merits. All of these explanations involve confidential information that must not be disclosed under Rule 1.6, and perhaps information that is privileged under the attorney-client privilege.<sup>177</sup> On the other hand, the

173. CODE DR 2-110(C)(6).

174. WY. R. APP. P. 19.02 requires written consent of the court to withdraw as attorney. UNIFORM RULES FOR THE DISTRICT COURTS OF THE STATE OF WYOMING Rule 102(c), requires a court order to withdraw from a district court action. UNIFORM RULES FOR THE COUNTY COURTS OF WYOMING Rule 1.02, incorporates the district court rule. See also United States District Court, DISTRICT OF WYOMING LOCAL RULES Rule 201.

175. Wyoming Bar Grievance Committee Meeting Minutes (October 21, 1985). WYOMING RULES Rule 3.4(c) requires that a lawyer obey court rules except for an open refusal based on an assertion that no valid obligation exists. The decision to refuse to continue representation in these circumstances would be such an open refusal.

176. See *supra* note 174.

177. It is unclear whether a lawyer who is ordered by the court to explain why she wants to withdraw can do so without being concerned about confidentiality. A provision of the Kutak Commission Proposed Rule 1.6, to permit disclosure of confidences "to comply with other law" was omitted. CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra* note 13, at 49-50. However, WYOMING RULES Rule 1.6 comment 20 states that a lawyer must comply with

judge may hesitate to allow the lawyer to withdraw without specific reasons, particularly when the alternative is pro se representation and the withdrawal bases are so broad under the Rules.

The Comment to Rule 1.16 indicates that the judge should accept a very generally stated reason for withdrawal. It states that, "The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient."<sup>178</sup> The author's experience indicates that this is not sufficient to persuade courts in many cases.

### III. THE LAWYER'S NON-ADVOCACY RULES

The second part of the rules, Rules 2.1 to 2.3, applies certain general rules in the first section to lawyers serving in roles other than as an advocate for a client. The rules on conflict of interest, confidentiality and withdrawal are applied to such roles as evaluator and mediator, and a rule on the lawyer as advisor is included.

#### A. LAWYER AS COUNSELOR

Rule 2.1 directs a lawyer to use independent judgment and give candid advice when advising a client. Here the concern is that the lawyer might give the client the answer she wants to hear in order to please the client. Both the requirement to communicate to the client and the requirement to act competently require the lawyer to give complete and candid advice, even if the advice is not what the client wishes to hear.<sup>179</sup> If a course of action may result in substantial adverse consequences, the lawyer may be required to advise the client even if the client has not sought advice.<sup>180</sup>

A lawyer may refer to non-legal reasons, such as moral or economic reasons, in advising a client, under the second portion of Rule 2.1. This is one of the few places where the Rules permit rather than prohibit or

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final court orders requiring the lawyer to give information about a client. See *infra* note 227 on the question of whether information on a client's intended perjury or other unlawful act comes within the attorney-client privilege.

178. WYOMING RULES Rule 1.16 comment 3. This applies to appointed counsel and counsel who have filed an appearance. *Id.* The Comment to Model Rule 1.16 applies this procedure only to appointed counsel. This limitation may be based on the assumption that only such counsel must have permission of the court to withdraw. The court rules in Wyoming require that all lawyers have permission of the court to withdraw from representation in a matter before the court. See *supra* note 174.

In one Colorado case, the court, in dicta, stated that a lawyer whose client insists on perjuring herself can only state that she has irreconcilable differences with her client in seeking to withdraw. *People v. Schultheis*, 638 P.2d 8, 18 (Colo. 1981). Also, United States District Court, DISTRICT OF WYOMING LOCAL RULES Rule 201, states that the attorney must file a motion stating the reasons for withdrawal "unless to do so would violate the Code of Professional Liability." (It is assumed that this refers to the applicable ethical rules.) However, since the Rule also requires a commitment from another attorney to represent the client, the federal district court may not be very concerned about the reasons for the withdrawal.

179. WYOMING RULES Rule 2.1 comment 1.

180. *Id.* at comment 5.

mandate. If clients are not sophisticated, lawyer competence and the need for the client to make an informed decision may require a lawyer to advise a client of the possible non-legal effects of an action.<sup>181</sup>

#### B. LAWYER AS MEDIATOR

The lawyer as mediator is addressed in Rule 2.2. The Rule applies to cases where the lawyer is asked to represent more than one client in reaching a goal.<sup>182</sup> For example, two people with a common general objective may seek a lawyer to work out a formal written agreement. The lawyer in such cases is described as an intermediary. This role contrasts with the role of arbitrator where the lawyer does not represent either party but serves as a neutral decisionmaker.<sup>183</sup>

The Comment suggests that the lawyer asked to organize or reorganize a business or arrange a property settlement of an estate may be able to serve as an intermediary on behalf of a number of clients.<sup>184</sup> Some of the signals that a lawyer should not undertake such a role are:

- 1) signs that the parties are already antagonistic,<sup>185</sup>
- 2) cases where the lawyer's longstanding relationship with only one of the clients suggests that she will not be able to act impartially,<sup>186</sup> and
- 3) situations where the tentative agreements that the potential clients present suggest that one is overreaching another.<sup>187</sup>

Like the conflict of interest rule, Rule 2.2 requires the lawyer who is considering a role as mediator to make an independent assessment of whether she can resolve the matter on terms that are in each of the client's best interests.<sup>188</sup> She must also reasonably believe that she can proceed impartially, that there is little risk of material prejudice to any client if the mediation is not successful, and that each client will be able to make informed decisions.<sup>189</sup>

The clients must consent to the lawyer serving as intermediary after the risks and benefits are explained. The Rule specifies that one risk, the effect on attorney-client privilege, must be explained.<sup>190</sup> If two clients agree to joint representation, the lawyer can be compelled to testify about her own statements and the statements of each client in a later conflict

181. *Id.* at comment 3.

182. "A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; . . ." *Id.* at Rule 2.2 comment 3.

183. *Id.* at comment 2.

184. *Id.* at comment 3.

185. *Id.* at comment 4.

186. *Id.* at comment 7.

187. Where one lawyer served both parties in a divorce, a claim of overreaching by the lawyer will be subjected to far more scrutiny than if each had independent counsel. *Levine v. Levine*, 56 N.Y.2d 42, 436 N.E.2d 476, 478, 451 N.Y.S.2d 26 (1982).

188. WYOMING RULES Rule 2.2(a)(2).

189. *Id.* at Rule 2.2(a)(2), (3).

190. *Id.* at Rule 2.2(a)(1).

between the clients over the matter.<sup>191</sup> In other words, attorney-client privilege will not apply in a later conflict between the clients who now seek a mediator.

Rule 2.2(c) also states another risk for client and lawyer. If any client decides to terminate the mediation, the lawyer cannot continue to represent any party in the matter. Each party will have to get different counsel at that point. This defeats the cost-saving goal of joint representation. If this breakdown in the mediation was governed by Rule 1.9, the person who terminated the relationship has become a former client and could consent to the lawyer continuing to represent the other parties. However, Rule 2.2(c) absolutely prohibits continuing representation of the other clients in the same matter. Apparently, it was decided that the risk here was too great and an absolute prohibition was required.<sup>192</sup>

Joint representation raises one controversial question. How should a lawyer respond when a couple seeking a divorce asks the lawyer to work out details of a settlement that they have reached? Since the couple are direct adversaries, at least formally, Rule 1.7(a) seems to apply. The Comment to Rule 1.7 states that one lawyer cannot represent opposing parties in litigation.<sup>193</sup> On the other hand, if the lawyer reasonably believes that the benefits to *each* client from an amicable settlement outweigh the risks, it appears that she may undertake the intermediary role of Rule 2.2.<sup>194</sup> The risks to be considered include the possibility that two other lawyers will be needed if negotiation breaks down. Any seasoned domestic relations lawyer knows that such breakdown often occurs in cases where the couple initially profess a belief that they have worked out an agreement. The possibility of one spouse overreaching the other, or of antagonistic negotiations developing, counsels against taking on the role of mediator between divorcing parties.

191. Where an "attorney acts for two or more parties having a common interest, neither party may exercise the [attorney-client] privilege in a subsequent controversy with the other." *Garner v. Wolfenbarger*, 430 F.2d 1093, 1103 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

192. The Kutak Commission proposed that continuing representation be permitted "if it was clearly compatible with the lawyer's responsibilities to the other client or clients." This clause was omitted by amendment. CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra* note 13, at 111-12.

193. WYOMING RULES Rule 1.7 comment 6.

194. This poses a problem for the filing of the divorce. One lawyer cannot appear as attorney for both parties in the divorce itself. WYOMING RULES Rule 1.7 comment 6. Presumably the lawyer should file on behalf of one party and the divorce will be resolved by an agreement, incorporating the terms reached in the mediation. However, if filing on behalf of one party is viewed as terminating the relationship with the other, the attorney could not represent either party after filing, under WYOMING RULES Rule 2.2(c).

At least two courts have held that the fact that one lawyer represented both the husband and wife does not invalidate the property settlement agreement. Both courts, in dicta, conclude that representation of both parties to a divorce may be proper in some circumstances. *Levine*, 436 N.E. 2d at 478; *Halversen v. Halversen*, 3 Wash. App. 827, 479 P.2d 161, 163 (1970) (Party challenging agreement chose same counsel after being advised to seek separate counsel if she perceived a conflict of interest. She stated what she wished, received it and expressed satisfaction, according to the court.). However, the IOWA CODE prohibits dual representation in all divorce cases, whether or not they are contested. IOWA CODE OF PROFESSIONAL RESPONSIBILITY, IOWA RULES OF COURT DR 5-105(A) (West 1987).

### C. LAWYER AS EVALUATOR FOR THIRD PERSONS

The final rule in the section on non-advocacy roles applies where a lawyer is asked to evaluate a matter affecting her client, for use by a third person. Common examples are title searches on behalf of a vendor and statements done to encourage investment or meet the requirements of securities laws. Such evaluations are likely to produce tension between a lawyer's duty to her client and her duty to the recipient of the report. Rule 2.3 requires that the lawyer decide, before she agrees to do such an evaluation, whether it is likely to create a conflict with the client.<sup>195</sup> The lawyer must advise the client of the possible problems of undertaking such an evaluation and get the client's consent.<sup>196</sup>

A conflict with the client may occur when a lawyer must disclose confidential information to do an adequate evaluation report. To include confidential information in the report may remove it from attorney-client privilege.<sup>197</sup> On the other hand, the lawyer must get consent to disclose confidential information if it is needed to avoid making false statements to the third party in the report.<sup>198</sup> The lawyer should get this consent in advance. If the client refuses to consent after the evaluation is undertaken and the lawyer is unable to provide the promised report, this will damage and embarrass the client. The lawyer may have a legal duty to the third party.<sup>199</sup> However, the Rule makes it clear that information from the original client is confidential from the third party if it is not required by the report.<sup>200</sup>

## IV. LAWYER AS ADVOCATE

Rules 3.1 to 3.9 focus on the lawyer as advocate and on her duties to the court and to the opposing party.

### A. MERITLESS CLAIMS AND DELAY

Under Rule 3.1, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous."<sup>201</sup> Under the Code, a lawyer was not to take an action "unwarranted under existing law."<sup>202</sup> The Comment defines "frivolous"

195. WYOMING RULES Rule 2.3(a)(1).

196. *Id.* at Rule 2.3(a)(2).

