

WORK IN PROGRESS: THE VERMONT RULES OF PROFESSIONAL CONDUCT

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INTRODUCTION

Seven years after the American Bar Association (ABA) adopted the Model Code of Professional Responsibility (Model Code), L. Ray Patterson, Dean of Emory University Law School, suggested that:

The time has come to renounce completely the fiction that ethical problems for lawyers are matters of ethics rather than law. The fiction pervades the Code of Professional Responsibility and is its major shortcoming. Even so, those who criticize the present code as a failure miss the point: it is a transitional document, representing a middle stage in the development of law for lawyers.

... It is rigid and simplistic, complex and contradictory, and difficult to read. . . . The code does not provide the individual lawyer with adequate guidelines to deal with ethical problems, for it does not reflect the realities of legal life.¹

Shortly after publication of Dean Patterson's seminal article, the ABA constituted a Commission on Evaluation of Professional Standards with Omaha lawyer Robert Kutak as chairman (Kutak Commission).

Three years later, after intensive study and analysis, the Kutak Commission produced its first Discussion Draft of the Model Rules of Professional Conduct (Model Rules). Chairman Kutak described the work of the Kutak Commission in January 1980:

In developing the proposed Rules, the commission began by analyzing what lawyers actually do, what the lawyer's functions are in various client-lawyer relationships. . . .

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1. L. Ray Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A. J. 639, 639 (1977).

What the commission has done is to take the underlying structural thrust of the Code of Professional Responsibility—its bifurcation of disciplinary rules and ethical considerations—to its next logical step by drafting rules that are the legal foundation of good professional conduct, although not necessarily exhaustive. The effort is to state the necessary, but not the entire, content of ethical lawyer behavior. The commission has undertaken to write proposed Rules of Professional Conduct that are truly legislative in their reach and in their limitations.²

Following several drafts and much debate, the ABA House of Delegates finally adopted the Model Rules on August 2, 1983.³ This marked a significant step in progress from aspirational standards to comprehensive and enforceable minimum standards of acceptable conduct.

For a number of reasons, the Model Rules represent an improvement over the Model Code. On the one hand, the Model Rules recognize the varied roles of lawyers as advisors, advocates, negotiators, legal evaluators, and intermediaries between and among clients. The Model Code, on the other hand, fails to provide sufficient attention to the actual work of lawyers, other than litigators within the adversary system. The Model Code also fails to distinguish among norms of professional conduct according to the operational context of law practice. The Model Rules remedy this defect by formulating specific responsibilities for representation in special circumstances, such as criminal defense and governmental and organizational representation.

The restatement format of the Model Rules is a large improvement over the Model Code's often confusing tripartite structure of Canons, aspirational Ethical Considerations, and enforceable Disciplinary Rules. Under separate topic headings, the Model Rules reflect the differing roles and responsibilities of lawyers. Unlike the Model Code, the Model Rules emphasize the responsibilities of *both* clients and lawyers in representation relationships, and extol truth and candor over the much misused "zealous representation" standard of the Model Code.

The overall theme of the Model Rules is grounded in the lawyer's primary duty of competence in providing legal services. From there, the Model Rules move on to other aspects of the client-lawyer relationship, particularly with respect to conflicts of interest, and then on to professional standards for lawyers in various roles and in different contexts. The final parts of the Model Rules deal with providing information about legal

2. Robert J. Kutak, *Coming: The New Rules of Professional Conduct*, 66 A.B.A. J. 46, 47-48 (1980).

3. STEPHEN GILLERS & ROY D. SIMON, JR., *REGULATION OF LAWYERS: STATUTES AND STANDARDS* xvii (1996).

services and the responsibilities of lawyers as members of a public profession.

The Emerging Model Rules in Vermont

In 1994, Vermont Professional Conduct Board (PCB) Chair Deborah Banse wrote to the Vermont Supreme Court recommending that a study committee be established to consider whether the Model Rules should be adopted in Vermont. In September 1994, the court appointed eight distinguished lawyers and judges to the Study Committee on the ABA Model Rules Professional Conduct (Study Committee), with instructions to advise the court on whether the current Vermont Code of Professional Responsibility should be replaced with new disciplinary rules based on the Model Rules.⁴ Specifically, the court charged the Study Committee with

assessing how the ABA Model Rules differ from the current Code of Professional Responsibility, how adoption would affect Vermont practice, what changes in the current program would be required by adoption of the Model Rules, including any changes in annual budget, and whether the Supreme Court should adopt the Model Rules.⁵

The first meeting of the Study Committee was held in mid-November 1994. The drafting of the new Rules began shortly thereafter. As part of the writing process, the Study Committee solicited and obtained comments from a number of lawyers, including the views and opinions of attorneys with specialized practices, in areas which might be affected by adoption of Model Rules. The Study Committee met three more times before issuing its preliminary draft for public review in March 1995. Following the receipt of comments, the Study Committee revised several rules and issued its Final Report to the court on July 15, 1995.⁶ The Final Report was

4. The court appointed Burlington lawyer Christopher Davis as Chair of the Study Committee. Supreme Court of Vermont, Charge and Designation to Committee to Study the Model Rules for Professional Responsibility [sic] (Sept. 22, 1994) [hereinafter Charge and Designation]. Other members of the Study Committee include District Court Judge Dean Pineles, Superior Court Judge John Wesley, and attorneys Martha Davis, Richard Cassidy, Kevin Griffin, Rachel Hexter, and Clarke Gravel. FINAL REPORT OF THE STUDY COMMITTEE ON THE ABA MODEL RULES OF PROFESSIONAL CONDUCT I (July 15, 1995) [hereinafter STUDY COMM. FINAL REPORT]. To correct the absence of government lawyers and prosecutors on the Study Committee, the court, in mid-December 1995, appointed J. Wallace Malley, Jr., of the Attorney General's Office, and Robert Sand, of the Vermont Department of States' Attorneys and Sheriffs, to the Study Committee. PCB Counsel Wendy Collins serves as the Study Committee's Reporter. *Id.*

5. Charge and Designation, *supra* note 4.

6. STUDY COMM. FINAL REPORT, *supra* note 4.

eventually made available for general public comment during October 1995. Written responses were received from approximately twenty lawyers. The court has since extended the deadline to May 1, 1996, to allow additional time for public study, discussion, and debate of the proposed Rules.

The current efforts of the Study Committee represent a critical second look at the Model Rules by the court. Ten years ago, the court rejected adoption of the Model Rules and left the current Code in place. Adoption of the Model Rules, as proposed by the Study Committee, will cause a large change in the way Vermont attorneys practice law and will mark a significant departure from many familiar regulatory norms of the present Code.

Vermont remains one of a dwindling number of states still regulating lawyers under the 1969 Model Code.⁷ Thirty-seven states and the District of Columbia now base their lawyer disciplinary codes primarily on the Model Rules.⁸ On the other hand, several states have kept their own Code versions, but have incorporated parts of the Model Rules as amendments.⁹ California remains unique, with its own Rules of Professional Conduct which combines much of the Model Rules and the Model Code.¹⁰

Unlike the Model Code's emphasis on litigation, the Model Rules focus on the multifunctional roles of lawyers as counselors, advocates, and mediators with responsibilities to the justice system markedly different from those under the Model Code. For example, by requiring truthfulness in negotiations and other dealings with adversaries, the Model Rules tilt lawyer ethics strongly away from the Model Code's emphasis on client autonomy. The proposed Vermont rules would go considerably farther than the Model Rules by expanding the "truth" requirement to *all* statements of fact in negotiations, not just "material" statements.¹¹ The Study Committee makes similar recommendations in a number of other areas, particularly concerning the package of interrelated rules on confidentiality and candor toward the tribunal.¹² These two rules, and the rule concerning statements to third persons, have provoked the most heated comments within the ABA and among jurisdictions which have considered

7. Vermont is one of twelve jurisdictions which regulate lawyers under the Model Code of Professional Responsibility. See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 5 (4th ed. 1995).

8. *Id.*

9. *Id.*

10. *Id.*

11. See *infra* Part III.

12. See *infra* Parts I-II.

adopting the Model Rules. Because these rules represent a fundamental shift away from client autonomy in both litigation and non-litigation settings, they generally remain the most controversial parts of the Model Rules. There is no reason to believe the debate will be any different in Vermont.

This Essay explores and comments on the Rules of Professional Conduct recently proposed by the Study Committee. Special attention is paid to areas where the Study Committee has deviated from the Model Rules. In many of these areas, the Study Committee's proposals are substantial improvements on the Model Rules. In other areas, however, the Study Committee should reevaluate its proposals.

I. CONFIDENTIALITY OF INFORMATION: RULE 1.6

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.¹³

With limited exceptions, under both the Model Code and the Model Rules, a lawyer has a responsibility to avoid voluntarily disclosing confidential information.¹⁴ However, protection of client confidences is generally more expansive under the Model Rules than under the Model Code. Under DR 4-101(A), client "confidences" and "secrets" are protected only if required by the client to be held inviolate or if disclosure

13. STUDY COMM. FINAL REPORT, *supra* note 4, at 16.

14. Recognized exceptions to the duty of confidentiality include client consent, challenges to court orders requiring disclosure, collection of fees, responses to charges of unlawful conduct, preventing a client from committing a crime, and disclosure where required by other ethical obligations. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) [hereinafter MODEL RULES]. See also GILLERS, *supra* note 7, at 44-52 (discussing exceptions to the duty of confidentiality under the Model Rules).

would be "embarrassing" or is "likely to be detrimental" to the client.¹⁵ The Study Committee version of Rule 1.6 greatly increases protection of client information by applying the non-disclosure duty to *all* information "relating to representation of a client" regardless of the source.¹⁶ Unlike the Code provision, Proposed Rule 1.6 imposes both a presumption and a duty of confidentiality which are limited only by specific exceptions in the rule, by other rules of civil and criminal law, and by several other sections of the Rules, such as Rule 3.3 and Rule 4.1.¹⁷

One controversial proposed exception to the duty of keeping client confidences is the "crime-fraud" exception. Under the Model Rules, this exception is restricted to the disclosure of confidential information which the lawyer reasonably believes is needed to prevent a client from committing a crime which the lawyer believes "is likely to result in imminent death or substantial bodily harm."¹⁸ The Study Committee rejected the death and harm limitation as unduly restrictive.¹⁹ Instead, the Study Committee proposal would permit, but not require, disclosure "to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act."²⁰ This proposal marks a return to DR

15. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1983) [hereinafter MODEL CODE].

16. STUDY COMM. FINAL REPORT, *supra* note 4, at 16. The Reporter's Note to draft Rule 1.6 states:

This Rule represents a significant departure from the Vermont Code. It imposes a duty of confidentiality concerning information relating to the representation regardless of whether it is acquired before or after the relationship existed. The information must be kept confidential regardless of whether the client indicates a desire for confidentiality or whether disclosure of particular information might be embarrassing or detrimental.

Id. at 19.