197. The cases differ on whether voluntary disclosure by the lawyer destroys the privilege. In *Sprader v. Mueller*, 265 Minn. 111, 117, 121 N.W.2d 176, 180 (1963), the court concluded that an attorney's intentional disclosure waives the privilege if she believes that disclosure would help her client's cause, even if she does not have client consent. On the other hand, inadvertent disclosure by the lawyer does not show the required intent to waive the privilege, according to *Connecticut Mutual Life Ins. Co. v. Shields*, 18 F.R.D. 448, 451 (S.D.N.Y. 1955). See also *Himmelfarb v. United States*, 175 F.2d 924, 939 (9th Cir. 1949) (client consent can be inferred).

198. WYOMING RULES Rule 4.1(a).

199. *Id.* at Rule 2.3 comment 4.

200. *Id.* at Rule 2.3(b). In this sense, the original client and the recipient of the report are not joint clients of the lawyer.

201. *Id.* at Rule 3.1.

202. CODE DR 7-102(A)(2).



through some examples. A claim is not frivolous because the lawyer believes that her client will not ultimately prevail. Nor is a claim frivolous just because the facts are not fully substantiated or will be developed by discovery. A claim is frivolous if the client's motive for the action is primarily to harass or maliciously injure another person.<sup>203</sup>

The Comment to Rule 3.1 also states that an action is frivolous if the lawyer cannot make a good faith argument on the merits.<sup>204</sup> However, Rule 3.1 makes an exception for criminal defense that was not contained in the Code. The lawyer for a defendant in a proceeding that could involve incarceration may require that "every element of the case be established",<sup>205</sup> even if she has no basis to controvert certain allegations. Both the Code and the Rules permit a lawyer to test the existing law if she has a good faith argument that the law should be changed.<sup>206</sup>

The Grievance Committee added to Rule 3.1 a proscription based on Rule 11 of the Federal Rules of Civil Procedure.<sup>207</sup> Specifically, the final sentence in Wyoming Rule 3.1 is:

The signature of an attorney constitutes a certificate by him that he has read the pleading, motion or other court document; that to the best of his knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.<sup>208</sup>

Incorporating this civil procedure rule into the ethical rules gives authority to discipline a lawyer for violation of this Rule, whether or not the trial court imposed a sanction under the civil procedure rule. The Grievance Committee made the addition to strengthen the Rule, to make it enforceable, and to clarify its application to pleadings.<sup>209</sup> Wyoming Rule 3.1 requires the lawyer to make reasonable inquiry as to the validity of the claims she makes in a pleading or court document. She cannot fail to inquire and simply claim that she did not know the statements were incorrect. The Comment to Wyoming Rule 3.1 indicates that this inquiry is to be made as to the facts and law before a pleading is filed.<sup>210</sup>

203. WYOMING RULES Rule 3.1 comment 2.

204. *Id.*

205. *Id.* at Rule 3.1

206. CODE DR 7-102(A)(2); WYOMING RULES Rule 3.1.

207. WYOMING RULES Rule 3.1. Note that the Rule incorporates Rule 11 of the Federal Rules of Civil Procedure, except that the words "or other court document" are substituted for "or other paper". FED. R. CIV. P. 11. Rule 11 of the Wyoming Rules of Civil Procedure, at the time the new ethical rules were reviewed and adopted, was more general and did not explicitly require inquiry. It was amended, effective April 21, 1987, and this section of Rule 11, Wyoming Rules of Civil Procedure, now conforms to the language of the Federal Rules.

208. WYOMING RULES Rule 3.1.

209. Wyoming Bar Grievance Committee Meeting Minutes (July 14, 1985).

210. WYOMING RULES Rule 3.1 comment 2.

The Grievance Committee debated the application of Rule 3.1 to general denial answers. A motion was made to state in the Rule that a general denial at the beginning of the case was not frivolous. The motion was withdrawn after opponents argued that to permit single sentence general denials conflicted with the purpose of the Rule and with Wyoming Rules of Civil Procedure Rule 8. In addition, it was pointed out that Rule 3.1 indicates that a full investigation is not required by the Rule before an answer is filed.<sup>211</sup>

Under the Code, the lawyer only violated the rule analogous to Rule 3.1 when she knowingly advanced a claim that was not warranted under existing law, or when she knew or it was obvious that she was advancing a claim merely to harass.<sup>212</sup> There is no knowledge requirement in Rule 3.1. Particularly as modified by the Grievance Committee, the Rule sets a more objective standard for claims without merit and requires the lawyer to make some inquiry before making a claim or defense on behalf of a client.

Rule 3.2 requires that a lawyer "make reasonable efforts to expedite litigation consistent with the interests of the client."<sup>213</sup> The Code prohibited a lawyer from delaying a trial when such action "would serve merely to harass or maliciously injure another."<sup>214</sup> The Code did not directly address other kinds of delay. On its face, Rule 3.2 seems to require the lawyer to make efforts to push along the litigation as long as it is consistent with her client's interests. The lawyer's own interests do not justify delay, but the client's interests do. However, the Comment states that certain client's interests are not a legitimate basis for delay.

The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.<sup>215</sup>

## B. ADVOCATE'S DUTIES TO THE COURT

Rule 3.3 gathers together all of the rules on obligations of a lawyer to a court or other tribunal while representing a client.<sup>216</sup> The first obligation under Rule 3.3 is not controversial: "A lawyer shall not knowingly

211. Wyoming Bar Grievance Committee Meeting Minutes (July 14, 1985).

212. CODE DR 7-102(A)(1) & (2).

213. WYOMING RULES Rule 3.2.

214. CODE DR 7-102(A)(1).

215. WYOMING RULES Rule 3.2 comment.

216. "Tribunal" is not defined in the Model Rules or the Wyoming Rules. In Black's Law Dictionary it is defined as, "[t]he seat of a judge, the place where he administers justice" and "[t]he whole body of judges who compose a jurisdiction; a judicial court; the jurisdiction which the judges exercise." BLACK'S LAW DICTIONARY 1350 (5th ed. 1979). WYOMING RULES Rule 3.9 refers to a "legislative or administrative tribunal [acting] in a nonadjudicative proceeding." This Rule and the Comment to it suggest that a broad definition of the word "tribunal" is intended in the Model Rules and that the earlier rules in the section are intended to apply to any body acting in an adjudicative capacity.

make a false statement of material fact or law to a tribunal."<sup>217</sup> The new Rule adds the qualification "material" to the Code language.<sup>218</sup> Rule 3.3(a)(4), like the Code, prohibits a lawyer from knowingly offering false testimony.<sup>219</sup>

Rule 3.3(a)(3), taken directly from the Code,<sup>220</sup> requires the lawyer to disclose to the court legal authority in the controlling jurisdiction that is directly adverse to her client and that is not disclosed by opposing counsel. This duty is often a surprise to lawyers. The Rule is criticized as requiring a lawyer to do the opposing lawyer's work. However, a lawyer will rarely have to disclose adverse case law under this Rule if the term "directly adverse" is narrowly interpreted.

Under Rule 3.3(d), a lawyer is also required, in an *ex parte* proceeding, to disclose to the tribunal adverse material facts. This Rule has no counterpart in the Code. Normally, the opposing counsel must discover and present adverse facts. However, since the court will not receive such information in an *ex parte* proceeding, Rule 3.3(d) requires a lawyer to present adverse facts in such a proceeding.<sup>221</sup>

Two parts of Rule 3.3(a) require the lawyer to take remedial action when a statement of her client, or other evidence the lawyer presents, is false or misleading. Under Section (a)(2), the lawyer shall not "fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."<sup>222</sup> This is a specific application of the general rule prohibiting a lawyer from assisting criminal or fraudulent acts by the client.<sup>223</sup> Rule 3.3(a)(2) may prohibit remaining silent and continuing to represent a client before a tribunal if that will assist the client's fraud or perjury. Reference to perjured testimony in a closing argument has been interpreted as assisting a client's criminal act.<sup>224</sup>

217. WYOMING RULES Rule 3.3(a)(1).

218. CODE DR 7-102(A)(5).

219. CODE DR 7-102(A)(4).

220. CODE DR 7-106(B)(1).

221. WYOMING RULES Rule 3.3 comment 15. The Kutak Commission "vigorously debated" a requirement that, in civil proceedings, an advocate disclose facts, even if adverse, that would probably have a substantial effect on the determination of a material issue. Kutak, *supra* note 12, at 49.

222. WYOMING RULES Rule 3.3(a)(2).

223. *Id.* at Rule 1.2(d).

224. ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, DEFENSE FUNCTION, Standard 4-7.7, states in part: "[I]t is unprofessional conduct for the lawyer to lend aid to the perjury or use the perjured testimony. A lawyer may not later argue the defendant's known false version of the facts to the jury as worthy of belief, and may not recite or rely upon false testimony in his or her closing argument." This standard was proposed and discussed but not adopted by the ABA House of Delegates, in 1979. *ABA Midyear Meeting Wrap-up*, 65 A.B.A. J. 336 (1979). The court in *Matter of Goodwin*, 279 S.C. 274, 305 S.E.2d 578, 580 (1983), held that Standard 4-7.7 stated the proper action when faced with client perjury. *See also State v. Long*, 148 Ariz. 295, 714 P.2d 465, 467 (Ct. App. 1986) (Court found that it was proper for defense counsel not to comment in his final statement on testimony that he believed to be perjured.). *Contra*, *Johns v. Smyth*, 176 F. Supp. 949 (E.D. Va. 1959) (The court concluded that a trial was unfair because the lawyer did not offer an instruction based on, or argue in closing, a client statement that he believed was false.).

Rule 3.3(a)(4) treats differently than the Code the lawyer's affirmative duty if she discovers that she has offered false testimony. The Code required a lawyer to take action if she later discovered that her client had "perpetrated a fraud upon a person or tribunal."<sup>225</sup> However, the lawyer was not required to advise the court of the false evidence if she knew of the falsity from privileged information.<sup>226</sup> Presumably, information on perjury would not be within the evidentiary attorney-client privilege, so the lawyer could disclose perjury.<sup>227</sup> However, a formal opinion of the ABA interpreted the exception to prohibit disclosure of all confidential information.<sup>228</sup> This interpretation essentially did away with the obligation, since the lawyer would almost always have to reveal confidential information in order to advise the court about false testimony. Rule 3.3(b) states that the duty exists even if the lawyer has to disclose information protected by the confidentiality rule.<sup>229</sup> For this reason, the obligation under the new Rule will have some impact.

Both the duties on disclosing false evidence and on disclosing adverse legal authority continue only until the end of the proceeding.<sup>230</sup> The drafters apparently believed that the lawyer's duty, to reveal falsity that she discovers after evidence and legal authority are presented, should not extend indefinitely.

What exactly must the lawyer do if her client unexpectedly perjures herself? Rule 3.3(a)(4) directs the lawyer to take "reasonable remedial measures."<sup>231</sup> According to the Comment, the first step, though it is not likely to be successful, is to try to persuade the client to reveal the falsehood. If this does not work, the lawyer in a civil proceeding must reveal the lie to the tribunal, if this is necessary to rectify the situation.<sup>232</sup> The Comment acknowledges that the lawyer's duty to reveal the lie, is a special problem to the lawyer representing a criminal defendant. However, after exploring the alternatives, the Comment concludes that the criminal

225. CODE DR 7-102(B)(1).

226. *Id.*

227. Generally, a client's use of the attorney's services in the furtherance of a crime negates the privilege. J. WIGMORE, ON EVIDENCE, § 2298 (1961). *In re John Doe Corp.*, 675 F.2d 482, 491 (2nd Cir. 1982). The court in *United States v. Friedman*, 445 F.2d 1076, 1085 (9th Cir. 1971), *cert. denied*, 404 U.S. 958 (1971), held that attorney-client communications lose their privileged character when they concern contemplated unlawful acts by the client. In a case involving client perjury, the court concluded that the lawyer had no duty to the client not to disclose, under the attorney-client privilege, when the client perjured himself and the lawyer knew it. *Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Cray*, 245 N.W.2d 298, 306 (Iowa 1976). Similarly, the privilege does not cover work that a lawyer did for a client in preparing an affidavit that was false, or at least intentionally misleading, whether or not the lawyer knew of the falsity at the time. *In re Sealed Case*, 676 F.2d 793, 812 (D.C.Cir. 1982).

228. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 at 108 (1975) (Interprets the term "privileged communication" in CODE DR 7-102(B) "as referring to those confidences and secrets that are required to be preserved by [CODE] DR 4-101.'). *But see infra* note 241.

229. WYOMING RULES Rule 1.6.

230. *Id.* at Rule 3.3(b).

231. *Id.* at Rule 3.3(a)(4).

232. *Id.* at Rule 3.3 comments 5, 6.

defense lawyer, too, must disclose perjury.<sup>233</sup> If the ethical rules allowed the lawyer to remain silent, the Comment states, she would be assisting in the perjury, and that is worse than the prejudice to the client caused by the revelation.<sup>234</sup>

The Comment to Rule 3.3 concedes that constitutional provisions may limit the lawyer's duties when representing a defendant in a criminal action and that these provisions supersede the ethical rules.<sup>235</sup> A recent United States Supreme Court decision at least suggests that the constitutional right to effective counsel does not prevent a criminal defense lawyer from revealing her client's perjury. In *Nix v. Whiteside*,<sup>236</sup> a criminal defense lawyer believed that certain testimony the client wished to present was false. The lawyer threatened to reveal this belief if the client insisted on presenting the testimony and the client backed down.<sup>237</sup> The Court concluded that the lawyer's threat was within the range of competent and ethical lawyer behavior.<sup>238</sup> This suggests that carrying out the threat by disclosing the perjury would also be constitutionally permissible.<sup>239</sup>

An ABA Formal Opinion interprets the lawyer's duty under Rule 3.3(a) when the client intends to commit perjury or the lawyer concludes that the client has already committed perjury.<sup>240</sup> If the client intends to commit perjury, the Opinion directs the lawyer to advise the client of the possible consequences, including the lawyer's duty to disclose to the court. If the lawyer still believes that the client will commit perjury, the lawyer is to question the client only on subjects on which she does not expect perjury. If the lawyer expects all of the testimony to be perjured, the lawyer must not permit the client to testify. If it is not possible to keep the client from testifying, the lawyer must disclose the client's intention to the court. If a lawyer is surprised by client perjury or learns of client perjury after the testimony, she must disclose the perjury to the court, if

233. *Id.* at comments 8-11.

234. *Id.* at comment 8. Withdrawal is another option suggested. *Id.* at comment 7. Withdrawal as a lawyer may mean that the lawyer is not assisting in the client's perjury, but it does not remedy the court's problem of reliance on false testimony. Also, a judge is not likely to permit withdrawal when a trial is in progress. ABA Comm. on Professional Ethics and Grievances, Informal Op. 1314 (1975), took the position that the lawyer must call upon the client to rectify the situation, and "may" withdraw, but that the confidential privilege "must be upheld over any obligation of the lawyer to betray the client's confidence in seeking rectification of any fraud that may have been perpetrated by his client upon a person or tribunal." *Id.* at 188. *But see* note 241 *infra* and accompanying text.

235. WYOMING RULES Rule 3.3 comment 12.

236. 475 U.S. 157 (1986).

237. *Id.* at 161.

238. *Id.* at 174-75.

239. If the threat to disclose was proper, the disclosure must be proper. If not, the court is approving a lawyer lying to her client. However, the Court declined to decide whether disclosure was proper. The majority opinion distinguishes the situation where a lawyer discloses her client's perjury while she is still a client. The Court accepted the trial court finding that the threat in the case before the court was to disclose the perjury after the lawyer withdrew as counsel. *Id.* at 172-73, n.7. In his concurrence, Justice Stevens stated that the Court was not reviewing the way that the threat may be carried out. *Id.* at 191. The Court did note that "commentary" suggests that disclosing client perjury to the court is professionally responsible. *Id.* at 170.

240. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

the client will not. The Opinion finds these instructions consistent with the Court's holding in *Nix*.<sup>241</sup> The Committee acknowledges that the Opinion reverses or changes some previous opinions which limited the lawyer's duty to disclose perjury.

All of the lawyer's obligations regarding false testimony are modified by the phrase in Rule 3.3(a) that the lawyer shall not "knowingly" do or fail to do any of these acts. For example, a lawyer is not to knowingly "offer evidence that the lawyer knows to be false."<sup>242</sup> Lawyers who feel that a duty to reveal damaging information about a client is a threat to zealous advocacy will interpret "knows" or "knowingly" narrowly. They will argue that one never knows with absolute certainty which version of the "facts" is true and which is false. Under such a definition, most of the lawyer's duties regarding perjured testimony are eliminated. However, according to the Terminology section of the Rules, "'Knowingly', 'Known', or 'Knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."<sup>243</sup> Since knowledge can be inferred by the Grievance Committee from the circumstances, a lawyer is taking a risk if she decides that because no one absolutely knows the facts, she will not advise the court when she strongly suspects client perjury.<sup>244</sup>

Suppose that a lawyer suspects but is not sure that evidence which her client wants to offer is false. The lawyer who refuses to present such evidence may have a defense, under Rule 3.3(c), to a client's claim that the lawyer did not adequately represent her. Under that section, the lawyer may refuse to offer evidence she "reasonably believes" to be false. To the extent that the ethical rules are used as guidelines in cases alleging ineffective assistance of counsel or malpractice, this Rule may provide a defense for the lawyer who chooses not to present evidence that she suspects is false.<sup>245</sup> Also, it may serve as a defense when a client complains to the Grievance Committee that her lawyer did not represent her diligently because the lawyer refused to offer certain favorable evidence.<sup>246</sup>

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241. *Id.* Formal Op. 353 notes that Formal Op. 341, *supra* note 228, is inconsistent with this Opinion and the Model Rules. It also discusses the effect of the Model Rules on the conclusions in Informal Op. 1314, *supra* note 232.

242. WYOMING RULES Rule 3.3(a)(4).

243. WYOMING RULES Terminology 5.

244. *Nix* assumes, based on the finding of the trial court, that the testimony that the defendant was planning to give was false. *Nix*, 475 U.S. at 162-63. Thus, the Court avoided the difficult issue of when the lawyer *knows* the client will commit perjury.

245. The lawyer may have to present a factual basis for her belief that perjury will be committed. In United States *ex rel* Wilcox v. Johnson, 555 F.2d 115 (3rd Cir. 1977), counsel threatened to withdraw if the client insisted on presenting what the lawyer believed to be perjured alibi testimony. The lawyer could not recall her basis for believing the testimony to be false. In dicta, the court concluded that the lawyer would be violating her duty as defense counsel if she discussed with the judge her belief that the client intended perjury without a firm factual basis for that belief. The court stated that it was the job of judge and jury to decide the facts, not the lawyer. *Id.* at 122. Another court found that a last minute change in testimony was enough for the lawyer to conclude that the client intended perjury, though there was contradictory eyewitness testimony as well. *Thorton v. United States*, 357 A.2d 429, 438 (D.C. 1976).

246. It appears, under Comment 1 to WYOMING RULES Rule 1.2, that it is generally the lawyer's decision whether or not to present certain evidence. "In questions of means, the

## C. DUTIES TO OPPOSING PARTY AND COUNSEL

Rule 3.4 covers the lawyer's duties to the opposing party and counsel. As was the case under the Code,<sup>247</sup> Rule 3.4(a) on concealing evidence depends on other law. In other words, if a lawyer violates statutes or case law on concealing evidence,<sup>248</sup> she may be disciplined under the rules. Some commentators argued for a lawyer's duty to disclose evidence that was broader than the duties of all citizens under obstruction of justice statutes.<sup>249</sup> However, the Rule makes all violations under the ethical rules dependent on violations of other laws which apply generally.

Other parts of Rule 3.4 subject a lawyer to discipline for violating some of the basic "rules of the game" in the adversary process. These sections include falsifying evidence,<sup>250</sup> offering an inducement to witnesses,<sup>251</sup> disobeying a court rule,<sup>252</sup> making a frivolous discovery request and not making a reasonably diligent effort to comply with a proper discovery request.<sup>253</sup>

Under Rule 3.4(f), a provision with no parallel in the Code, a lawyer for one of the parties in a case cannot request that third persons keep relevant but damaging evidence to themselves. A lawyer can make such a request of an employee, relative or agent of the client, under the Rule, if the lawyer reasonably believes that the person's interests will not be adversely affected. The purpose of the Rule is to facilitate one party's access to relevant evidence from anyone other than those closely associated with the opposing party.

Rule 3.4(e) was drawn from the Code.<sup>254</sup> However, it is a rule many lawyers are not familiar with or do not take seriously. It prohibits a lawyer from alluding, in trial, to irrelevant matters or facts that will not be supported by admissible evidence. It also prohibits a lawyer, in trial, from

lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as . . . concern for third persons who might be adversely affected." *Id.* If the lawyer's desire not to present certain evidence is based on concern for third persons, perhaps it is the client's decision, under the interpretation in the Comment.

Until *Nix* was decided in 1986, it was assumed that the defendant had a constitutional right to decide whether or not she would testify in a criminal matter. *Nix*, 475 U.S. at 186 n.5 (Blackmun, J., concurring). However, the majority in that case stated that the United States Supreme Court had never directly decided the point. *Id.* at 164. The Court held that the defendant did not have a right to testify falsely. *Id.* at 173.

247. CODE DR 7-109(A).

248. This is an important limitation because most statutes on concealing evidence have been interpreted to require an affirmative act, not simply a failure to disclose. See *United States v. Daddano*, 432 F.2d 1119, 1124-25 (7th Cir. 1970), cert. denied, 402 U.S. 905 (1971); *United States v. King*, 402 F.2d 694 (9th Cir. 1968) (interpreting a federal statute on concealing knowledge of a felony). See also *Dillard v. State*, 640 S.W. 2d 85 (Tex. Ct. App. 1982) (interpreting the Texas statute on concealing evidence).

249. Comment, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665, 1682 (1979); Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1057-58 (1975).

250. WYOMING RULES Rule 3.4(b).

251. *Id.*

252. *Id.* at Rule 3.4(c).

253. *Id.* at Rule 3.4(d).

254. CODE DR 7-106(C)(1), (3), (4).

asserting personal knowledge of facts and from stating a personal opinion as to the justness of a cause, credibility of a witness or the culpability of a party. Often criminal defendants raise such conduct by the prosecutor as a basis for reversing their convictions. The Wyoming Supreme Court has sometimes noted the prosecutor's improper conduct but has generally found that the error was not prejudicial.<sup>255</sup> Of course, the prosecutor violates the ethical rule and is subject to discipline even if the defendant was not prejudiced.