17. *Id.* at 16. For a discussion of Proposed Rule 3.3, see *infra* Part II. For a discussion of Proposed Rule 4.1, see *infra* Part III.

18. MODEL RULES, *supra* note 14, Rule 1.6(b)(1). Model Rule 1.6(b)(1) states that: A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.

Id.

19. STUDY COMM. FINAL REPORT, *supra* note 4, at 20.

20. *Id.* Eight states *require* disclosure of client confidences under certain circumstances. See, e.g., ILL. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1993) [hereinafter ILL. RULES] (providing that a lawyer must reveal otherwise confidential information when necessary to prevent a client from "committing an act that could result in death or serious bodily harm"); N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1984) [hereinafter N.J. RULES] (mandating disclosure of confidential information "to prevent a client from committing a criminal, illegal or fraudulent act . . . likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another"); VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(3)(1) (1996) [hereinafter VA. CODE] (requiring lawyer to reveal "intention of his client as stated by the client, to commit a crime and the information necessary to prevent the crime"). The Virginia Code provides that:

4-101(C)(3), which allows disclosure of information necessary to prevent a client from committing a crime.²¹ Broadening the exception to include "crimes" is generally consistent with similar amendments of Rule 1.6(b)(1) by many other states.²²

Although laudable, the Study Committee's proposal may not go far enough. In addition to permitting disclosure of criminal acts, the rule should be further amended to include fraudulent acts. Earlier versions of the Model Rules would have permitted disclosure of confidential client information in order "to prevent the client from committing a . . . fraudulent act that the lawyer believes is likely to result in . . . substantial injury to the financial interests or property of another" or to "rectify the consequences of a client's fraudulent act in the commission of which the lawyer's services had been used."²³ Both clauses were rejected by the

[B]efore revealing such information, the attorney shall, where feasible, advise his client of the possible legal consequences of his action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel.

Id. Four other states (Arizona, Connecticut, Nevada, and North Dakota) compel disclosure to prevent client commission of serious violent crimes. See ARIZ. SUPREME COURT RULES Rule ER 1.6(b) (1996); CONN. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (hereinafter CONN. RULES); NEV. COURT RULES Rule 156(2) (1996); N.D. RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1994).

21. Model Code DR 4-101(C)(3) permits a lawyer to reveal the "intention of a client to commit a crime and the information necessary to prevent the crime." MODEL CODE, *supra* note 15, DR 4-101(C)(3). The Code provision is derived in part from Canon 37 of the 1908 ABA Canons of Professional Ethics which excluded from confidentiality the "announced intention of a client to commit a crime" and permitted a lawyer to make disclosure "as may be necessary to prevent the act or protect those against him it is threatened." ABA CANONS OF PROFESSIONAL ETHICS Canon 37 (1908).

22. See GILLERS & SIMON, *supra* note 3, at 74 (discussing selected state variations of Model Rule 1.6). Twelve states have retained the Model Code language to allow a lawyer to reveal "the intention of a client to commit a crime." *Id.* The New Jersey version of Rule 1.6 requires a lawyer to reveal confidential information "to prevent a client from committing a criminal, illegal or fraudulent act . . . likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another." N.J. RULES, *supra* note 20, Rule 1.6. Although the California Rules of Professional Conduct has no provision on confidentiality, section 6068(e) of the Business and Professions Code requires California lawyers "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." CAL. BUS. & PROF. CODE § 6068(e) (1996 supp.). In June 1993, the California Supreme Court voted not to introduce the language of section 6068(e) into the Rules of Professional Conduct. GILLERS & SIMON, *supra* note 3, at 770. The rejected provision (proposed Rule 3-100) would have permitted a lawyer to reveal a confidence or secret "to the extent the [lawyer] reasonably believes necessary to prevent the commission of a criminal act that the [lawyer] believes is likely to result in death or substantial bodily harm." *Id.* at 796.

23. MODEL RULES, *supra* note 14, Rule 1.6(b) (Draft 1981 and 1982). These proposals reflect earlier rules which allowed much more disclosure than the current Model Rule 1.6. Canon 41 of the 1908 Canons of Professional Ethics required a lawyer to disclose "fraud and deceptions" to victims if the client did not first rectify the wrong. ABA CANONS OF PROFESSIONAL ETHICS Canon 41 (1908). The language of Canon 41 has been viewed by Professors Hazard and Koniak as imposing "a mandatory duty to disclose both past and ongoing fraud, whether or not the lawyer's services had been

ABA House of Delegates.²⁴ Ten years later, at the ABA's 1991 Annual Meeting, the House of Delegates again defeated a proposed amendment to Rule 1.6(b) that would have permitted a lawyer to reveal information that the lawyer reasonably believed necessary to "rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used."²⁵ Paragraphs 10 and 14 in the Comment to Model Rule 1.6 recognize, however, that a lawyer must not counsel or assist a client in criminal or fraudulent conduct.²⁶ Additionally, a lawyer is required to withdraw if the lawyer's services will be misused by the client to advance a crime or fraud.²⁷

used to perpetuate the fraud." GEOFFREY C. HAZARD & SUSAN P. KONIAK, *THE LAW AND ETHICS OF LAWYERING* 282 (1990). Continuing the requirements of Canon 41, original DR 7-102(B) provided:

A lawyer who receives information clearly establishing that . . . [a] client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

MODEL CODE, *supra* note 15, DR 7-102(B).

24. GILLERS & SIMON, *supra* note 3, at 67.

25. *Id.* at 73 (quoting 1991 proposed amendment). The 1991 proposal was essentially the same as the 1982 draft which was rejected by the ABA. *Id.* The ABA House of Delegates also rejected the following proposed amendments to the Comment to Rule 1.6:

To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client's confidences even though the client's purpose is wrongful.

Generally speaking, information relating to the representation must be kept confidential. . . . However, where the client is or has been engaged in criminal or fraudulent conduct or the integrity of the lawyer's own conduct is involved, the principle of confidentiality may have to yield, depending on the lawyer's knowledge about and relationship to the conduct in question, and the seriousness of the conduct.

Even if the [lawyer's] involvement was innocent . . . the fact remains that the lawyer's professional services were made the instrument of the client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct, and has the professional right, although not a professional duty, to rectify the situation. Exercising that right may require revealing information relating to the representation.

Id. (alterations in original). See also CONN. RULES, *supra* note 20, Rule 1.6(c)(2) (permitting lawyers to reveal confidential information to "[r]ectify the consequence of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used"); MD. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) [hereinafter MD. RULES]; MICH. RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(3); N.J. RULES, *supra* note 20, Rule 1.6(c)(1); PA. RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(2) (1996) [hereinafter PA. RULES].

26. MODEL RULES, *supra* note 14, Rule 1.6, cmt. 10, 14.

27. *Id.* Several situations must be distinguished. First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See *id.* Rule 1.2(d). Similarly, a lawyer has a duty under the Model Rules not to use false evidence. *Id.* Rule 3.3(a)(4). Finally, if the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw. *Id.* Rule 1.16(a)(1).

Noncriminal fraud, which could cause *greater* damage than some crimes, should not be exempt from permissive disclosure. It seems strange, for example, that a lawyer would be allowed to disclose a client's intent to commit a misdemeanor, but would be barred from warning that the same client intends to engage in noncriminal fraud which might cause severe harm. For fraudulent conduct of all sorts, both minor and grave, Vermont lawyers would be required to remain silent and would be relegated to mere withdrawal of services under Proposed Rule 1.16(a)(1).²⁸ In such circumstances, the Study Committee rule would permit only "noisy withdrawal" as described in the Comment to Proposed Rule 1.6.²⁹ These parts of the Comment were added to the Model Rules after the House of Delegates defeated the 1981 and 1982 Kutak Commission drafts which would have allowed a lawyer to reveal confidential information to the extent the lawyer believes necessary "to rectify the consequences of a client's criminal or fraudulent" conduct involving the lawyer's services.³⁰

Proposed Rule 1.6(b)(2) should be amended to include the Kutak Commission "rectify harm" exception. The rationale is cogently stated by Professors Hazard and Hodes:

[L]awyers need a mechanism to save both themselves and the innocent victim of the crime or fraud. The only fully effective mechanism is to make seasonable disclosure to the victim if the client refuses to rectify the situation. Concededly, this involves a betrayal of the client's interests, and a breach of the duty normally owed to the client. But by hypothesis the situation is not normal; the client has already betrayed the lawyer and abused the client-lawyer relationship. To the extent that the rule of confidentiality was intended to benefit the specific client involved in the matter, it may justly be said that the client has forfeited any right to such benefit.³¹

Adding the "rectify harm" language to Proposed Rule 1.6(b)(2) would strengthen the ability of Vermont lawyers to deal with damage caused by

28. STUDY COMM. FINAL REPORT, *supra* note 4, at 44.

29. *Id.* at 18. The Comment to Proposed Rule 1.6 states that:

After withdrawal, the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) or Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Id.

30. GILLERS & SIMON, *supra* note 3, at 67. The "noisy withdrawal" provision is explained in ABA Comm. on Professional Ethics and Grievances, Formal Op. 92-366 (1992).

31. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 1.6.110, at 168.5 (2d ed. 1996 supp.).

client abuse of lawyer services, and may help diminish a public view of lawyers as amoral hired guns. Lawyer assistance to victims of client crime or fraud also could enhance general public confidence in the integrity of the legal profession.

II. CANDOR TOWARD THE TRIBUNAL: RULE 3.3

(a) *A lawyer shall not knowingly:*

(1) *make a false statement of fact or law to a tribunal;*

(2) *fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;*

(3) *fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or*

(4) *offer evidence that the lawyer knows to be false. If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.*

(b) *The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.*

(c) *A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.*

(d) *In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.³²*

Closely connected to Rule 1.6 on client confidences is Rule 3.3. Model Rule 3.3 sets out four special duties of lawyers appearing before courts and other tribunals in criminal, civil, and administrative matters:

1. Do not lie;³³
2. Do not remain silent if keeping quiet assists a client fraud or crime;³⁴
3. Do not fail to disclose legal authority adverse to your client if not otherwise disclosed by opposing counsel;³⁵ and
4. Do not present false evidence.³⁶

32. STUDY COMM. FINAL REPORT, *supra* note 4, at 56-57.

33. MODEL RULES, *supra* note 14, Rule 3.3(a)(1). See also *Exodus* 20:16.

34. MODEL RULES, *supra* note 14, Rule 3.3(a)(2).

35. *Id.* Rule 3.3(a)(3).

36. *Id.* Rule 3.3(a)(4) (as amended through August 1995).

Paragraphs (a)(1) through (a)(3) of Proposed Rule 3.3 are substantially similar to counterparts in the Model Code.³⁷ Rule 3.3(a)(4), which forbids the offering of evidence known by a lawyer to be false, is almost identical to DR 7-102(A)(4), which provides that a lawyer shall not “knowingly use” perjured testimony or false evidence.³⁸ However, the second half of Rule 3.3(a)(4), which requires a lawyer to take “reasonable remedial measures” to rectify false evidence or perjured testimony, is a radical *reversal* of the Code’s protection of client confidences.³⁹

What exactly are “reasonable remedial measures?” What does a lawyer “know,” and what should a lawyer do when she *knows* that false evidence will be or has been presented before a tribunal? These are not easy questions, and the Comment to Proposed Rule 3.3 provides little assistance on these issues. Although the Terminology section of the Proposed Rules defines “knows,” “believes,” and similar words of cognition,⁴⁰ practical definitions are often difficult to apply in the context of client perjury. In *Nix v. Whiteside*, Justice Stevens reached for judicial lyricism on when and how a lawyer “knows” about client perjury:

[A]fter a case has been tried and the evidence has been sifted . . . , a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must often deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel.⁴¹

Very rare indeed is the client who tells his or her lawyer in advance of trial: “I intend to lie about the facts in this case and you can’t stop me!” The hard cases are those posing a tension between the client’s right to testify at trial and what a lawyer *suspects* may be perjury. The question becomes even more difficult when constitutional guarantees of due process are factored into the equation, as in *Whiteside*.

37. See GILLERS & SIMON, *supra* note 3, at 211 (comparing the Model Rules and Model Code).

38. *Id.* (comparing the Model Rules and Model Code).

39. The Reporter’s Notes explain that: “This Rule maintains the Vermont Code’s requirement that if the interests of client and tribunal conflict with regard to candor, the interests of the tribunal prevail.” STUDY COMM. FINAL REPORT, *supra* note 4, at 60.

40. *Id.* at 7. The Terminology section of the Proposed Rules states that: “‘Knowingly,’ ‘known,’ or ‘knows’ denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” *Id.*

41. *Nix v. Whiteside*, 475 U.S. 157, 190 (1986) (Stevens, J., concurring).

Under the Proposed Rules, "knows" means "actual knowledge of the fact in question."⁴² This does not mean that a lawyer must be an actual witness to the fact in question to have "actual knowledge." The thorny issue of what is "actual knowledge" mandating rectification of false evidence and client perjury under Rule 3.3 would be best resolved by setting the standard at "beyond a reasonable doubt." This test more closely protects client constitutional rights, and at the same time remains consistent with a lawyer's general duty of client loyalty.

The standard is appropriately lower as to the *right* of the lawyer under Rule 3.3(c) to "refuse to offer evidence that the lawyer reasonably believes is false."⁴³ However, the reasonable belief standard is afflicted with the same problems of definitional circularity as is "knows" in the Terminology section. "Reasonable belief" and "reasonably believes," according to the Proposed Rules, mean "that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."⁴⁴ In application, however, Rule 3.3(c) provides a latitude of discretion for the skeptical lawyer to decline to present evidence that she views as doubtful and which may not be persuasive to the trier of fact.⁴⁵

The version of Rule 3.3 proposed by the Study Committee differs in some respects from the Model Rule. The Study Committee proposes to delete "material" as a modifier of "fact" in Rule 3.3(a)(1) and (2).⁴⁶ The Reporter's Note states that "[t]he Drafters rejected the ABA proposed Model Rule to the extent that knowingly false statements of immaterial

42. STUDY COMM. FINAL REPORT, *supra* note 4, at 7. Other jurisdictions apply different language to the duty to reveal perjury. See, e.g., D.C. RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1996) [hereinafter D.C. RULES] ("evidence that the lawyer knows to be false"); FLA. RULES OF PROFESSIONAL CONDUCT Rule 4-3.3(a)(4) (1994) [hereinafter FLA. RULES] ("testimony or other evidence that the lawyer knows to be false"). Maryland adds a subparagraph to its Rule 3.3 to limit the disclosure obligation in criminal defense cases. The subparagraph provides that "a lawyer for an accused in a criminal case need not disclose that the accused intends to testify falsely or has testified falsely if the lawyer reasonably believes that the disclosure would jeopardize any constitutional right of the accused." MD. RULES, *supra* note 25, Rule 3.3(e).

43. STUDY COMM. FINAL REPORT, *supra* note 4, at 57. This part of Rule 3.3 provides more discretion to the lawyer than does DR 7-102(A)(4) of the Model Code, which prohibits the introduction of evidence the lawyer *knows* to be false. GILLERS & SIMON, *supra* note 3, at 211 (comparing the Model Rules and Model Code).

44. STUDY COMM. FINAL REPORT, *supra* note 4, at 7.

45. GILLERS & SIMON, *supra* note 3, at 211 (discussing Model Rule 3.3(c)).

46. STUDY COMM. FINAL REPORT, *supra* note 4, at 56-57. The Model Rules state that: "A lawyer shall not knowingly make a false statement of *material* fact or law to a tribunal [or] fail to disclose a *material* fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." MODEL RULES, *supra* note 14, Rule 3.3(a)(1)-(2) (emphasis added).

facts and law were countenanced."⁴⁷ This is consistent with criticisms of Rule 3.3 that *no* falsehoods or concealment of truth should be aided by lawyers before tribunals under any circumstances—no matter how trivial or immaterial.⁴⁸ There is contrary opinion, however, that attorneys ought not be sanctioned for untrue but exaggerated or trivial statements of fact which have no material bearing on the factual or legal questions before the tribunal.⁴⁹

III. TRUTHFULNESS IN NEGOTIATIONS: RULE 4.1

In the course of representing a client a lawyer shall not knowingly:

(a) *make a false statement of fact or law to a third person; or*

(b) *fail to disclose a fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.*⁵⁰

The Study Committee has proposed significant changes in Rule 4.1 which would have important consequences for the way Vermont attorneys practice law. First, the Study Committee removed "Statements to Others" as the rule title and substituted "Negotiations," thereby limiting the rule's scope. The *content* of the proposed rule, however, is not similarly restricted to negotiations, but instead applies generally to "the course in representing a client" by a lawyer. This "course" includes transactions other than negotiations. "Third person" under Proposed Rule 4.1, includes many persons, such as opposing counsel, expert witnesses, and government officials, in non-negotiation settings. As to these types of "third person" situations, Proposed Rule 4.1 clearly requires truthful statements. Therefore, the Study Committee should either strike "Negotiations" from the draft title and return to the broader "Statements to Others," or retain "Negotiations" in the title and limit "course of representation" to negotiations. Failure to make either change will leave the rule open to confused interpretation.

47. STUDY COMM. FINAL REPORT, *supra* note 4, at 60. Possibly through an oversight, the Study Committee draft fails to delete "material" from Rule 3.3(a)(4) in apparent contradiction to the Reporter's Notes. This part of Rule 3.3 states, in part, that: "If a lawyer has offered *material* evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." *Id.* at 57 (emphasis added).

48. See Chauncey M. DePree & Rebecca K. Jude, *The Materiality Precept in the Legal Profession's Rules of Conduct*, PROF. LAW., Nov. 1993, at 10.

49. See W. William Hodes, *Two Cheers for Lying (About Immaterial Matters)*, PROF. LAW., May 1993, at 3.

50. STUDY COMM. FINAL REPORT, *supra* note 4, at 69.

The next change proposed by the Study Committee involves expansion of Rule 4.1 to prohibit "puffing" in certain statements which the Model Rule would otherwise treat as immaterial and beyond its scope. To effect this prohibition, the Study Committee deleted the word "material" as a modifier of fact.⁵¹ The Reporter's Note to the Study Committee draft explains that "[t]he Drafters rewrote this rule to avoid countenancing 'puffing' or other less than honest methods of negotiation as countenanced by the ABA Model Rule. The Drafters felt that one should be able to accept the word of a lawyer as truth."⁵²

The gloss of "materiality" was added by the ABA framers to the 1980 Discussion Draft of Rule 4.1 (then called Rule 4.2).⁵³ According to Professor Wolfram, the "materiality" criterion was

part of a general effort by the Model Rules framers to confine what otherwise might be senselessly extreme applications of the Rules. No instances were cited, however, in which the potentially more universal sweep of DR 7-102(A)(5) had been applied to discipline a lawyer for a nonmaterial false statement.⁵⁴

51. *Id.*

52. *Id.* at 70.

53. GILLERS & SIMON, *supra* note 3, at 261.

54. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.5, at 726 n.36 (1986). Colorado has deleted the word "material" from its version of Rule 4.1(a). See COLO. RULES OF PROFESSIONAL RESPONSIBILITY Rule 4.1(a) (1995 supp.) [hereinafter COLO. RULES]. Colorado deleted the word "material" from its Rule 4.1(a) when the Colorado Supreme Court replaced the Code four years ago: Rule 4.1 differs from the Model Rule by omitting the qualifier "material" to the prohibition against false and misleading statements of fact or law.

Simply put, lawyers cannot lie. A lawyer may refuse to answer an inquiry from a third party, evade answering or seek client consultation before responding. The prohibition against lying may reward an adversary who asks the right question and receives a telling non-response.

The prohibition against misrepresentation also applies to statements of law as well as fact. Third parties must not be given distorted statements of law whether based on lack of research or snap judgments. Obviously, lawyers are not generally subject to legal malpractice claims with respect to advice to non-clients, yet incorrect statements of law that rise to the level of *misstatements* may be subject to discipline.

How much a lawyer may withhold in a business negotiation is unclear. If a business person across a table requests information that appears material to consummating a transaction, a half-truth or evasive answer may be materially misleading. Rule 4.1 recognizes a lawyer silence as the equivalent of untruthfulness. Only where the adversary does not seek material information should a lawyer be at ease when withholding significant information.

Richard F. Hennessey et al., *Colorado's New Rules of Professional Conduct: A More Comprehensive and Useful Guide for Lawyers*, 21 COLO. LAW. 2101, 2118 (1992).

The rationale for allowing non-material false statements is set out in Paragraph 2 of the Model Rule Comment:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.⁵⁵

The Comment presents a very slippery problem for the practicing lawyer. What exactly is "material?" When is a deceptive statement not to be treated as a statement of fact? When is an opinion or estimate of price or value an actionable misrepresentation? How close to the line between "puffing" and fraud can a lawyer skid without violating Rule 4.1?

The Study Committee draft provides a practical solution by banning, under Proposed Rule 4.1(a), all knowingly false statements of fact regardless of materiality, and by requiring disclosure of all facts necessary for the lawyer to avoid assisting client frauds and crimes.⁵⁶ The draft amendment comports well with the general requirement of Rule 8.4(c), prohibiting lawyer "conduct involving dishonesty, fraud, deceit or misrepresentation,"⁵⁷ and returns to Rule 4.1 a moral component otherwise lacking under the Model Rule.

Another improvement by the Study Committee involves its removal of the exception to disclosure in Rule 4.1(b), which addresses confidential information otherwise protected by Rule 1.6. Professor Wolfram describes the problem solved by the Study Committee:

Rule 4.1(b), at first glance, seems to go on to state an affirmative disclosure duty corresponding to passive misrepresentation law. But it may be a closed loop: a lawyer shall not "knowingly" "fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." Because [Model Rule] 1.6 prohibits most if not all imaginable disclosures in the circumstance stated by the first

55. MODEL RULES, *supra* note 14, Rule 4.1, cmt 2. For a thoughtful analysis of the moral issues of deception in lawyer negotiating, see Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45 (1994).