A lawyer is free to make points, in closing, based on the admissible evidence. For example, "The evidence shows . . ." This is not viewed as a statement of the lawyer's personal opinion as to the facts. The Code made it explicit that the lawyer could argue for any position as long as she bases the position on an analysis of the evidence.<sup>256</sup> The Grievance Committee added a statement to the Comment to Rule 3.4 to clarify that the Rule does not change this, "[p]aragraph (e) does not prohibit a lawyer, in opening and closing statements, from commenting on what the evidence shows about the credibility of a witness."<sup>257</sup> The Grievance Committee examined Wyoming case law and concluded that Rule 3.4(e) and the added Comment codified that law.<sup>258</sup>

#### D. IMPROPER INFLUENCE OVER COURT OR JURY

Improper influence over the court or jury is addressed in the first two sections of Rule 3.5. Section(a) prohibits seeking to influence a judge, jury or other official by illegal means. Such illegal conduct is a basis for discipline. The Code specified prohibited conduct towards a jury member.<sup>259</sup> Rule 3.5(a) refers to other law for such specifics. The Grievance Committee added the following statement to the Comment to Rule 3.5(a), "[a]ny discussion with jurors before or during a trial, except in the trial proceedings themselves, is prohibited by other law."<sup>260</sup>

Another aspect of improper influence, *ex parte* communication with a judge or other official acting in an adjudicative capacity, is the subject of Rule 3.5(b). The Model Rule states that, "[a] lawyer shall not . . . communicate *ex parte* with [a judge, juror, prospective juror or other official]

255. See, e.g., *Noetzelmann v. State*, 721 P.2d 579 (Wyo. 1986) (The court affirmed the trial court's decision that it was improper for the prosecutor to state his own lack of belief in the defense's evidence but, in context, the conduct did not justify a retrial.); *MacLaird v. State*, 718 P.2d 41 (Wyo. 1986) (The prosecutor's statement was essentially testimony and violated the ethical rule on commenting on the credibility of testimony, but the error was harmless, in view of the abundant direct testimony.); *Ostrowski v. State*, 665 P.2d 471, 489 (Wyo. 1983) (The prosecutor's characterization of the defendant as a criminal was improper but prejudice was not clearly shown.). *But see* *Browden v. State*, 639 P.2d 889, 893-95 (Wyo. 1982) (The court found that the prosecutor's repeated statements of his own belief, and statements that it was his own credibility being questioned, were enough to constitute plain error and reverse the conviction in a case of close facts.).

256. CODE DR 7-106(C)(4).

257. WYOMING RULES Rule 3.4 comment 4.

258. Wyoming Bar Grievance Committee Meeting Minutes (July 14, 1985).

259. CODE DR 7-108.

260. WYOMING RULES Rule 3.5 comment 2.



... except as permitted by law."<sup>261</sup> The Grievance Committee added a provision that makes it clear that a lawyer can communicate with a judge outside the presence of opposing counsel with that counsel's consent. The change was designed to expedite communication with the judge when the other party does not object.<sup>262</sup> The Grievance Committee also narrowed the application of the Rule. The Model Rule appeared to apply to communication with all officials. Wyoming Rule 3.5(b), however, limits the scope to communication with officials "acting in an adjudicative capacity."<sup>263</sup> The Grievance Committee decided that *ex parte* communication with legislative bodies, such as city councils, was proper unless such legislative bodies were acting in an adjudicative capacity.<sup>264</sup> Finally, the Grievance Committee also added language to the Rule to clarify that there is no distinction between discussing procedural and substantive matters with a judge *ex parte*.<sup>265</sup>

Rule 3.5(c) prohibits a lawyer from disrupting a tribunal. "Disrupt" is a vague term, undefined by the Rule. However, the drafters avoided the broader language of the Code that the lawyer was not to engage in "undignified or discourteous conduct which is degrading to a tribunal."<sup>266</sup> Another Code provision was dropped that required a lawyer to give opposing counsel notice if she was not going to comply with known local customs in appearing before a tribunal.<sup>267</sup>

#### E. TRIAL PUBLICITY

The trial publicity rule, Rule 3.6, replaces much more complex Code provisions that had very detailed rules and which differed depending on the stage of the litigation and whether the case was civil or criminal.<sup>268</sup> The Code absolutely prohibited making public certain types of information.<sup>269</sup> Since the Code was adopted by the ABA, federal courts have found first amendment limits on the state's ability to regulate trial publicity.<sup>270</sup> The drafters of the Model Rules responded by setting a general standard and a list of types of information likely to violate the general standard. The general rule, Rule 3.6(a), states that:

261. MODEL RULES Rule 3.5(b).

262. Wyoming Bar Grievance Committee Meeting Minutes (July 14, 1985).

263. WYOMING RULES Rule 3.5(b).

264. Wyoming Bar Grievance Committee Meeting Minutes (Oct. 21, 1985).

265. "A lawyer shall not . . . communicate *ex parte* with an official acting in an adjudicative capacity concerning any substantive or procedural issue before him." WYOMING RULES Rule 3.5(b).

266. CODE DR 7-106(C)(6).

267. *Id.* at DR 7-106(C)(5).

268. *Id.* at DR 7-107.

269. *Id.* at DR 7-107(A), (B), (G), (H).

270. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *Hirschkop v. Sneed*, 594 F.2d 356 (4th Cir. 1979). *Chicago Council* rejects the general standard of "reasonable likelihood that such dissemination will interfere with a fair trial." 522 F.2d at 249. The court held that the state can only regulate statements which pose a "serious and imminent threat" of interference, under the first amendment. *Hirschkop* held that "reasonable likelihood" was a constitutional standard. 594 F.2d at 370. Each court found certain of the Code's rules on trial publicity to be unconstitutional.

A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.<sup>271</sup>

Note that the Rule covers all lawyers, not just those representing parties in the litigation. Rule 3.6(b) lists types of information that are ordinarily likely to have such a prejudicial effect in civil matters triable to a jury, in criminal matters and in other matters which might result in incarceration. The Rule has no list for other civil cases or administrative cases.

Rule 3.6(b)(3) concludes that publicly disclosing information about physical evidence that is expected to be presented in a trial would ordinarily have a prejudicial effect. A lawyer's public statement on the guilt or innocence of a defendant or suspect in a criminal case is ordinarily prejudicial.<sup>272</sup> However, there are no provisions regarding comments on the merits of civil matters. In criminal matters, information about confessions is considered likely to be prejudicial, as is information about a possible guilty plea.<sup>273</sup> Comments about the character of a party are considered prejudicial, as are the results of tests or a person's refusal to take tests.<sup>274</sup> Unlike the Code, Rule 3.6(b)(1) extends the character information restriction to suspects or witnesses, as well as parties.<sup>275</sup>

A lawyer involved in investigation or litigation is specifically permitted to publicly state certain information "without elaboration" under Rule 3.6(c). For both civil and criminal matters, information in a public record can be publicly stated by a lawyer.<sup>276</sup> In a criminal matter, Rule 3.6(c) permits public statement of other types of information similar to those permitted in the Code.<sup>277</sup> However, in criminal matters, the Code specifically permitted a lawyer to publicly describe physical evidence at the time of seizure.<sup>278</sup> Such public disclosure could be quite prejudicial since physical evidence is often the subject of suppression motions at a later date. Rule 3.6(b)(3) takes the opposite position and lists description of physical evidence as information likely to have a prejudicial effect.

271. WYOMING RULES Rule 3.6(a).

272. *Id.* at Rule 3.6(b)(4).

273. *Id.* at Rule 3.6(b)(2).

274. *Id.* at Rule 3.6(b)(1) & (3).

275. CODE DR 7-107(C)(7). The Grievance Committee originally added a subsection to WYOMING RULES Rule 3.6(b). It would have included the following in the types of statements that are likely to be prejudicial: "[t]he commencement or likelihood of commencing litigation, civil or criminal, against any participant in the pending matter." Wyoming Bar Grievance Committee Meeting Minutes (Aug. 21, 1985). The added provision was later deleted by the Committee from its recommendations because the Committee decided that other parts of the Rule covered the statements about which the Committee was concerned and the added provision, as stated, might conflict with other parts of the Rule. Wyoming Bar Grievance Committee Meeting Minutes (Jan. 15, 1986).

276. WYOMING RULES Rule 3.6(c)(2).

277. CODE DR 7-107(A) & (C).

278. *Id.* at DR 7-107(C)(7).

Less information about the circumstances of the arrest is specifically permitted under Rule 3.6(c)(7) than was permitted under the Code.<sup>279</sup> Only the fact, time and place of arrest are specifically permitted under the Rule. The fact that a person has been arrested and charged with a crime is considered likely to be prejudicial, unless a statement is included that the charge is merely an accusation and the person is presumed innocent until proven guilty.<sup>280</sup>

The Code contained a general exception to all of the trial publicity rules. A lawyer could publicly respond to allegations against her that were made public.<sup>281</sup> This exception does not appear in the Rule.

#### F. LAWYER AS WITNESS

A lawyer is generally prohibited from being both an advocate and a witness in the same proceeding. Rule 3.7(a) states:

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- 1) the testimony relates to uncontested issues;
- 2) the testimony relates to the nature and value of legal services rendered in the case; or
- 3) disqualification of the lawyer would work substantial hardship on the client.<sup>282</sup>

Rule 3.7 is much simpler than the Code rule which differentiated between testimony adverse to the client and testimony favorable to the client.<sup>283</sup> The Code did not include a hardship exception where the lawyer would be an adverse witness. Once it became clear that the lawyer would be called to testify against her client, she had to withdraw.<sup>284</sup> The Code also qualified the term "substantial hardship." The hardship had to be "because of the distinctive value of the lawyer or his firm as counsel in the particular case."<sup>285</sup>

Rule 3.7 does not specifically require the lawyer to anticipate that she may be called as a witness before she takes on a case. However, the lawyer should try to anticipate the problem. A withdrawal will likely prejudice the client, requiring at least that she incur additional expense.<sup>286</sup> Also,

279. CODE DR 7-107(C)(5), also permitted a lawyer to publicly disclose resistance, pursuit and use of weapons in an arrest.

280. WYOMING RULES Rule 3.6(b)(6).

281. CODE DR 7-107(I).

282. WYOMING RULES Rule 3.7(a).

283. CODE DR 5-102(A) & (B). It may be prejudicial to the client to have to rely on favorable testimony by her own lawyer, since the factfinder may assume bias.

284. CODE DR 5-102(B).

285. *Id.* at DR 5-102(A). The Wyoming Code further stated that: "Except when essential to the ends of justice, a lawyer should avoid testifying in court on behalf of his client." WYOMING CODE DR 5-101(B)(5).

286. Withdrawal may be required by WYOMING RULES Rule 3.7. It may also be required by WYOMING RULES Rule 1.7, if the fact that she has to testify creates a conflict of interest for the lawyer.

the Comment advises the disciplinary authority to be skeptical of a lawyer's claim that she had to continue the representation to avoid hardship to her client, when the lawyer could have anticipated, at the time she took the case, that she might later be called as a witness.<sup>287</sup>

Under the Code, no one in a firm could represent a client if *any* lawyer in the firm would be called as a witness.<sup>288</sup> Under Rule 3.7(b), another lawyer in the firm can testify unless the lawyer representing the client would then have a conflict under the general conflict of interest rule.<sup>289</sup> Such a conflict would likely arise when a lawyer must cross-examine another lawyer in her firm. This more relaxed rule on another firm lawyer testifying makes sense. Rules forbidding a lawyer from being both a witness and an advocate in the same proceeding are partly based on possible jury confusion about which role the lawyer is taking when she speaks.<sup>290</sup> When the witness is a different member of the firm, the confusion is less likely.