56. STUDY COMM. FINAL REPORT, *supra* note 4, at 69.

57. *Id.* at 95.

part of [Model Rule] 4.1(b), the "unless" clause entirely stops the lawyer's mouth from uttering the disclosures that the rule otherwise requires. Rule 4.1(b), becomes a meaningless semantic puzzle lacking even linguistic interest. Interest, and confusion, is gained by enlarging the puzzle to take account of other parts of the Model Rules.⁵⁸

With removal of the confidentiality exception to Rule 4.1, the Proposed Rule imposes a moral obligation on lawyers to avoid assisting future or continuing client crimes and frauds. However, disclosure or rectification of *past* crimes and frauds outside the courtroom remains generally prohibited under Proposed Rule 1.6. As suggested earlier in this Essay, the Study Committee should carve out an exception to Rule 1.6 to permit a lawyer to reveal information to "rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used."⁵⁹

A similar paradox in the Study Committee draft centers on the fact that a lawyer would be allowed, under Rule 4.1, to disclose facts in order to avoid assisting client fraud, but would *not* be allowed under Rule 1.6 to prevent the same fraud by disclosing confidential information. On the one hand, a lawyer will be disciplined for knowingly failing to disclose a *fact* to avoid assisting client crimes and frauds. On the other hand, Proposed Rule 1.6 prevents a lawyer from revealing "information relating to representation of a client" except to prevent the client from committing a criminal act.⁶⁰ Does one rule trump the other? If so, which one is supreme? Can the rules be harmonized by limiting "fact" in Rule 4.1 to that which is not confidential—that is, "relating to representation of a client," under Rule 1.6? Because most facts under Rule 4.1 will relate to client representation, and therefore will be confidential, how can a lawyer disclose such facts without violating Rule 1.6?

As drafted by the Study Committee, Rules 1.6 and 4.1 remain inconsistent unless Rule 4.1(b) is read as an implied exception to Rule 1.6. Another saving construction has been suggested by Professors Hazard and Hodes, who claim that a lawyer would be required to speak out about client misconduct under Model Rule 1.2(d).⁶¹ This is questionable,

58. WOLFRAM, *supra* note 54, § 13.5, at 724.

59. *See supra* Part I.

60. STUDY COMM. FINAL REPORT, *supra* note 4, at 16.

61. Referring to a "merry-go-round of inconsistencies" in the application of Rule 4.1(b), Hazard and Hodes reason that:

[S]ilence assists client fraud; the lawyer must therefore speak; she may not speak if prevented from doing so by Rule 1.6; *but Rule 1.6 does not prevent her from speaking, for she is required by law—Rule 1.2(d)—to speak.* Put another way . . . carrying out

however, because Proposed Rule 1.2(d), prohibits a lawyer from assisting client conduct that the lawyer believes is criminal or fraudulent, but does not mandate or allow disclosure as a remedy.⁶² By implication, under the scheme for Rule 1.2(d) as proposed by the Study Committee, the lawyer's only course of action for fraudulent client conduct will be to withdraw from representation. But even after withdrawal, the lawyer is not permitted to reveal confidential information protected by Rule 1.6. As suggested earlier in this Essay, the Study Committee can eliminate the inconsistencies among Rules 1.2(d), 1.6 and 4.1(b) by adding "fraudulent act" to the confidentiality exception in Rule 1.6(b).⁶³ If the Study Committee does *not* add "fraudulent act" to Rule 1.6(b)(1), then another solution would be to rewrite Rule 4.1(b) as follows: "A lawyer shall not fail to disclose a fact to a third person when disclosure, which would otherwise be prohibited by Rule 1.6, is necessary to avoid assisting a criminal or fraudulent act by a client." In any event, the Study Committee should do something to eliminate the inconsistencies.

The Study Committee also deviated from Model Rule 4.1 by including additional Comments. Proposed Rule 4.1 contains the following language, which is a modified version of the 1980 ABA Discussion Draft: "A lawyer should not conclude an agreement, or assist a client in concluding an agreement, that the lawyer knows or reasonably should know is illegal, contains legally prohibited terms, works a fraud, or would be unconscionable as a matter of law."⁶⁴ As originally cast, the 1980 Discussion Draft used the term "shall" when prohibiting lawyers from concluding, or assisting a client in concluding, illegal, fraudulent, or unconscionable agreements.⁶⁵ The Study Committee draft, on the other hand, changes "shall" to "should" and incorporates the 1980 proposal into the Comment, thereby providing exhortation only and no obligation for compliance.

The last paragraph of the Comment to Proposed Rule 4.1 is an amalgam of aspirational language and introduces what may be a unique proscription against vindictiveness:

legal representation ordinarily requires that many statements be made on behalf of a client, and the lawyer has a responsibility under law to assure that such statements be not misleading.

HAZARD & HODES, *supra* note 31, § 4.1:303, at 722 (1993 supp.).

62. STUDY COMM. FINAL REPORT, *supra* note 4, at 9.

63. See *supra* Part I.

64. STUDY COMM. FINAL REPORT, *supra* note 4, at 69.

65. The 1980 Discussion Draft contained the following: "A lawyer *shall* not conclude an agreement, or assist a client in concluding an agreement, that the lawyer knows or reasonably should know is illegal, contains legally prohibited terms, would work a fraud, or would be held to be unconscionable as a matter of law." GILLERS & SIMON, *supra* note 3, at 69 (emphasis added).

A lawyer should never deceive or intentionally mislead opposing counsel during negotiations. A lawyer should not induce or rely on a mistake by opposing counsel as to matters agreed upon to obtain an unfair benefit for the client. An attorney should not overstate his authority to settle nor represent that he has authority which he does not have. For instance, in family law cases, a lawyer should not, as part of negotiated settlements, contest child custody or visitation for either financial leverage or vindictiveness.⁶⁶

The final sentence of the Comment appears to have no relation to the mandate of truthfulness in negotiations. The statement may have been intended to illustrate the situation of a client making a calculated, but insincere, claim in custody or visitation negotiations only for spite or to obtain a relative financial advantage. The language is overbroad, however, and should be amended to apply only to false statements or insincere claims in these kinds of disputes.

IV. COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL: RULE 4.2

*In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.*⁶⁷

Closely related to the problem of truthfulness in dealing with third persons is Proposed Rule 4.2 governing communications with persons represented by legal counsel. Model Rule 4.2 was extensively amended by the ABA House of Delegates in its 1995 Annual Meeting.⁶⁸ The amendments substituted "person" for "party" in the rule's text and made wholesale revisions to the Comment.⁶⁹ Because the ABA amendments were made after the Study Committee issued its Final Report, none of these changes were included in Proposed Rule 4.2. The sponsor of the amendments, the ABA Standing Committee on Ethics and Professional Responsibility (Standing Committee), explained that the word "party" in

66. STUDY COMM. FINAL REPORT, *supra* note 4, at 70. This Comment is drawn from the "Bounds of Advocacy" drafted by the American Academy of Matrimonial Lawyers. See GILLERS & SIMON, *supra* note 3, at 262-63.

67. STUDY COMM. FINAL REPORT, *supra* note 4, at 70.

68. GILLERS & SIMON, *supra* note 3, at 266. By voice vote the House of Delegates changed the word "party" to "person" in Rule 4.2, added three new paragraphs to the Comment, and revised three existing paragraphs in the Comment. *Id.*

69. *Id.*

Rule 4.2 is ambiguous and historically has been the "source of considerable uncertainty about the proper scope of the ethical prohibition in the investigative stages of a matter before litigation has commenced."⁷⁰

This amendment provoked strong opposition from the United States Department of Justice (DOJ),⁷¹ which has its own controversial rules on communication with parties and persons represented by legal counsel.⁷² DOJ argued that the amendment could, among other effects, "severely limit the ability of government attorneys and agents to communicate freely and efficiently with non-party fact witnesses."⁷³ In rejecting DOJ's objections, the Standing Committee said that it "does not believe that the Rule does or will significantly limit legitimate access of lawyers, whether prosecutors or private counsel, to witnesses."⁷⁴

With one possible exception, the 1995 amendments to Model Rule 4.2 should be included in the Study Committee's Final Report to the Supreme Court. Amended Rule 4.2 is a substantial improvement over the original 1983 Model Rule, particularly on the thorny and troublesome question of *who* can be contacted when the other party is a corporation or other public or private organization or entity. Historically, the alter egos of an organization represented by counsel were treated as "persons" under the Model Code.⁷⁵ The Model Rules, in Paragraph 4 of the Comment, adopt the alter ego test and expand it beyond corporate officers and employees with managerial responsibility. Model Rule 4.2 now applies to positions and actions involving "any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."⁷⁶ This expansion has the salutary effect of prohibiting communications beyond managerial "control groups" to other individuals whose acts or omissions would be directly relevant to the subject matter. This expansion is consistent with the "no-

70. *Id.* at 267 (quoting ABA Report explaining 1995 amendments to Model Rules).

71. *Id.* at 266-67.

72. *See* Communications with Represented Person, 28 C.F.R. §§ 77.1-77.12 (1995). The rule is the successor to the so-called "Thornburgh Memorandum" issued during June 1989 by then-Attorney General Richard Thornburgh on communications with represented parties. GILLERS & SIMON, *supra* note 3, at 989. The thrust of the Thornburgh position was that Rule 4.2 and DR 7-104 do not apply to federal prosecutors. *Id.*

73. GILLERS & SIMON, *supra* note 3, at 268 (quoting Letter from Deputy Attorney General Jamie Gorelick to Margaret C. Love, Chair of the ABA Standing Committee on Ethics and Professional Responsibility (Nov. 1, 1994)).

74. *Id.* at 269 (quoting ABA Report explaining 1995 amendments to the Model Rules).

75. MODEL CODE, *supra* note 15, DR 7-104(A)(1).

76. MODEL RULES, *supra* note 14, Rule 4.2, cmt. 4.

contact" doctrine of *Upjohn Co. v. United States*, which extended the attorney-client privilege beyond management as warranted by the facts in each case.⁷⁷

Another important improvement which should be considered by the Study Committee concerns the "authorized by law" exception to Rule 4.2.⁷⁸ This exception is most frequently implicated in preindictment criminal investigations under the direct supervision of government prosecutors. In many of those cases, undercover communications take place between government agents and suspects who are frequently already represented by lawyers. The Clinton Administration's position under the "Reno Regs" is that government attorneys may communicate directly with a person otherwise represented by a lawyer in the conduct of both overt and undercover investigations without the presence or the permission of the person's lawyer.⁷⁹

Following intense opposition by the criminal defense bar, the ABA House of Delegates modified Paragraph 2 of the Comment by specifying that "authorized by law" includes "constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found

77. *Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981).