### G. PROSECUTORIAL DUTIES

Rule 3.8 sets out special responsibilities of a prosecutor for her own actions and actions of those who work with her. Rule 3.8 makes certain acts by the prosecutor disciplinable which might also be a basis for overturning the criminal conviction. It also may subject a prosecutor to discipline for actions of employees and associates when reasonable measures by the prosecutor might have prevented the acts.<sup>291</sup>

Like the Code,<sup>292</sup> Rules 3.8(a) and (d), respectively, prohibit the prosecutor from prosecuting without probable cause and require the prosecutor to turn over certain evidence to defense counsel. Two prosecutor duties are added by the Rules. First, under Model Rule 3.8(b) the prosecutor is required to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given the opportunity to obtain counsel."<sup>293</sup> The Grievance Committee added an initial clause that the prosecutor only has this duty in cer-

287. "[P]aragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. . . . It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness." WYOMING RULES Rule 3.7 comment 4.

288. CODE DR 5-102(A), (B).

289. WYOMING RULES Rule 1.7.

290. The lawyer witness rule has a long history. It is the ABA CANONS OF PROFESSIONAL ETHICS, Canon 19. See *supra* note 34. However, the reasons for the rule are not clear. Enker, *The Rationale of the Rule that Forbids a Lawyer to be Advocate and Witness in the Same Case*, 1977 AM. B. FOUND. RES. J. 455, 456. Role confusion for the fact-finder is one basis for the rule. *MacArther v. Bank of New York*, 524 F. Supp. 1205, 1208 (S.D.N.Y. 1981). However, a recognized treatise rejects role confusion as a basis for the rule. J. WIGMORE, ON EVIDENCE, § 1911(3) (1967). In discussing the reasons for the rule, CODE EC 5-9, stated that: "[t]he roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively."

291. WYOMING RULES Rule 3.8(b), (e).

292. CODE DR 7-103(A), (B).

293. WYOMING RULES Rule 3.8(b).

tain circumstances. Under Wyoming Rule 3.8(b), the prosecutor must make such reasonable efforts "prior to interviewing an accused or prior to counseling a law enforcement officer with respect to interviewing an accused."<sup>294</sup> The change was intended to limit the prosecutor's duty to cases where she was directly involved.<sup>295</sup> In spite of the revision, some members of the Grievance Committee vigorously argued for the omission of Rule 3.8(b), arguing that it created a greater duty than the substantive law and that it was not practical. They contended that the prosecutor has little control over the actions of law enforcement officers.<sup>296</sup>

The second new restriction, in Rule 3.8(c), prohibits a prosecutor from trying to obtain a waiver of important pretrial rights from an unrepresented accused. The Comment concludes that this Rule does not apply if a court has approved pro se representation.<sup>297</sup>

The final section, Rule 3.8(e), requires the prosecutor to exercise reasonable care that law enforcement persons, investigators and employees and other associates do not make public statements that the prosecutor could not make under the trial publicity rule. Under Rule 8.4(a), a lawyer cannot assist another to violate the rules or violate the rules through another's act. However, Rule 3.8(e) imposes an affirmative duty that the prosecutor take reasonable actions to *prevent* others from making public statements that the prosecutor could not make. The Grievance Committee added a statement to the Comment in order to make it clear that this affirmative duty did not make the prosecutor a supervisor of the other agencies.<sup>298</sup> Although the prosecutor must make efforts to prevent extrajudicial statements by others, she is not liable as a supervisor for such statements.<sup>299</sup>

#### H. ADVOCACY BEFORE A RULEMAKING OR POLICYMAKING BODY

The final rule in the advocacy section applies to lawyers appearing before a legislative or administrative tribunal that is acting in a rulemaking or policymaking capacity.<sup>300</sup> Rule 3.9 requires that the lawyer disclose that she appears as a representative of a client. Otherwise, the legislative or administrative body may assume the lawyer is stating her own view of what the rule or policy should be. The Rule requires the lawyer to disclose that the appearance is in "a representative capacity."<sup>301</sup> The Rule is not explicit as to whether the name of the client must be disclosed. A later rule requires a lawyer participating in a law reform organization to

294. *Id.*

295. Wyoming Bar Grievance Committee Meeting Minutes (July 14, 1985).

296. *Id.*

297. WYOMING RULES Rule 3.8 comment 2.

298. Wyoming Bar Grievance Committee Meeting Minutes (July 14, 1985).

299. "Section (e) does not create an affirmative duty on the part of the prosecutor to exercise supervisory control over other agencies." WYOMING RULES Rule 3.8 comment 4.

300. WYOMING RULES Rule 3.9. Lawyers are governed by the other rules in Section 3 when appearing before a legislative or administrative body acting in an adjudicative capacity. See *supra* note 216.

301. WYOMING RULES Rule 3.9.

disclose when a client will benefit from the reform.<sup>302</sup> This rule states explicitly that the lawyer does not have to identify the client but merely to indicate that she has a client who may materially benefit from the proposed reform.<sup>303</sup> Perhaps the omission of this clause in Rule 3.9 means that the name of the client must be disclosed to the rulemaking body.

Rule 3.9 goes on to require that the lawyer comply with certain earlier rules in this section when appearing before a rulemaking body on behalf of a client. The lawyer must comply with the rules on making false statements,<sup>304</sup> not assisting the client's fraud,<sup>305</sup> disclosing adverse legal authority,<sup>306</sup> falsifying or concealing evidence,<sup>307</sup> disobeying a rule of the administrative or legislative body,<sup>308</sup> seeking to influence the body by illegal means<sup>309</sup> and disrupting the body.<sup>310</sup> Rule 3.9 has no counterpart in the Code. The Comment notes that, with this Rule, lawyers will have a greater duty than non-lawyers appearing before the rulemaking body. It concludes that such official bodies have a right to expect lawyers to deal with them as lawyers deal with courts.<sup>311</sup>

## V. CONTACT WITH PERSONS OTHER THAN CLIENTS

The fourth section of the Rules governs the lawyer's interactions with persons other than clients. Rule 4.1(a) prohibits making false statements of material fact or law to others. The Comment makes a curious application of this duty to negotiation. It concludes that certain types of statements are not generally considered statements of fact in negotiation. Examples given are estimates of price or value placed on the disputed subject and a party's views on settlement.<sup>312</sup> If they are not statements of fact, then they cannot be false statements of fact. Therefore, the lawyer is free to use wide latitude with such statements during negotiation.

Rule 4.1(b) imposes an affirmative obligation on a lawyer to disclose information to a third person if necessary to avoid assisting a client's criminal or fraudulent act. Continuing to represent a client in a transaction where the client has acted fraudulently could be interpreted as assisting in the fraud. However, unlike the rule requiring candor to a tribunal, the lawyer has no obligation to tell a third person if the information is con-

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302. *Id.* at Rule 6.4.

303. *Id.*

304. *Id.* at Rule 3.3(a)(1).

305. *Id.* at Rule 3.3(a)(2).

306. *Id.* at Rule 3.3(a)(3).

307. *Id.* at Rule 3.4(a), (b).

308. *Id.* at Rule 3.4(c).

309. *Id.* at Rule 3.5(a).

310. *Id.* at Rule 3.5(c). Since the Grievance Committee decided to exclude bodies not acting in an adjudicative capacity from the *ex parte* provision, WYOMING RULES Rule 3.5(b), it omitted WYOMING RULES Rule 3.5(b) from the rules included in Model Rule 3.9.

311. WYOMING RULES Rule 3.9 comment 2.

312. *Id.* at Rule 4.1 comment 2.

fidential, under Rule 1.6.<sup>313</sup> Since all "information relating to representation of a client" is confidential under Rule 1.6, the lawyer will rarely have an affirmative duty to third persons under Rule 4.1(b).

A lawyer cannot communicate on a matter with a person represented by counsel without that counsel's consent, under Rule 4.2. Of course, disputing parties who have lawyers can communicate with each other unless the lawyer is directing that communication.<sup>314</sup> If other law authorizes direct communication with a person who has counsel, then such communication does not violate the Rule.<sup>315</sup> The example given is a law permitting communication with government agency officials. Given such a law, a lawyer can talk directly with agency officials, even though the officials have counsel.<sup>316</sup> Who can a lawyer communicate with inside an organization, without the consent of the organization's lawyer? The Comment suggests that a lawyer can communicate directly with anyone in the organization except those in a managerial capacity or those who can speak on behalf of the organization.<sup>317</sup>

A lawyer must not state or imply that she is disinterested when communicating with an unrepresented person about a case, under Rule 4.3. If she knows or should know the person is confused, she must attempt to clarify her role as representative of a client. The analogous Code provision prohibited a lawyer from giving any advice to an unrepresented person other than the advice to obtain counsel, if the unrepresented person's interests might conflict with those of her client.<sup>318</sup> Rule 3.4 says nothing about advising an unrepresented person, though the Comment states that a lawyer *should* not give advice to an unrepresented person.<sup>319</sup> Apparently, under the Rule itself, once the third person understands the lawyer's role, it is her responsibility to evaluate any advice with this potential bias in mind.

Rule 4.4 is a general rule about harassing or violating the rights of a third person. More specific rules in the Code on treatment of witnesses and jurors were eliminated.<sup>320</sup> Rule 4.4 makes it clear that being a client's advocate does not excuse complete disregard of others' rights. It states that, "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."<sup>321</sup>

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313. *Id.* at Rule 4.1(b). This Rule refers to Rule 1.6 to define the client information that a lawyer cannot disclose to any third party. The Code stated that the lawyer must reveal client fraud to a third person who the fraud was perpetrated upon, unless the information is privileged. CODE DR 7-102(B)(1). The term "privilege" in this rule was interpreted to include all confidential information. Formal Op. 341, *supra* note 228.

314. WYOMING RULES Rule 4.2 comment 2.

315. *Id.* at Rule 4.2.

316. *Id.* at comment 1.

317. *Id.* at comment 2.

318. CODE DR 7-104(A)(2).

319. *But see* WYOMING RULES Rule 3.4(f). That Rule prohibits advising a person not to volunteer information to the other party.

320. CODE DR 7-106(C)(2); DR 7-108(D), (E).

321. WYOMING RULES Rule 4.4

## VI. LAW FIRMS AND ASSOCIATIONS

## A. RESPONSIBILITY FOR ACTIONS OF SUBORDINATES AND SUPERVISORS

The Code did not contain rules on a lawyer's responsibility for the actions of her subordinates or her supervisors.<sup>322</sup> Rule 5.1, 5.2 and 5.3 concern such responsibility. Rule 5.1(a) requires that a partner in a firm make reasonable efforts to assure that lawyers in the firm comply with the Rules. Similarly, a lawyer directly supervising other lawyers must make reasonable efforts to see that lawyers that she supervises comply with the Rules.<sup>323</sup> The supervising lawyer can be disciplined for those lawyer's actions which she orders or ratifies.<sup>324</sup> In addition, a partner in the firm or the supervising lawyer violates this Rule if she knows of the other lawyer's violation in time to mitigate the results and does not do so.<sup>325</sup>

Rule 5.3 imposes these same duties on a lawyer for "a non-lawyer employed or retained by or associated with a lawyer."<sup>326</sup> The lawyer is to make reasonable efforts to see that non-lawyers comply with the rules. She is subject to discipline when she orders or ratifies the act of a non-lawyer which violates the Rule. Under Rule 5.3(c)(2) she must also mitigate the consequences when she discovers a violation by a non-lawyer. According to the Comment, non-lawyers for whom a lawyer is responsible include secretaries, paraprofessionals, investigators and law student interns.

Looking at responsibility from the subordinate lawyer's position, a lawyer has violated a rule even if she acts at the direction of another lawyer.<sup>327</sup> However, if the action is taken because of a supervising lawyer's reasonable resolution of an arguable question of ethical duty, then the subordinate lawyer has not violated the Rules.<sup>328</sup> In other words, if a lawyer orders a subordinate lawyer to act in a way that is proper under a reasonable interpretation of the ethical rules, the subordinate lawyer is relieved from a later finding that the act was unethical.<sup>329</sup> Otherwise, the subordinate lawyer may be disciplined even if she was following the instructions of her superior.