78. The authorized by law exception contained in Rule 4.2 is identical to DR 7-104(A)(1) of the Code. See MODEL CODE, *supra* note 15, DR 7-104(A)(1). The District of Columbia tracks the Model Rule and adds three subsections, which require disclosure by the lawyer and which specify the conditions for the "authorized by law" exception:

(b) During the course of representing a client, a lawyer may communicate about the subject of the representation with a nonparty employee of the opposing party without obtaining the consent of that party's lawyer. However, prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party with a claim against the employee's employer.

(c) For purposes of this rule, the term "party" includes any person, including an employee of a party organization, who has the authority to bind a party organization as to the representation to which the communication relates.

(d) This rule does not prohibit communication by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client, whether or not those grievances or the lawyer's communications relate to matters that are the subject of the representation, provided that in the event of such communications the disclosures specified in (b) are made to the government official to whom the communication is made.

D.C. RULES, *supra* note 42, Rule 4.2(b)-(d).

79. On August 4, 1994 the Clinton Justice Department issued the so-called "Reno Regs" effective September 6, 1994. See Communications with Represented Persons, 28 C.F.R. §§ 77.1-77.12 (1995).

this Rule inapplicable.”⁸⁰ What exactly is “constitutionally permissible” is an issue that needs to be settled by the United States Supreme Court and remains beyond the scope of the Model Rules. In the meantime, this part of Rule 4.2 is subject to varying interpretation. Communications between government attorneys and represented persons who initiate contact should not be barred by Rule 4.2, however. Even though there remain uncertainties over the constitutional dimensions of Rule 4.2, the Study Committee should include the 1995 amendments in its final submission.

V. SPECIAL RESPONSIBILITIES OF A PROSECUTOR: RULE 3.8

The prosecutor in a criminal case shall:

(a) *refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;*

(b) *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 reasonable opportunity to obtain counsel;*

(c) *not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;*

(d) *make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and*

(e) *exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.*

(f) *not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:*

(1) *the prosecutor reasonably believes:*

(i) *the information sought is not protected from disclosure by any applicable privilege;*

(ii) *the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;*

(iii) *there is no other feasible alternative to obtain the information; and*

(2) *the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.*

80. MODEL RULES, *supra* note 14, Rule 4.2, cmt. 2.

(g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.⁸¹

The ABA House of Delegates took other actions affecting prosecutors at its August 1995 Annual Meeting. Following vigorous debate, the House deleted subparagraph (f)(2) of Rule 3.8.⁸² That subparagraph required prosecutors to obtain "prior judicial approval after an opportunity for an adversarial proceeding" before issuing subpoenas to lawyers to testify in grand jury or other criminal proceedings about present or past clients.⁸³ The 1995 amendment was the most recent development in a rocky dispute between prosecutors and much of the criminal defense bar over government efforts to obtain evidence from lawyers before initiating property forfeiture proceedings.

In 1987, the First Circuit, in *United States v. Klubock*, upheld a Massachusetts rule, very similar to Model Rule 3.8(f), which required all state and federal prosecutors to obtain court permission before subpoenaing a lawyer to testify in grand jury proceedings.⁸⁴ In 1990, Model Rule 3.8(f) was adopted to restrict prosecutors, on ethical principles, from issuing these subpoenas unless they had a reasonable belief that the information sought would not be privileged from disclosure; that the information was critically needed for the grand jury investigation or the criminal proceeding; and that there was no feasible alternative to the subpoena.⁸⁵ In the 1995 debate, the Standing Committee on Ethics and Professional Responsibility and the Section of Criminal Justice explained that subparagraph (f)(2) of Rule 3.8, requiring prior judicial approval, created an "implementing requirement that is properly established by rules of criminal procedure rather than established as an ethical norm."⁸⁶ As a result of the 1995 amendment, protections for privileged communications

81. STUDY COMM. FINAL REPORT, *supra* note 4, at 66-67.

82. GILLERS & SIMON, *supra* note 3, at 249.

83. *Id.* The vote to delete subparagraph (f)(2) from Rule 3.8 carried 187-113. *Id.* The amendment was sponsored jointly by the ABA Standing Committee on Ethics and Professional Responsibility and the ABA Criminal Justice Section. *Id.*

84. *United States v. Klubock*, 832 F.2d 664, 667-68 (1st Cir. 1987).

85. See GILLERS & SIMON, *supra* note 3, at 247-48 (discussing the 1990 amendments).

86. *Id.* at 250 (quoting ABA Report explaining 1995 amendments to Model Rule 3.8(f)). In its report, the Standing Committee stated that Rule 3.8(f) was not defective "in the substantive ethical standard it sets, but in its accompanying procedural prescription." *Id.*

between client and lawyer will be the responsibility of court procedural rules, not rules of professional conduct.

Should the Study Committee delete the prior judicial approval requirement from Rule 3.8? Should the rule provide some sort of procedural brake on prosecutorial excess? What is the proper role of ethical constraints in this area? Prior judicial review is not a good solution. Lawyers, like everyone else, have no inherent right to refuse testimony about unprivileged matters. The danger with requiring subpoena preapproval is that relevant information needed by the grand jury may be "overprotected" beyond the client-attorney privilege.

Is there a reasonable alternative to ethics rules trenching on criminal procedure? The en banc decision in *In re Doe*, may well provide an answer.⁸⁷ There, the Second Circuit rejected a rule that required trial court preapproval of grand jury subpoenas to lawyers.⁸⁸ The court also recognized that motions to quash "informed by Sixth Amendment standards" would still be available for individualized, case-by-case inquiry.⁸⁹ *In re Doe* replaces prior judicial review under Rule 3.8(f)(2) with case-specific inquiry *after* subpoenas have been served. This shifts the balance in favor of governmental need for nonprivileged testimony by lawyers.

Decisions of how to balance society's need to fight crime with the rights of individuals are more properly made by the courts through procedure or caselaw than by rules of lawyer discipline. As the ABA Standing Committee noted, "an ethics code necessarily has a more modest role than that implied by [former] Rule 3.8(f) . . . and . . . procedures that affect the operation of the courts should be developed and

87. *In re Doe*, 781 F.2d 238 (2d Cir. 1986) (en banc).

88. *Id.* at 246-47.

89. *Id.* at 250.

implemented by the court[s] themselves."⁹⁰ The Study Committee should take the same position and delete Rule 3.8(f)(2) in its Final Report.

VI. TRIAL PUBLICITY: RULE 3.6

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter 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

90. GILLERS & SIMON, *supra* note 3, at 250-51 (quoting Standing Committee and Criminal Justice Section Report explaining the 1995 amendments to Model Rule 3.8). Several jurisdictions continue to wrestle with the judicial preapproval issue. Illinois, for example, has witnessed a back and forth struggle between the state supreme court and government prosecutors. The court first added Model Rule 3.8(f) in 1991 and the following year, after strong objection by state and local prosecutors, issued an order repealing the rule. *See id.* at 252. Massachusetts, on the other hand, by separate court order, continues the judicial preapproval requirement for attorney subpoenas which was the *casus belli* of *Klubock*. Massachusetts Supreme Court Rule PF 15(c) provides:

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

MASS. SUPREME JUDICIAL COURT RULES Rule PF 15 (1990) [hereinafter MASS. RULES]. The most extensive variation of Rule 3.8 is the District of Columbia version, which provides:

The prosecutor in a criminal case shall not:

(a) in exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person;

(b) file in court or maintain a charge that the prosecutor knows is not supported by probable cause;

(c) prosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a *prima facie* showing of guilt;

(d) intentionally avoid pursuit of evidence or information because it may damage the prosecution's case or aid the defense;

(e) intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonable feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or, in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(f) except for statements which are necessary to inform the public of the nature and extent of the prosecutor's action and which serve a legitimate law enforcement purpose, make extrajudicial comments which serve to heighten condemnation of the accused;

(g) in presenting a case to a grand jury, intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, abuse the processes of the grand jury, or fail to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause; or

(h) peremptorily strike jurors on grounds of race, religion, national or ethnic background, or sex.

D.C. RULES, *supra* note 42, Rule 3.8.

should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result in any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, and occupation of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).⁹¹

The Vermont proposed rule prohibits extrajudicial statements which a lawyer knows or reasonably should know "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."⁹² Although the "substantial likelihood" standard is more protective of attorney speech than the "reasonable likelihood of prejudice" rule of Vermont's current Code, an argument can be made for adopting a "clear and present danger" or a "serious and imminent threat" standard instead of the "substantial likelihood" test.

91. STUDY COMM. FINAL REPORT, *supra* note 4, at 63.

92. *Id.*

In *Gentile v. State Bar of Nevada*, a deeply divided United States Supreme Court gave strikingly different interpretations to the substantial likelihood test.⁹³ Writing for a five to four majority, Chief Justice, and part-time Vermont resident, William Rehnquist stated that, because lawyers are "key participants in the criminal justice system," their speech may be restricted "under a less demanding standard than that established for regulation of the press"⁹⁴ in *Nebraska Press Ass'n v. Stuart*.⁹⁵ In a strong dissent, Justice Kennedy argued that the "substantial likelihood" test in the Nevada disciplinary rule should be applied in a "narrow manner" to prohibit only extrajudicial speech that creates a danger of substantial and imminent harm.⁹⁶ Justice Kennedy characterized the Nevada rule, as interpreted by Chief Justice Rehnquist, as so imprecise that it "creates a trap for the wary as well as the unwary."⁹⁷

Kennedy's view is much closer to the original intent of Model Rule 3.6 as drafted in 1983. The legislative history of Model Rule 3.6 demonstrates that the "substantial likelihood" clause "was meant to approximate the traditional 'clear and present danger' test regarding speech and required a case-by-case inquiry into the effect of each statement in question."⁹⁸

Compared with the vague "substantial likelihood" rule, the "clear and present danger" standard would provide a workable standard for Vermont attorneys. This would be particularly true if Vermont were to apply the *Brandenburg v. Ohio* approach, which limits the suppression of speech to

93. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

94. *Id.* at 1074.

95. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 537, 539 (1976).

96. *Gentile*, 501 U.S. at 1036 (Kennedy, J., dissenting).

97. *Id.* at 1051.

98. HAZARD & HODES, *supra* note 31, § 3.6.102, at 666 (1994 supp.). Several jurisdictions incorporate a type of "clear and present danger" test into their versions of Rule 3.6. For example, District of Columbia Rule 3.6 provides:

A lawyer engaged in a case being tried to a judge or jury shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of mass public communication if the lawyer knows or reasonably should know that the statement will create a serious and imminent threat to the impartiality of the judge or jury.

D.C. RULES, *supra* note 42, Rule 3.6. Similarly, Illinois Rule 3.6(a) prohibits statements that would "pose a serious and imminent threat to the fairness of an adjudicative proceeding." ILL. RULES, *supra* note 20, Rule 3.6(a). Under the Code, Oregon forbids extrajudicial statements posing "a serious and imminent threat to the fact-finding process in an adjudicative proceeding." OR. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(A) (1995). Virginia, also under the Code, prohibits a lawyer associated with prosecuting or defending a criminal matter which may be tried by jury from making an extrajudicial statement that "constitutes a clear and present danger of interfering with the fairness of the trial by jury." VA. CODE, *supra* note 20, DR 7-106(A).

statements intentionally directed to imminent and grave harm.⁹⁹ A *Brandenburg*-type test in Rule 3.6(a) would more closely conform with the original intent of the ABA framers and, more importantly, would provide Vermont attorneys with a far more workable rule on trial publicity than the vague guidance currently proposed by the Study Committee.

VII. DIRECT CONTACT WITH PROSPECTIVE CLIENTS: RULE 7.3

(a) *A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.*

(b) *A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:*

(1) *the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or*

(2) *the solicitation involves coercion, duress or harassment.*

(c) *Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "Advertising Material" on the outside envelope and at the beginning and ending of any recorded communication.*

(d) *Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.¹⁰⁰*

In *Shapero v. Kentucky Bar Ass'n*, the Supreme Court struck down general prohibitions against targeted mail solicitation by lawyers.¹⁰¹ Following *Shapero*, the ABA revised its rules applicable to advertising and solicitation by lawyers. In 1989, Model Rule 7.3(a) was added to continue the ban on in-person and "live" telephone solicitation of legal business

99. *Brandenburg v. Ohio*, 395 U.S. 444, 447, 449-50 (1969).

100. STUDY COMM. FINAL REPORT, *supra* note 4, at 87-88.

101. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 480 (1988).

with two exceptions.¹⁰² Companion Rule 7.3(b) permits and regulates written or recorded "targeted" communications to prospective clients which do not involve "coercion, duress or harassment."¹⁰³

The Vermont draft adopts, without amendment, all of Model Rules 7.2 and 7.3, as well as the provisions of Rule 7.1 governing the quality and content of advertising and solicitation by lawyers.¹⁰⁴ The Reporter's Note to Rule 7.3 states that "[t]his Rule diverges from Vermont's DR 2-104 by requiring that all targeted advertising, written or broadcast, be identified as advertising at the beginning and end of the message."¹⁰⁵ The Reporter's Note does not describe the rule accurately, however. Vermont's Proposed Rule 7.3(c) provides, in part, that the words "Advertising Material" be included "on the outside envelope [of a written communication] and at the beginning and ending of any recorded communication."¹⁰⁶

The Study Committee should amend Proposed Rule 7.3 to provide that the word "advertising" or "advertising material" be displayed prominently at the top of the first page of the text of every "written communication," and likewise be spoken or portrayed at the beginning and ending of "any recorded communication," including all lawyer television and radio advertisements. To regulate advertising practices more effectively, the Study Committee may also consider adopting a variation of Florida's recently amended solicitation rules which impose stiff requirements on written solicitations.¹⁰⁷ The Florida rules were adopted

102. MODEL RULES, *supra* note 14, Rule 7.3(a). Otherwise-prohibited solicitation is allowed for contact with family members and for persons or entities with whom the lawyer has a "prior professional relationship." *Id.* The exception to the exception is the District of Columbia, which omits Rule 7.3 entirely. D.C. Rule 7.1(b) permits *in-person* solicitation. See D.C. RULES, *supra* note 42, Rule 7.1(b). Minnesota Rule 7.3 allows *in-person* or telephone contact only "when a significant motive for the lawyer's doing so is [not] the lawyer's pecuniary gain." MINN. RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1993).

103. MODEL RULES, *supra* note 14, Rule 7.3(b).

104. STUDY COMM. FINAL REPORT, *supra* note 4, at 85-89.

105. *Id.* at 89. The Rule proposed by the Study Committee is similar to requirements in other states. Under Ohio DR 2-101(F), all targeted mail advertising must include in red ink and in not less than ten-point type the words "ADVERTISEMENT ONLY" on the envelope and in the text of the solicitation. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(F)(2)(e) (1994). In New Jersey, Rule 7.3(b)(4) requires the word "ADVERTISING" on direct mail letters to be "prominently displayed in capital letters at the top of the first page of text." N.J. RULES, *supra* note 20, Rule 7.3(b)(4). No particular color is specified, however. In Massachusetts, targeted advertising material must be "clearly labeled 'ADVERTISING' on its face and on any envelopes or container." MASS. RULES, *supra* note 90, DR 2-103(C).

106. STUDY COMM. FINAL REPORT, *supra* note 4, at 88.

107. Florida Rule 4-7.4(b)(2) provides in part as follows:

(A) Each page of such written communications [and the envelope] shall be plainly marked "advertisement" in red ink

(B) A copy of each such written communication and a sample of the envelopes in

one month after *Florida Bar v. Went For It, Inc.*, in which the United States Supreme Court decided that Florida could bar direct mail solicitation of victims and their relatives within thirty days of an accident.¹⁰⁸ In a five to four decision, the Court, through Justice O'Connor, upheld Florida's month-long "cooling off" period.¹⁰⁹ Justice O'Connor distinguished Kentucky's blanket bar against all direct mail solicitation, which was struck down in *Shapero*, from the narrow Florida restrictions designed to protect client privacy and improve the legal profession's public image.¹¹⁰ The broad social interests advanced in *Went For It* were foreshadowed by a strong dissent in *Shapero*, in which Justice O'Connor observed that:

[S]pecial ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably wield in a political system like ours.

... Precisely because lawyers must be provided with expertise that is both esoteric and extremely powerful, it would be unrealistic to demand that clients bargain for their services in the same arm's-length manner that may be appropriate when buying an automobile or choosing a drycleaner.¹¹¹

The Florida rules may prompt other states to tighten regulation of targeted lawyer advertising. Although solicitation involving "coercion, duress [or] harassment" is already forbidden by Florida Rule 4-7.4(b)(2),¹¹² specific instructions on the manner and methods of written communication to prospective clients, as in the Florida scheme, may protect the public from unscrupulous and overreaching lawyers, and give attorneys bright-line guidance for targeted advertising.

which the communications are enclosed shall be filed with the standing committee on advertising either prior to or concurrently with the mailing

(C) Written communications mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery.

(D) No reference shall be made in the communication [about] having received any kind of approval from the Florida Bar.

(G) The first sentence of any written communication concerning a specific matter shall be: "If you have already retained a lawyer for this matter, please disregard this letter."

FLA. RULES, *supra* note 42, Rule 4-7.4(b)(2).

108. *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995).

109. *Id.*

110. *Id.* at 2379.

111. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 489-90 (1988) (O'Connor, J., dissenting).

112. FLA. RULES, *supra* note 42, Rule 4-7.4(b)(2).

There are strong arguments against adoption of Florida's thirty-day cooling off period, however. The Florida rule was adopted against a background of public outrage over the perceived feeding frenzy of personal injury lawyers in accident and high-profile disaster cases. The *Went For It* majority quoted anecdotal evidence supplied by the Florida Bar about repugnant ambulance chasing.¹¹³ However, barring *all* direct mail solicitation within thirty days of an accident in order to protect bereaved or injured individuals may place these potential plaintiffs at a relative disadvantage. For example, unrepresented potential plaintiffs may be at a disadvantage in dealing with insurance company adjusters (often directed by in-house counsel) and could lose the benefit of timely collection and preservation of evidence which may not otherwise be recoverable thirty days after an accident. As with the Kentucky ban in *Shapero*, the Florida thirty-day rule is overinclusive.

Shapero and *Went For It* only involved print, telephone, and in-person communication. The Court has yet to decide any case involving radio or television advertising by lawyers. Given the impact of electronic media on consumers of legal services, the Study Committee may do well to consider tightening Rule 7.2 to protect the public against misleading lawyer television or radio commercials.¹¹⁴

Lawyer commercials on television can be more misleading than other means of advertising, particularly to less sophisticated segments of the population. As one state supreme court has observed, "the group that has the least access to informed sources on attorney skills and might rely most heavily on television for information, the less-affluent, less-educated public, is the most vulnerable to this kind of ad."¹¹⁵

With a view toward the broad and pervasive impact of television and radio broadcasting in our everyday life, the Study Committee must address several important issues pertaining to radio and television advertising. First, the Study Committee should consider whether to amend Rule 7.2 to protect the public *specifically* against false or misleading radio and

113. *Went For It*, 115 S. Ct. at 2377.

114. Iowa and New Jersey have gone the farthest in addressing potential abuses of electronic marketing of attorney services. A New Jersey rule states in part:

All advertisements shall be predominately informational. No drawings, animations, dramatizations, music, or lyrics shall be used in connection with televised advertising. No advertisement shall rely in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel; included in this category are all advertisements that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence.

N.J. RULES, *supra* note 20, Rule 7.2(a).

115. *In re Felmeister & Isaacs*, 518 A.2d 188, 195 (N.J. 1986).

television advertisements. If so, the breadth of the regulations must be considered. In making these judgments, the Study Committee must also evaluate what kinds of reforms would not violate lawyers' First Amendment commercial speech rights. Finally, the Study Committee must determine whether the general prohibitions in Model Rule 7.1 against "false or misleading communication" are sufficient to prevent abusive advertising in the electronic media.

VIII. CLIENT UNDER A DISABILITY: RULE 1.14

(a) *When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.*

(b) *A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.*¹¹⁶

Proposed Rule 1.14 provides special ethical guidance to lawyers representing disabled clients. The Reporter's Note to the Study Committee draft aptly states that "[t]his rule has no counterpart in the Vermont Code."¹¹⁷ Although Ethical Considerations 7-11 and 7-12 do provide some assistance, the guidance of the Code is incomplete, according to the ABA Commission on Legal Problems of the Elderly (CLPE).¹¹⁸ In a 1995 report to the ABA, the CLPE pointed out that:

Of special significance is the fact that the oldest of the old—those over age 85—are the fastest growing segment of the total U.S. population. Numbering over 3 million today, the 85+ group will more than quadruple in 50 years.

At the same time, the prevalence of dementia increases logarithmically with age. . . . Today, an estimated 1.5 million Americans suffer from severe dementia—that is, they are so incapacitated that

116. STUDY COMM. FINAL REPORT, *supra* note 4, at 39.

117. *Id.* at 40.

118. At last year's annual ABA meeting, the CLPE presented a report and a proposal to the House of Delegates to amend Model Rule 1.14 substantially. The CLPE withdrew the proposal, however, to provide wider circulation for public comment and also to give the ABA Standing Committee on Ethics and Professional Responsibility an opportunity to study the proposal. A similar proposal to amend Rule 1.14 is scheduled to be presented to the House of Delegates sometime later this year. GILLERS & SIMON, *supra* note 3, at 152-53.

others must care for them continually. An additional 1 million to 5 million have mild or moderate dementia. Ten times as many people are affected now as were at the turn of the century. The number of people with severe dementia is expected to increase 60% by the year 2000. Unless cures or means of prevention are found for the common causes of dementia, 7.4 million Americans will be affected by the year 2040.