## B. NON-LAWYER PARTICIPATION IN LAW FIRMS AND ASSOCIATIONS

Lawyers allowing non-lawyers to participate in the financing or management of law offices are treated in the Rules as they were under the Code.<sup>330</sup> A lawyer violates Rule 5.4(a) if she shares fees with a non-lawyer. She also violates the Rule if she forms a partnership or corpora-

322. The Code contains only the following statement, in the Preliminary Statement: "A lawyer should ultimately be responsible for the conduct of his employees and associates in the course of the professional representation of the client."

323. WYOMING RULES Rule 5.1(b).

324. *Id.* at Rule 5.1(c)(1).

325. *Id.* at Rule 5.1(c)(2).

326. *Id.* at Rule 5.3.

327. *Id.* at Rule 5.2(a).

328. *Id.* at Rule 5.2(b).

329. Neither lawyer should be disciplined for a reasonable interpretation of an arguable question. Therefore, this exception is not significant to this author.

330. *See generally* WYOMING RULES Rule 5.4; CODE DR 3-102; DR 3-103.



tion that involves the practice of law, in which a non-lawyer owns an interest or has any management control.<sup>331</sup> Limited exceptions include compensation plans that include non-lawyers and certain arrangements with the estate of a deceased lawyer.<sup>332</sup> When the Model Rules were drafted, the Kutak Commission proposed a more permissive rule. It would have allowed non-lawyers to invest in law firms and permitted other professionals to enter into partnerships with lawyers, under certain conditions. However, the ABA Section of General Practice recommended that the restrictive Code rules be substituted and the recommendation was adopted by the House of Delegates.<sup>333</sup>

Group legal services plans, such as plans provided as a benefit to union members, generated much controversy when the Model Rules were drafted and revised.<sup>334</sup> Rule 5.4(d) allows lawyers to work with corporations that are designed to provide legal services as long as they are not organized for a profit. Lawyers can be employed by, paid by, or recommended by such a legal services plan as long as they do not allow the non-lawyers to direct their professional judgment in rendering legal services.<sup>335</sup> The Rules dropped the Code provision requiring that group legal services plans provide options for beneficiaries who did not want to use the lawyers who were provided by the plan.<sup>336</sup> Requiring this option for beneficiaries probably had quite an impact on the cost-effectiveness of group legal services plans.<sup>337</sup>

### C. UNAUTHORIZED PRACTICE, PRACTICE OUTSIDE THE STATE AND AGREEMENTS RESTRICTING PRACTICE

Since the Wyoming Rules only regulate lawyers, other law regulates non-lawyers practice of law.<sup>338</sup> However, Rule 5.5, addresses unauthorized practice indirectly. Rule 5.5(b) prohibits a lawyer from assisting an unlicensed person in practicing law. The continuing problem is how to

331. WYOMING RULES Rule 5.4(b), (d).

332. *Id.* at Rule 5.4(a)(2), (3).

333. CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra* note 13, at 159-60.

334. *Id.* The ABA Section of General Practice proposed that the Code provision be substituted for the more permissive rule that the Kutak Commission had drafted, and their proposal was adopted. *Id.* at 159-62. The only portion of the Model Code that was debated at the time of its adoption was the group legal services rule and it was hotly debated. Armstrong, *A Century of Legal Ethics*, 64 A.B.A. J. 1063, 1070 (1978).

335. WYOMING RULES Rule 5.4(c).

336. CODE DR 2-103(D)(4)(e).

337. Closed panels are considered to be more economical. Phennigstorf & Kimball, *Regulation of Legal Services Plans*, 1977 AM. B. FOUND. RESEARCH J. 357, 409. The focus of the argument against open panels is the cost. Comment, *State Prohibition of Closed Panels-The Constitutional Question*, 27 BAYLOR L. REV. 590, 601 (1975). In considering state regulation of a closed union plan, the United States Supreme Court identified cost savings as one of the benefits to the members of the plan. *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576 (1971). In that case, the Union referred members to selected lawyers who agreed to a maximum fee of 25% of the award. The Court held that the right to collective activity to get access to courts, established in earlier cases, would be meaningless if courts could deny the means of enabling members to meet the costs of the legal representation. *Id.* at 585-86.

338. WYOMING RULES Rule 5.5(b); WYO. STAT. § 33-5-117 (1977, Rev. 1987).

define "practice of law." The Comment to Rule 5.5 simply states that the term is defined by other law. The Comment interprets the Rule to permit counseling a person who will appear pro se.<sup>339</sup> It also states that a lawyer does not violate the Rule when she instructs non-lawyers on law if their employment requires knowledge of the law.

If a lawyer, licensed in Wyoming, practices law in a state where the regulations do not permit her to practice, she violates a Wyoming Rule. In other words, under Rule 5.5, a Wyoming lawyer can be disciplined in Wyoming for practicing without a license in another jurisdiction. The Comment to Rule 8.5 states that activities in another state that are "substantial and continuous" may constitute the practice of law in that state.<sup>340</sup> As to a lawyer's out-of-state violation of the substantive rules, Rule 8.5 declares that this state's disciplinary authority has jurisdiction over a lawyer admitted to practice here, even if the acts occur elsewhere. If the two jurisdictions have conflicting rules on the conduct in question, the Comment states that principles of conflicts of law and choice of law apply.<sup>341</sup> The Code had no rule on jurisdiction over activities outside the state.

Rule 5.6, the final rule in this section, prohibits a lawyer from participating in certain agreements restricting any lawyer's right to practice. Under the Code, a lawyer could not participate in an employment or partnership agreement that restricted a lawyer's right to practice after ending the employment relationship, except an agreement on retirement benefits.<sup>342</sup> Also, a lawyer could not participate in the settlement of a controversy or lawsuit if the settlement restricted her right to practice.<sup>343</sup> Rule 5.6 includes these prohibitions and prohibits *offering* such agreements or settlements as well.<sup>344</sup>

## VII. PUBLIC SERVICE

A lawyer "should render public interest legal service," under Rule 6.1, the rule on a lawyer's pro bono duty.<sup>345</sup> This is the only rule that uses "should" instead of "shall" and the choice is clearly intentional. The Comment states that this Rule is not intended to be enforced through discipline.<sup>346</sup> The Rule departs from the drafters general concept, which was to dispense with the aspirational statements of the Code's ethical considerations, and include only rules, enforceable by discipline.<sup>347</sup> However,

339. In *Peter v. State*, 695 P.2d 617, 631 (Wyo. 1985), the court stated that the defendant's contention was spurious that a lawyer who advised him when he appeared pro se was violating CODE DR 3-101(A), the comparable Code rule.

340. WYOMING RULES Rule 8.5 comment 1.

341. *Id.* at comment 3.

342. CODE DR 2-108(A).

343. *Id.* at DR 2-108(B).

344. WYOMING RULES Rule 5.6. This rule also prohibits a lawyer from participating in a settlement that restricts another lawyer's right to practice.

345. *Id.* at Rule 6.1.

346. *Id.* at comment 1.

347. *See supra* note 26.

those who argued for a mandatory pro bono rule did not prevail in the drafting of the Model Rules.<sup>348</sup>

Rule 6.1 broadly defines the public interest legal service a lawyer should render. It includes directly providing free or reduced cost services to persons of limited means. It also includes legal services to charitable organizations, activities to improve the legal system and financial contributions to lawyers who represent persons of limited means.<sup>349</sup> The Comment acknowledges that individual lawyers' pro bono services will not meet the need for legal services to the poor and that organizations providing such services are needed.<sup>350</sup>

Two more rules in this section are designed to encourage lawyers to be active in public service. Rule 6.4 permits a lawyer to be involved in a law reform organization whose activities may affect the interests of a client. The Comment states that a lawyer who participates in such an organization does not have a client-lawyer relationship with the organization. Otherwise, the conflict of interest rule<sup>351</sup> might keep experienced lawyers away from law reform organizations in their area of expertise.

Rule 6.3 is designed to encourage lawyers to serve on the boards of legal services organizations. The Rule addresses the conflict of interest issue that may arise between the lawyer-board member's clients and the clients of the organization. The lawyer is permitted to serve on such a board even if the organization serves people who have interests adverse to a client of the lawyer. However, the lawyer must not knowingly participate in organization decisions that would materially adversely affect either her client or a client of the organization whose interests are adverse to her client's interests.<sup>352</sup>

Though Rule 6.2 prohibits a lawyer from trying to avoid appointment to represent a person (i.e., an indigent defendant in a criminal matter) except for "good cause," the examples of good cause in the Rule are broad. The first "good cause" stated is that the representation is likely to result in violation of the ethical rules or other law.<sup>353</sup> The example given in the Comment is not being competent in the type of representation.<sup>354</sup> In other words, a lawyer who has never practiced criminal law might argue that she had "good cause" for trying to avoid an appointment in a criminal

348. A proposal was widely circulated and discussed which required each lawyer to give a fixed amount of time each year to legal aid programs serving the poor. The Discussion Draft of the Kutak Commission, released in February, 1980, stated that a lawyer shall do public interest legal service. It required that lawyers report annually on how the pro bono duty had been met. MODEL RULES Rule 8.1 (Discussion Draft 1980). The Kutak Commission's final draft proposal omitted the reporting requirement, leaving only an aspirational "rule." CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra* note 13, at 169.

349. An amendment to the Kutak Commission's final draft proposal added financial contributions as a substitute for providing personal services. CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra* note 13, at 169.

350. WYOMING RULES Rule 6.1 comment 3.

351. *Id.* at Rule 1.7.

352. *Id.* at Rule 6.3(a), (b).

353. *Id.* at Rule 6.2(a).

354. *Id.* at Rule 6.2 comment 2.

case. Secondly, a lawyer is permitted to try to avoid appointment if it would result in an unreasonable financial burden.<sup>355</sup> The final "good cause" stated is that the client or the matter is so repugnant that it will interfere with the representation or relationship with the client.<sup>356</sup> The Comment states that you must not seek to avoid appointment because the matter or the client is unpopular.<sup>357</sup> Of course, a judge may appoint a lawyer regardless of her efforts, based on the Rule, to persuade the judge not to do so. The Code addressed appointment only in the ethical considerations. Only "compelling reasons" justified seeking to be excused and the repugnancy of the client or subject matter was not considered a compelling reason.<sup>358</sup>

### VIII. ADVERTISING, SOLICITATION, AND TRADE NAMES

Enactment of disciplinary rules on advertising follows a pattern. First, the United States Supreme Court makes a decision. Then the ABA House of Delegates amends its model ethical rules to comply with the Court's decision, making an effort not to give up more of the rule's restrictions on advertising than necessary to comply. Then the Court makes another decision, invalidating certain advertising restrictions and the rules are amended again.<sup>359</sup>

355. *Id.* at Rule 6.2(b).

356. *Id.* at Rule 6.2(c).

357. *Id.* at Rule 6.2 comment 1.