The consequence of these realities is that virtually every practicing lawyer has or will deal more frequently with older clients of diminished capacity, typically within the context of multi-generational families.¹¹⁹

The Rules need to change to meet the ethical demands of expanding elder-law practice. The CLPE found that both the Model Code and the Model Rules are inadequate for lawyers with clients who have diminished mental capacity. Specifically, the CLPE found that:

Even though the legal profession is aware of the increasing diversity of the law, of modes of practice, and of legal needs, its professional standards remain deeply rooted in the nineteenth-century mode of practice out of which they emerged: the representation of sophisticated individuals and businesses, on a retained basis, typically in business transactions or in litigation. The result is that problems facing lawyers for older clients may not be addressed by the professional standards.¹²⁰

To correct inadequacies in Rule 1.14, the CLPE proposed reversing the order of language in Model Rule 1.14(b) to emphasize the priority of other protective actions over guardianship.¹²¹ The CLPE also proposed a new

119. ABA Commission on Legal Problems of the Elderly, Report to the House of Delegates, at 6-7 (Aug. 1995) [hereinafter CLPE Report] (footnotes omitted).

120. *Id.* at 9.

121. GILLERS & SIMON, *supra* note 3, at 153. In looking to "other protective actions" the CLPE noted that:

The existing Model Rule provides little guidance on the range of protective actions other than guardianship that may be taken under Rule 1.14(b). As a threshold principle, preventative action through advance planning for incapacity is the preferred course of action in all cases. But if advanced planning has not been done or, for whatever reason, has not worked, then protective action on behalf of a client under Rule 1.14(b) becomes a potential necessity.

CLPE Report, *supra* note 119, at 13. Colorado has added the following language to Rule 1.14(b):

Not only can the mental, physical or other condition of the client impose additional responsibilities on the lawyer, the fact that a client is impaired does not relieve the lawyer of the obligation to obtain information from the client to the extent possible.

COLO. RULES, *supra* note 54, Rule 1.14(b). This variation recognizes the need to maintain client autonomy to the most practical extent possible while at the same time acknowledging that protective

section in the Comment to set out guidelines to clarify the de facto guardianship which lawyers sometimes assume for their disabled clients.¹²² The most radical change proposed by the CLPE would be a provision permitting a lawyer to act in an emergency for a "purported client" who lacks capacity to enter into a client-lawyer relationship.¹²³

These proposed changes to Rule 1.14, if adopted, would be unique in the Model Rules. Nowhere else in the Rules is there any provision whereby a lawyer can assume to act for someone without the express or even implied consent or agreement by the other person. This sort of "emergency lawyering" would have a parallel in the medical profession which has long recognized presumed consent *in extremis*. In view of changing demographics and an increasingly aged population, the Study Committee should give careful thought to the CLPE's proposed revisions to Rule 1.14. These suggestions would help clarify lawyer obligations toward disabled clients, particularly regarding representation in legal emergencies.

IX. FEES: RULE 1.5

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

action may be needed.

122. GILLERS & SIMON, *supra* note 3, at 153.

123. *Id.* Although not contained in the final CLPE draft proposal, "purported client" was defined by the CLPE to mean "a person who has contact with a lawyer and who would be a client but for the inability to enter into an express agreement." *Id.*

(b) *When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.*

(c) *A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.*

(d) *A lawyer shall not enter into an arrangement for, charge, or collect:*

(1) *any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or*

(2) *a contingent fee for representing a defendant in a criminal case.*

(e) *A division of a fee between lawyers who are not in the same firm may be made only if:*

(1) *the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;*

(2) *the client is advised of and does not object to the participation of all lawyers involved; and*

(3) *the total fee is reasonable.*¹²⁴

With the possible exception of advertising provisions, fee provisions garner the greatest attention of the parts of the Model Code and Model Rules dealing with the *business* of lawyering. The requirement of Model Rule 1.5(a) that fees be reasonable is certainly an improvement over the Code's implied permission to charge excessive fees as long as they are not "clearly excessive."¹²⁵ Similarly helpful to improving client-lawyer relations is the Study Committee's decision to require that contingent fee

124. STUDY COMM. FINAL REPORT, *supra* note 4, at 13-14.

125. DR 2-106(A) provides that a lawyer "shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." MODEL CODE, *supra* note 15, DR 2-106(A).

contracts be in writing.¹²⁶ Because a significant percentage of client-lawyer disputes concern fees, a requirement that *all* fee agreements be in writing would alleviate the difficult evidentiary problems concerning "who said what to whom," that often plague fee lawsuits and arbitration proceedings. The Comment to Proposed Rule 1.5 concedes that "[a] written statement concerning the fee reduces the possibility of misunderstanding."¹²⁷ Making written fee agreements the rule rather than the exception would better serve the legal profession and its clients. Additionally, the writing should include a statement about other costs or expenses to be borne by the client.¹²⁸

A. Fee Arbitration

Fee disputes will continue to occur whether or not the fee agreement is in writing. The Study Committee amends the Comment to Rule 1.5 to recommend that "[i]n the event of a fee dispute, the lawyer should whenever feasible submit the matter to the Vermont Bar Association's Fee Arbitration Committee."¹²⁹ In 1992, the ABA Commission on Evaluation of Disciplinary Enforcement recommended that each state enact mandatory fee dispute arbitration.¹³⁰ In 1995, the House of Delegates adopted the Model Rules for Fee Arbitration, which bar a lawyer from suing a client without first notifying the client about available fee arbitration.¹³¹ Arbitration would be mandatory at the client's request, but not required if the lawyer were to ask for it.

No jurisdiction has yet imposed mandatory fee arbitration as a substitute for litigation. Given the absence of a track record for mandatory fee arbitration, the Study Committee appears to be on firm ground in encouraging, rather than requiring, fee arbitration at this time. Because mandatory arbitration remains highly controversial, Vermont would do

126. STUDY COMM. FINAL REPORT, *supra* note 4, at 14. Requiring written fee agreements is not novel. The Pennsylvania, New Jersey, and the District of Columbia rules mandate written fee agreements for all matters if the client has not been previously represented by the lawyer. See D.C. RULES, *supra* note 42, Rule 1.5(b); N.J. RULES, *supra* note 20, Rule 1.5(b); PA. RULES, *supra* note 25, Rule 1.5(b).

127. STUDY COMM. FINAL REPORT, *supra* note 4, at 14.

128. See, e.g., ALASKA RULES OF PROFESSIONAL CONDUCT Rule 1.5(b) (1995) (providing that a lawyer in litigation must "notify the client of any costs, fees or expenses for which the client may be liable if the client is not the prevailing party").

129. STUDY COMM. FINAL REPORT, *supra* note 4, at 15.

130. GILLERS & SIMON, *supra* note 3, at 60.

131. *Id.*

well to wait for the experience of other jurisdictions before requiring arbitration for client-lawyer fee disputes.

B. Fee Splitting

Another perennial source of dispute is the division of fees between lawyers in different firms. Proposed Rule 1.5(e) considerably relaxes the requirements of DR 2-107 on forwarding fees charged by lawyers who refer cases to other lawyers. The Code mandates that the fee division be made "in proportion to the services performed and responsibility assumed by each [lawyer]."¹³² In contrast, Proposed Rule 1.5(e)(1) permits fee splitting "when the division is in proportion to the services performed by each lawyer or, by written agreement with the client, when each lawyer assumes joint responsibility for the representation."¹³³ Although "joint responsibility" is not defined in the Rules, the Comment to Proposed Rule 1.5 states that:

Paragraph (e) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligation stated in Rule 5.1 for purposes of the matter involved.¹³⁴

Despite this definition, the meaning of "joint responsibility" remains elusive.

132. MODEL CODE, *supra* note 15, DR 2-107(A)(2).

133. STUDY COMM. FINAL REPORT, *supra* note 4, at 14. The Reporter's Notes describe the Study Committee's proposed change from the Code:

[T]he rule permits fee division between lawyers not in the same firm, as long as the fee is reasonable, the client consents, and the fee is in proportion to the services performed *or* in proportion to the responsibility assumed by each lawyer. The Vermont Code permits such division, so long as the fee is reasonable, the client consents, and the fee is in proportion to services performed *and* in proportion to the responsibility assumed. Thus, under the Rules, but not under the Code, a referral fee is permitted in limited situations.

Id. at 16.

134. *Id.* at 15. The fee splitting provisions of Rule 1.5 represent a radical departure from the Code. However, not all states adopting the Model Rules have followed the "services or joint responsibility" provision of Rule 1.5. *See, e.g.,* COLO. RULES, *supra* note 54, Rule 1.5(e) (flatly prohibiting all referral fees without exception); WYO. RULES OF PROFESSIONAL CONDUCT Rule 1.5(e)(1) (1991) (continuing the Code's requirement of services *and* joint responsibility, and forbidding fees to lawyers *solely* for making a referral to another attorney).

Contrary to the Reporter's Note in the Study Committee draft, there is nothing in Proposed Rule 1.5 to limit the referral fee to the proportionate responsibility of the forwarding lawyer. Proposed Rule 1.5 requires only that the responsibility be "joint." The reference to Rule 5.1, entitled "Responsibilities of a Partner or Supervisory Lawyer,"¹³⁵ in the Comment to Proposed Rule 1.5 does not exhaustively define "joint responsibility." Commenting on the meaning of "joint responsibility," Professor Wolfram stated that:

The assumption of joint responsibility is set by the Comment to [Model Rule] 1.5 (Division of Fees) to "entail the obligations" of [Model Rule] 5.1 on superior and subordinate lawyers. The phrase "joint responsibility" in the rule is also susceptible to being read as a euphemism for assumption of joint and several liability for legal malpractice purposes, as if the two lawyers were partners.¹³⁶

Professor Wolfram's interpretation of "joint responsibility" more closely resembles the language of the 1980 Discussion Draft of Rule 1.5(e) (formerly Rule 1.6) than the language of the current Rule.¹³⁷

The Study Committee should amend Proposed Rule 1.5(e)(1) to add "as if they were partners." Such language would require forwarding lawyers to assume joint malpractice liability with the lawyer who receives the case and pays the referral fee. The "partnership for the case" arrangement would encourage forwarding lawyers to make referrals to competent attorneys instead of to lawyers who have not demonstrated competency in particular matters. The Study Committee should also examine the more basic question of whether to incorporate in the new rules the Code requirement that fee splits be made "in proportion to the services performed and responsibility assumed by each."¹³⁸ Underlying such a requirement is the policy that the forwarding lawyer must do some work to earn his or her share of the fee. Under the Code, money cannot be paid solely for the case referral. Under the Study Committee proposal,

135. STUDY COMM. FINAL REPORT, *supra* note 4, at 73.

136. WOLFRAM, *supra* note 54, § 9.3, at 512 n.9.

137. The 1980 version provided that:

A division of fee between lawyers who are not in the same firm may be made only if: The division is in proportion to the services performed by each lawyer, or both lawyers expressly assume responsibility as if they were partners;

GILLERS & SIMON, *supra* note 3, at 53 (discussing 1980 draft of Model Rule 1.5(e)(1)). Although the ABA rejected any explicit partnership imputation, the cross-reference to Rule 5.1 in the Rule 1.5 Comment may imply a type of temporary "partnership for the case."