358. CODE EC 2-29.

359. See generally Armstrong, *A Century of Legal Ethics*, 64 A.B.A. J. 1063, 1070-71 (1978). In 1975, the United States Supreme Court held in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), that the practice of law is commerce and that the State Bar's minimum fee schedule violated the antitrust laws. *Id.* at 788. The Court also decided that year, in *Bigelow v. Virginia*, 421 U.S. 809 (1975), that speech does not lose its first amendment protection because it is contained in an advertisement. *Id.* at 818-21. These two decisions sparked amendments to the Code advertising rules. At the mid-year meetings of the ABA House of Delegates in February, 1976, some urged that consideration of the amendments be delayed to the August meeting. The Chairman of the Committee on Ethics and Professional Responsibility, which had proposed the amendments, urged the House to act. He cited *Goldfarb* and *Bigelow*, as well as a pending federal court case, and urged that if the House did not act, the federal government would take over the whole field. The House adopted very limited amendments which broadened the information that could be included in a law directory or the yellow pages. *The House Broadens Code's "Publicity in General" Rules at Midyear Meeting in Philadelphia*, 62 A.B.A. J. 470, 471-72 (1976). See also *Legal Profession Is Considering Code Amendments to Permit Restricted Advertising by Lawyers*, 62 A.B.A. J. 53 (1976).

On June 7, 1977, just before the United States Supreme Court first decided a case on lawyer advertising, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the ABA created the Task Force on Lawyer Advertising. On June 23, 1977, the Task Force circulated 2 proposals. Two days later, the *Bates* decision was announced in which the Court held that the State Bar of Arizona could not absolutely prohibit an advertisement listing standard fees. *Id.* at 383.

After the opinion was released, the President of the ABA directed the Task Force to, "develop rapidly a set of recommendations on what the bar must do to respond affirmatively to the Court's decision." Armstrong, *supra* note 254, at 1071. In August, 1977, the House of Delegates removed the absolute prohibition on advertising and substituted a very specific list of items of general information that could be included in an advertisement. The House rejected a proposal that simply prohibited misleading or deceptive advertising, similar to MODEL RULES Rule 7.1. Since the *Bates* and O'Steen advertisement had included standard fees, the amendment permitted advertising of certain types of fees, but it also mandated disclaimers with the fee information, something which *Bates* suggested was permissible.

Rule 7.1, tracks the Court's holding in *Bates v. State Bar Of Arizona*,<sup>360</sup> that the states can regulate false and misleading lawyer advertising.<sup>361</sup> The Rule states that, "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."<sup>362</sup> This general Rule applies to all types of lawyer communication. The other rules in the section address specific types of communication. Rule 7.1 goes on to define three categories of information as false and misleading.

The first of the three categories appears to be consistent with the regulation of other kinds of advertising.<sup>363</sup> Under Rule 7.1(a), a lawyer must not, when describing herself or her services, make material misrepresentations or omit facts necessary to avoid materially misleading the recipient. Under Rule 7.1(b), a lawyer cannot make statements likely to create unjustified expectations about the results she might achieve. Within this category, a specific provision forbids a lawyer from implying that

433 U.S. at 375; *House of Delegates Adopts Advertising D. R. and Endorses a Package of Grand Jury Reforms*, 63 A.B.A. J. 1234, 1234-35 (1977). Even then, in August, 1977, the ABA knew more changes were coming and a Commission on Advertising was created. Armstrong, *supra*, at 1071.

The debate in 1983 in the House of Delegates on the Model Rules on advertising and solicitation, Rules 7.1 and 7.2, was also influenced by what was perceived to be the constitutional minimums, under the United States Supreme Court cases. CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra* note 13, at 177-78, 182-85.

Regulation of group legal services is another area where the ABA chose to go only as far as the United States Supreme Court's decisions required. In fact, CODE DR 2-103(D)(5), as first adopted, described the organizations that a lawyer could cooperate with as legal aid, public defender, military legal assistance, lawyer referral and bar associations sponsored organizations. A lawyer could only cooperate with other organizations "in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal services activities . . ." *Association's House of Delegates Meets in Dallas, August 11-13*, 55 A.B.A. J. 970, 971 (1969).

360. 433 U.S. at 350.

361. *Id.* at 383.

362. WYOMING RULES Rule 7.1.

363. In *Virginia Bd. of Pharmacy v. Virginia Citizen Consumer Council*, 425 U.S. 748 (1976), the Court stated that regulation of advertising of professional services may involve quite different factors than the advertising of standardized products. Physicians and lawyers "render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain types of advertising." *Id.* at 773 n.25. This was echoed in *Bates*, 433 U.S. at 383. However, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Court found the state's argument unpersuasive that the problem of identifying deceptive legal advertising was different in kind from identifying deception in general advertising. *Id.* at 644. The dissent contended that there was a qualitative difference between professional service advertising and the advertising of products. To the dissent, the difference justified greater deference to the state's efforts to regulate professional advertising. *Id.* at 676 (O'Connor, J., dissenting).

The regulation of advertising by the Federal Trade Commission (FTC) includes both direct misrepresentations and omissions of fact that make an advertisement misleading. The definition of "false advertisement," that the FTC may prohibit, is "an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only the representations made or suggested . . . but also the extent to which the advertisement fails to reveal facts material in light of such representations . . ." Federal Trade Commission Act, 15 U.S.C. § 55(a) (1982). FTC deception law has long recognized that "[w]ords and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive". *Pridgen, Consumer Protection and the Law*, § 10.06[3] (1986) (citing *Bockenstetter v. FTC*, 134 F.2d 369, 371 (10th Cir. 1943)). See, e.g., *J.B. Williams Co. v. FTC*, 381 F.2d 884, 889 (6th Cir. 1967); *P. Lorillard Co. v. FTC*, 186 F.2d 52 (4th Cir. 1950).

she can achieve results by means that violate the rules or other law. The Comment interprets this second category to ordinarily prohibit statements about results, such as favorable verdicts or large damage awards, that the lawyer obtained for previous clients, because such statements suggest that similar results can be obtained for others, regardless of the circumstances. Under Rule 7.1(c), the lawyer is not to compare her services to those of other lawyers unless she can support such statements with facts. This suggests that "puffing" is probably not permitted in lawyer advertising, though it is often tolerated in other types of advertising.<sup>364</sup> For example, statements by a lawyer that she is the best divorce lawyer in town would probably be forbidden.

Advertising is permitted, under Rule 7.2(a), as long as the advertisements are not false or misleading under Rule 7.1. Television advertising is specifically included. The lawyer cannot give another person anything for recommending her except that she can pay the reasonable costs of advertising or not-for-profit referral.<sup>365</sup> The Comment states that a lawyer does not violate this Rule when a prepaid legal services plan advertises her services.<sup>366</sup>

Procedural requirements for advertising make up the rest of Rule 7.2. A record must be kept for two years and the name of one lawyer responsible for the advertisement must be included in the advertisement.<sup>367</sup> Rule 7.2 omits the Code requirement that the information be presented in a "dignified manner."<sup>368</sup> The term "dignified" is a matter of taste and thus is speculative and subjective.<sup>369</sup>

Direct contact between a lawyer and a potential client is governed by Rule 7.3. The Rule states that a lawyer may not solicit employment when

364. In *Bates*, the Court stated, "[i]n fact, because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising claims as to the quality of services—a matter we do not address today—are not susceptible to measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction." *Bates*, 433 U.S. at 383-84. *But see supra* note 363. One commentator argues that "puffing" comments should be allowed in lawyer advertising. Huber, *Competition at the Bar and the Proposed Code of Professional Standards*, 57 N.C.L. Rev. 559, 575 (1979).

"A rather well-established rule of law is that trade 'puffing' is permissible. . . . [One form] is a subjective statement of opinion as to a product's quality using such terms as 'best' or 'greatest.'" Comment, *Deceptive Advertising and the Federal Trade Commission: A Perspective*, 6 PEPPERDINE L. REV. 439, 457 (1979). "What was said was clearly justifiable . . . under those cases recognizing that such words as 'easy,' 'perfect,' 'amazing,' 'prime,' 'wonderful,' 'excellent' are regarded in law as mere puffing or dealer's talk upon which no charge of misrepresentation can be based." *Carlay Co. v. FTC*, 153 F.2d 493, 496 (7th Cir. 1946). In more recent cases, the FTC has recognized the exception and interpreted it narrowly or found it not to apply. *In re H.W. Kirschner*, 63 F.T.C. 1282, 1290-93 (1963); *In Re Colgate-Palmolive Co.*, 59 F.T.C. 1452 (1961).

365. WYOMING RULES Rule 7.2(c).

366. *Id.* at Rule 7.2 comment 6. The detailed requirements in the CODE DR 2-103(D)(4), for a lawyer to take referrals from a prepaid legal services plan, were not included in the Model Rules. *See supra* note 335-37 and accompanying text.

367. WYOMING RULES Rule 7.2(b), (d).

368. CODE DR 2-101(B).

369. WYOMING RULES Rule 7.2 comment 3.

a significant motive is pecuniary gain. She may solicit employment from prior clients or family members.<sup>370</sup> Rule 7.3 then defines "solicit" to include "contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient."<sup>371</sup> It does not include letters or circulars "distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter."<sup>372</sup>

Case law suggests that Rule 7.3, on solicitation, will be vulnerable to constitutional challenge, like many past rules on advertising and solicitation. In *Zauderer v. Office of Disciplinary Counsel*,<sup>373</sup> the United States Supreme Court decided that newspaper advertising directed at specific victims is protected by the first amendment and cannot be absolutely prohibited.<sup>374</sup> The newspaper advertisement in that case was directed at users of the Dalkon shield contraceptive device. The Court found that this advertisement did not raise the privacy concerns of in-person solicitation.<sup>375</sup> Consequently, Rule 7.3 will have to be interpreted to permit newspaper advertising directed at victims of a particular injury.

Before *Zauderer*, the New York Court of Appeals had held that the State of New York could not discipline a lawyer because he wrote, seeking clients, directly to victims of the Kansas City Hyatt Regency sky-walk disaster.<sup>376</sup> The United States Supreme Court denied certiorari in that case, after *Zauderer* was decided.<sup>377</sup> The United States Supreme Court also recently heard argument in a case where the state prohibited a lawyer's mailings to persons who had had foreclosure actions filed against them.<sup>378</sup> Mailing solicitations to persons known to need representation in a specific matter would clearly violate Rule 7.3. The mailing was directed to persons "known to need legal services . . . in a particular matter."<sup>379</sup>

Rule 7.3 will not be enforceable against direct mail solicitation if the Court interprets the first amendment to protect mailings directed to victims. The Court will likely reach this conclusion. Targeted mail seems more

370. The question is whether former clients are any less vulnerable to in-person solicitation. One court has approved a similar exception under the Code that included close friends, relatives and former clients. It concluded that people in such a relationship to the lawyer are less likely to be subjected to unethical pressures and can evaluate the lawyer's competence. In addition, the exception allows the lawyer to "comport with the demands of the relationships". *Goldthwaite v. Disciplinary Bd. of the Alabama State Bar*, 408 So.2d 504, 507 (Ala. 1982) (The court reversed the discipline of a lawyer who suggested his employment to an old friend.).

371. WYOMING RULES Rule 7.3.

372. *Id.* WYOMING RULES Rule 7.3 comment 7 concludes that a lawyer can contact organizations that might be interested in establishing a prepaid or group legal services plan.

373. 471 U.S. 626 (1985).

374. *Id.* at 646-47.

375. *Id.* at 642.

376. *In re Von Wiegen*, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984), cert. denied, 472 U.S. 1007 (1985). See also, *Adams v. Attorney Registration and Disciplinary Comm'n*, 801 F.2d 968 (7th Cir. 1986).

377. See *supra* note 376.

378. *Shapiro v. Kentucky Bar Ass'n*, 56 U.S.L.W. 3526 (U.S. Feb. 9, 1988), was argued before the United States Supreme Court on March 1, 1988.