138. MODEL CODE, *supra* note 15, DR 2-107(A)(2).

on the other hand, no legal work need be performed by the referring lawyer to earn a forwarding fee.

By permitting lawyers to receive compensation for merely forwarding a case while assuming vague "joint responsibility," the Study Committee opens the door to unsavory case brokering which would drive up client legal costs. For example, Lawyer A with a potentially lucrative case could, under proposed Rule 1.5, sell the case to a lawyer or law firm which offers the highest forwarding fee. Because Lawyer A would not be required to perform any legal work, but only assume "joint responsibility," Lawyer A would have an incentive to ignite a bidding war among prospective buyers of the case. One possible, but not inevitable, result of this kind of brokering is that Lawyer B (who receives the case and pays the forwarding fee) could be tempted to rationalize the forwarding fee as a cost disbursement item otherwise recoverable from the client under general overhead or by hidden bill padding. Thus, Rule 1.5 could facilitate false billing since the Rule fails to require that the client be informed about fee splitting or the size of the fee charged. The Rule also would not require disclosure of the extent of shared work or the fact that the forwarding lawyer may actually do no legal work. Clients would thus be ill-served by the failure of Proposed Rule 1.5 to require disclosure of all material aspects of lawyer fee splitting.

Florida has enhanced its client protection by adopting elaborate amendments to Rule 1.5 and a separate ten-part Statement of Client's Rights at the end of Rule 1.5.¹³⁹ Before entering into a contingent fee contract, a Florida lawyer must provide the client a copy of this statement.¹⁴⁰ The Florida amendments lay the groundwork for an experiment on whether providing consumers of legal services a better understanding of their rights will actually enhance ethical practice by lawyers and, in the case of forwarding fees, whether lawyers will provide better legal services when clients are provided with more complete information.

139. See FLA. RULES, *supra* note 42, Rule 1.5. Part 5 of Florida's Statement of Client's Rights provides:

If your lawyer intends to refer your case to another lawyer or counsel with other lawyers, your lawyer should tell you about that at the beginning. If your lawyer takes the case and later decides to refer it to another lawyer or to associate with other lawyers, you should sign a new contract which includes the new lawyers. You, the client, also have the right to consult with each lawyer working on your case and each lawyer is legally responsible to represent your interests and is legally responsible for the acts of the other lawyers involved in the case.

Id.

140. *Id.* Rule 1.5(f)(4)(C).

Although Vermont may not yet be willing to amend Rule 1.5 to the extent of Florida's changes, the Study Committee should carefully examine whether Vermont should jettison the "work and responsibility" requirements of the Code. If the Model Rules are adopted in Vermont, the Study Committee should consider whether "joint responsibility" should mean imputed partnership. These issues remain fundamental to any planned improvements in the regulation of lawyer fee splitting.

X. OTHER RULE PROPOSALS

A. Terminology

"Belief" or "believes" denotes that the person actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Firm" or "law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization, lawyers employed by a government entity, and lawyers employed in a legal services organization. . . .

"Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

"Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.¹⁴¹

141. STUDY COMM. FINAL REPORT, *supra* note 4, at 6-7.

In recognition of the increasingly widespread use of the limited liability partnership form for law practice,¹⁴² the term "partner" should be expanded to include "a member or owner of a limited liability partnership." In addition, definitions of the terms "consent" and "disclose" or "disclosure" should be included in the Terminology section because of their importance to the Rules, particularly those Rules dealing with conflicts. As to "consent," the Terminology section in the District of Columbia Rules provide a useful definition: "'Consent' denotes a client's uncoerced assent to a proposed course of action, following consultation with the lawyer regarding the matter in question."¹⁴³ Similarly, the Study Committee should consider the Illinois Disciplinary Rules' definition of "disclose" and "disclosure" for inclusion. The Illinois Rules state that: "'Disclose' or 'disclosure' denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."¹⁴⁴ Clarifying these terms in the Terminology portion of the proposed Rules will provide more predictable and user-friendly disciplinary guidance for Vermont lawyers.

B. Scope of Representation: Rule 1.2

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith

142. More than half of the states have enacted laws allowing law firms and other professional associations to use limited liability status. See Anthony E. Davis, *Limited Liability for Lawyers*, PROF. LAW., Aug. 1995, at 1.

143. D.C. RULES, *supra* note 42, Terminology.

144. ILL. RULES, *supra* note 20, Terminology.

effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.¹⁴⁵

Florida has added the words "or reasonably should know" to "knows" in both Rule 1.2(d) and (e) to eliminate the problem of conscious avoidance.¹⁴⁶ Similar amendment of these Rules would be desirable in the Vermont draft since the term "knows" is defined in the Terminology section as "actual knowledge of the fact in question," although "a person's knowledge may be inferred from circumstances." The Florida amendment charges a lawyer with knowledge which reasonably *should* have been known from all relevant circumstances. This amendment comports with the Comment to Proposed Rule 1.2 that "a lawyer may not knowingly assist a client in criminal or fraudulent conduct."¹⁴⁷ The Florida rule closes a possible loophole which an unscrupulous lawyer might use under the Proposed Rules to claim lack of "actual knowledge" of client criminal or fraudulent schemes and conduct, and should be considered by the Study Committee.

CONCLUSION: MODEL RULES OR MORAL RULES?

The final draft produced by the Study Committee contains many recommendations which, if adopted by the Supreme Court, would improve normative standards for law practice in Vermont. Unlike the Code, which was intended to be partly aspirational, the Proposed Rules are "partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role."¹⁴⁸ The Model Rules are not sanctified writ.¹⁴⁹ They are more than their own modest self-description

145. STUDY COMM. FINAL REPORT, *supra* note 4, at 9.

146. FLA. RULES, *supra* note 42, Rule 1.2(d)-(e).

147. STUDY COMM. FINAL REPORT, *supra* note 4, at 10.

148. *Id.* at 4.

149. See, e.g., Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985). Professor Gillers has been scathingly critical of the Rules:

Because the matters addressed in and omitted from the Rules were debated by so many, so intensely, for so long, the final document embodies a condensed, elliptical self-portrait of the American bar's influential constituencies. What does it show?

Closeup, I will argue, little that is flattering. The bar has drafted a code that proves the wisdom of its own precept against client-lawyer conflicts. The lawyers who approved

of "simply . . . a framework for the ethical practice of law."¹⁵⁰ As proclaimed "rules of reason," the Model Rules need and deserve constant reexamination informed by the realities of law practice in a democratic society.¹⁵¹

The Study Committee has been of great public service in recognizing the multidimensional roles of lawyers and the importance of sometimes subordinating client autonomy to truthfulness and candor.¹⁵² The Study Committee has not, however, made the case for scrapping all of the present Code and for replacing it with a new disciplinary structure fashioned on the Model Rules. The Supreme Court's September 1994 charge to the Study Committee to recommend "whether the Supreme Court should adopt the Model Rules"¹⁵³ remains unanswered. Although the Reporter's Notes provide reasons why specific rules are improvements over their Code counterparts and, in some cases, fill a void not covered by the Code, the Study Committee has not yet spoken on the larger policy question of wholesale replacement of the Code with the Rules. That a

the Rules looked after their own. They have given us an astonishingly parochial, self-aggrandizing document, which favors lawyers over clients, other persons, and the administration of justice in almost every line, paragraph, and provision that permits significant choice. It is internally inconsistent to the bar's benefit. It continues the practice of using the language of ethics to mask controls on the availability of legal services that in turn artificially inflate the cost of the services.

Id. at 245 (footnotes omitted). Gillers is not alone in his criticism of the Rules. See, e.g., L. Ray Patterson, *The Function of a Code of Legal Ethics*, 35 U. MIAMI L. REV. 695 (1981); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981); Richard O. Brooks, *Ethical Legal Identity and Professional Responsibility*, 4 GEO. J. LEGAL ETHICS 317 (1990).

150. MODEL RULES, *supra* note 14, Scope, para. 2.

151. The relationship between moral development and compliance with a constitutive statement of ethical norms, such as the Model Rules, is sometimes ambiguous. In an early commentary on the Model Rules, Professor Loder observed:

While it is undoubtedly possible to achieve much clearer definition of the boundary between the acceptable and the ideal than is achieved in the *Model Code*, some muddle is inevitable. Standards of acceptable and good lawyering inherently overlap. A model of the good lawyer will imply certain moral principles of behavior; the same principles may also be used to define minimally acceptable conduct. For example, a provision exhorting individual lawyers to engage in pro bono activities implies both an underlying moral principle that individuals have an affirmative personal responsibility for the well-being of others, and a commitment to the policy of providing access to legal services. The principle of responsibility to others also operates in a revised confidentiality rule which might require lawyers to reveal confidences to prevent serious harm to others. Because of overlap in the application of principle, the line between required conduct and suggested conduct will always be blurrier than practically desirable.

Reed Elizabeth Loder, *Tighter Rules of Professional Conduct: Saltwater for Thirst?*, 1 GEO. J. LEGAL ETHICS 311, 335 (1987).

152. For an in-depth analysis and taxonomy of the many moral identities assumed by lawyers, see Brooks, *supra* note 149, at 322.

153. Charge and Designation, *supra* note 4.

great majority of jurisdictions has adopted some form of the Model Rules will not be enough. The Study Committee needs to articulate a solid rationale for replacement. If such justification is not forthcoming, the Study Committee's efforts may founder on the Vermont wisdom of "if it ain't broke, don't fix it."

For many lawyers, articles on legal ethics and professional responsibility are real snoozers. This Essay may prove no different. There is an interesting story, however, about a lady and her bird. A lady had an amazing parrot who spoke five languages fluently. One day the lady had to run errands around town, so she asked a neighborhood boy to bird-sit for the afternoon. When she returned, she discovered, to her horror, that the boy had cooked the parrot in a big pot of gumbo. When asked why he ate the bird, the boy replied, "Was one of them languages English?" Through her tears the woman answered, "Of course, you idiot!" Looking up from his shoes, the boy then said, "Then why didn't he just say somethin'?"

Like the boy who ate the parrot, lawyers, judges, and law professors don't always understand the language of ethics. Sometimes the Rules of Professional Conduct actually do appear to be in five different languages. What are our obligations to clients? What do we do with the lying bum we represent who has just perjured himself in court? How do we satisfy our duties to the justice system? What are our duties? Can we be good lawyers and good people at the same time? Why do some people think "congenital lawyer" means "congenital liar?"

Many and varied are the moral codes by which we all conduct our personal lives. Similarly multidimensional are the rules that govern our professional behavior as lawyers. These rules constitute the law of lawyering. They are more than oxymoronic "legal ethics." They make up the morality of law practice—personal obligation, "other law" of statutes and regulations, and specialized conduct codes such as the Model Rules. Although any decision on adoption of the proposed Rules of Professional Conduct rests with the Supreme Court, as members of the legal profession, we remain ultimately responsible for fulfilling the promise of ethical self-government both for ourselves and for the people we serve.