379. WYOMING RULES Rule 7.3.

like the directed newspaper advertisement in *Zauderer* than like in-person solicitation.<sup>380</sup> The Comment, anticipating a first amendment challenge, defends the absolute prohibition of targeted mailings. It points out that those needing legal help may be particularly vulnerable. The Comment reviews lesser restrictions on solicitation and concludes that such restrictions would not be effective.<sup>381</sup>

Rule 7.3 only prohibits solicitation for pecuniary gain. Under the Code, a lawyer ordinarily could not accept any employment that was a result of unsolicited advice.<sup>382</sup> The United States Supreme Court upheld the enforcement of such a rule against a lawyer who visited a car accident victim in the hospital to persuade her to hire him.<sup>383</sup> However, in a case decided the same day, the Court held a state could not discipline a lawyer affiliated with the American Civil Liberties Union who had met with and then written to a potential client offering legal assistance to challenge a sterilization.<sup>384</sup> The Court distinguished the two cases partly on the basis of the pecuniary motive in the first case.<sup>385</sup> Rule 7.3 incorporates this distinction. The Rule only prohibits direct lawyer contact with potential clients if the lawyer's financial benefit is a significant motive for the solicitation.

Rule 7.4 restricts the advertising of specialties to admiralty, patents and specialties certified by the particular state. The Comment to the Rule is quite technical regarding what words indicate a specialty. For example, the Comment concludes that stating that a practice is limited to a certain field implies formal recognition as a specialist.<sup>386</sup> The Grievance Committee decided to omit this Rule and Comment so that advertising of a specialty would be governed by the false or misleading standard of Rule 7.1.<sup>387</sup> Declaring oneself a specialist when there is no certification process for that specialty might be considered misleading.

The Model Rules treat the firm name as a communication regarding the firm's services.<sup>388</sup> Therefore, Model Rule 7.5 and Wyoming Rule 7.4, on firm names, appear in this section of the rules. Most of the provisions regarding what name a firm can use are the same as those in the Code.<sup>389</sup> The new rules do permit a wider use of trade names than the Code did. Under the Code, the only thing that could be included in a firm name besides the names of lawyers actively practicing in the firm was the name

380. The United States Supreme Court upheld discipline of a lawyer for in-person solicitation in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

381. WYOMING RULES Rule 7.3 comment 5.

382. CODE DR 2-104(A).

383. *Ohralik*, 436 U.S. at 467.

384. *In re Primus*, 436 U.S. 412, 439 (1978).

385. *Id.* at 422.

386. MODEL RULES Rule 7.4 comment 1.

387. Wyoming Bar Grievance Committee Meeting Minutes (Jan. 15, 1986). Regulating specialty advertising with the general standard that it must not be false or misleading is more consistent with the United States Supreme Court holding in *In re R.M.J.*, 455 U.S. 191, 205 (1982).

388. "Information About Legal Services" is the title of this section of the rules.

389. CODE DR 2-102(B).



of a former member of the firm who was retired or deceased.<sup>390</sup> Under Model Rule 7.4(a), any trade name may be used as long as it is not misleading. One type of misleading trade name is specified in the Rule itself. A trade name used by a lawyer in private practice is considered misleading if it implies that the lawyer is affiliated with a public or charitable organization or agency. The Comment notes that a trade name that includes the name of a geographical location, such as a city, may imply such an affiliation, and therefore be misleading.<sup>391</sup>

## IX. GENERAL PROVISIONS

The final section of the rules governs the lawyer's conduct outside of her profession and a lawyer's duties regarding reporting of unethical conduct by other lawyers. This section also includes the basic rule subjecting a lawyer to discipline for violating the other rules.

The Code requirement<sup>392</sup> that a lawyer not have made a false statement on a bar application is included in Rule 8.1(a). Also under the Rule, the bar applicant must have corrected any misapprehension known to have arisen about the application. A lawyer must provide information requested by an admissions or disciplinary authority, under Rule 8.1(b). An affirmative requirement for all lawyers has been added. A lawyer must disclose a fact that is needed to correct a known misapprehension arising in a disciplinary proceeding or an admission application.<sup>393</sup> The Rule applies even if the lawyer is not directly involved. Disclosure is not required if the information is protected under the confidentiality rule.<sup>394</sup> Under the Code, a lawyer was not to further the application of a person who was not qualified for admission but the lawyer did not have an affirmative obligation to correct misleading information from another source.<sup>395</sup>

Under the Code, a lawyer was required to report all Code violations by other lawyers if the information was not privileged.<sup>396</sup> Therefore, it was a violation of the Code for a lawyer to fail to report her own or any other lawyer's violation. The Comment to the new Rule points out that the Code rule proved unenforceable.<sup>397</sup> Under Rule 8.3(a), a lawyer must report another lawyer's violation of the ethical rules only if the violation raises "a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."<sup>398</sup> The lawyer is not required to report her own violations. The report is to be made to the appropriate professional authority, in Wyoming the Grievance Committee. A parallel rule requires lawyers to report actions by judges that violate their ethi-

390. *Id.*

391. WYOMING RULES Rule 7.4 comment 1.

392. CODE DR 1-101(A).

393. WYOMING RULES Rule 8.1(b).

394. *Id.* at Rule 1.6.

395. CODE DR 1-101(B). WYOMING RULES Rule 8.1(a) also requires that a lawyer not make a false statement of material fact in furtherance of a bar admission application or in connection with a disciplinary matter.

396. CODE DR 1-103(A).

397. WYOMING RULES Rule 8.3 comment 3.

398. *Id.* at Rule 8.3(a).

cal code and reflect on their fitness.<sup>399</sup> Neither reporting is required if it would involve disclosure that violates the confidentiality rule.<sup>400</sup> When a client complains to a lawyer about conduct of another lawyer, who formerly represented the client, the information frequently would be confidential, as "information relating to representation of a client."<sup>401</sup> The Comment directs the lawyer to seek her client's consent to disclose the information to the disciplinary authority, if it will not substantially prejudice the client.<sup>402</sup>

Rule 8.3 only requires that a lawyer report *knowledge* of ethical violations by other lawyers, not rumors. The Comment states that one violation may be enough to trigger the reporting.<sup>403</sup> A pattern is not necessary, though it would often be relevant to the question of whether the misconduct raised a substantial question as to the lawyer's fitness.

Rule 8.2 regulates lawyers' statements about judges or public legal officers or candidates for judicial or legal office. Since the Rule has first amendment implications, the drafters used the standard announced in *New York Times v. Sullivan*<sup>404</sup> for testing statements about public officials. It is a violation of Rule 8.2(a), and was a violation of the Code,<sup>405</sup> for a lawyer to make a statement which she knows to be false about a judge or candidate for judicial office. It is also a violation of the Rule to make a statement about such persons with "reckless disregard as to its truth or falsity."<sup>406</sup> The scope of the Rule also extends to statements about other public legal officers or candidates for such offices. Section (b) of Rule 8.2 requires lawyers who are candidates for judicial office to comply with the Code of Judicial Conduct.

Rule 8.4 defines professional misconduct. Section (a) states that it is misconduct to violate the rules, to assist another to violate the rules or to violate the rules through the acts of another. The other sections of the Rule define other conduct which can subject a lawyer to discipline. Under the Code, any illegal act involving moral turpitude was professional misconduct.<sup>407</sup> The drafters of the Model Rules rejected the term "moral turpitude" because it had been interpreted to include crimes of personal morality, that have no specific connection to fitness to practice.<sup>408</sup> The example given in the Comment is adultery.<sup>409</sup> Rule 8.4(b) makes a criminal act professional misconduct only if it "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."<sup>410</sup>

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399. *Id.* at Rule 8.3(b).

400. *Id.* at Rule 1.6.

401. *Id.*

402. *Id.* at Rule 8.3 comment 2.

403. *Id.* at comment 1.

404. 376 U.S. 254 (1964).

405. CODE DR 8-102(A), (B).

406. WYOMING RULES Rule 8.2(a). This language is substantially similar to the test adopted in *New York Times v. Sullivan*, 376 U.S. at 279-80.

407. CODE DR 1-102(A)(3).

408. WYOMING RULES Rule 8.4 comment 1.

409. *Id.*

410. *Id.* at Rule 8.4(b).

The Comment discusses what types of crime qualify, including fraud, failure to file a tax return, violent crimes, and crimes involving a breach of trust. A pattern of minor offenses may also indicate an indifference to legal duty that adversely reflects on fitness to practice, according to the Comment.<sup>411</sup>

Rule 8.4(f) ties the ethical rules for lawyers to the Code of Judicial Conduct. This section makes it professional misconduct to assist a judicial officer in conduct that violates the Code of Judicial Conduct. The Code did not include such a rule.

The other sections of Rule 8.4 are very general, and probably too vague for meaningful enforcement, unless the lawyer also violates a more specific rule. Under 8.4(c), "conduct involving dishonesty, fraud, deceit or misrepresentation" is professional misconduct. While Rule 8.4(c) appears to apply to all situations, it seems that the earlier, more specific rules govern dishonesty or misrepresentation occurring during law practice. Rule 8.4(c) by implication governs actions outside of law practice. It is clearly a vague standard for discipline though it was taken directly from the Code.<sup>412</sup> Rule 8.4(d), also taken directly from the Code,<sup>413</sup> states that action that prejudices the administration of justice is professional misconduct. Finally, a lawyer must not imply that she can improperly influence a government agency or official, under Rule 8.4(e).

## X. CONCLUSION

The Rules significantly change the Code provisions on client perjury, business transactions with clients and imputed disqualification. The Rules on expediting litigation and on meritorious claims are also significantly different than the corresponding Code provisions, depending on how the Rules are interpreted.

Gaps in the coverage of the Code were filled by the Model Rules with rules on client decisionmaking, specific prohibited conflicts of interest, conflicts of interest with former clients and the organization lawyer. Other gaps were filled with the rules on the lawyer as intermediary, responsibility for the actions of others in the law office and the disabled client. Also, the Model Rules take a more practical approach in such areas as reporting misconduct of other lawyers and communicating with unrepresented persons.

The Grievance Committee and the Wyoming Supreme Court decided not to adopt one of the significant differences between the Model Code and the Model Rules. The Wyoming Rule incorporates the Model Code provision that a lawyer may disclose a client's plan to commit any crime, rather than the more restrictive Model Rule. In contrast to the Model Rule, the Wyoming Rule on meritorious claims explicitly requires that a lawyer make reasonable inquiry before a claim is made in a court document.

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411. *Id.* at Rule 8.4 comment 1.

412. CODE DR 1-102(A)(4).

413. *Id.* at DR 1-102(A)(5).

The Wyoming Rules prohibit a lawyer from accepting a fee solely for referral. They limit the application of the Model Rule prohibiting *ex parte* contact to tribunals acting in an adjudicative capacity and permit such contact with consent. Advertising of specialties under the Wyoming Rules is governed by the general rule that an advertisement not be false or misleading, rather than the specific Model Rule. As compared to the Model Rule, the Wyoming Rule narrows the prosecutor's duty to see that others advise a defendant of her right to counsel. Finally, the Wyoming Rules omit the preference for a written fee agreement that is contained in the Model Rules.

Overall, the Wyoming Rules, and the Model Rules on which they are based, are easier to understand, more concisely stated and more comprehensive in their coverage than their predecessors. They are also better organized and the confusion between aspirational and mandatory rules has been eliminated for the most part. Hopefully, all of these improvements will encourage lawyers to read the rules, consult them when a dilemma arises and help to see that they are enforced.

The Wyoming Rules and the Model Rules are clearly a product of compromise. The proper lawyer conduct in many circumstances is still not clear. A number of the rules can be fairly criticized as self-protective.<sup>414</sup> Hopefully, the Wyoming Rules will encourage lawyers to discuss further what should be the minimum required professional conduct and how best to promote and enforce such conduct.

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414. See Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985).