



*Annotated
Code of Trial Conduct*

**A Manual for Trial Practitioners
and for Use as a Teaching Aid**

 *hold every man a debtor to his profession; from the which, as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves, by way of amends, to be help and ornament thereto.”*

❧ Sir Francis Bacon ❧

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The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.



“In this select circle, we find pleasure and charm in the illustrious company of our contemporaries and take the keenest delight in exalting our friendships.”

—Hon. Emil Gumpert,
Chancellor-Founder, ACTL

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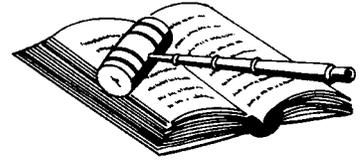
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AMERICAN COLLEGE OF TRIAL LAWYERS



Annotated Code of Trial Conduct

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Introduction

In 1956 the American College of Trial Lawyers (“ACTL”) adopted the “Code of Trial Conduct” (“the Trial Code”) and in 2002 the ACTL adopted the Code of Pretrial Conduct (“Pretrial Code”). Both of these Codes are matched by Canadian versions drawn in accordance with applicable Canadian principles. These Codes serve as guides for trial lawyers on issues of ethics and professionalism. The Trial Code was originally based on the American Bar Association’s Canons of Professional Ethics. When the Canons were replaced by the ABA Model Code of Professional Responsibility (“Model Code”), the ACTL updated the Trial Code to conform to the revised rules in the Model Code. When the Model Code was replaced by the Model Rules of Professional Conduct (“Model Rules”), the ACTL again updated the Trial Code, completing that revision in 1994. Finally, in 2002, the ACTL published the Pretrial Code, which details many professional responsibility issues that were not addressed in the Trial Code.

In recent years, judges, lawyers and law professors have observed a lack of civility in some trial lawyers. The ABA and many state bar associations have issued standards of aspirational conduct such as the ABA Torts and Insurance Practice Section’s “Lawyer’s Creed of Professionalism” (1988). State and federal courts have adopted their own standards of aspirational conduct such as the “Proposed Standards for Professional Conduct Within the Seventh Federal Judicial Circuit” contained in the Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441, 448 (1992). Courts have also published decisions lamenting the demise of professionalism and the rise of “Rambo” litigation tactics. One example of this is the remarkable en banc opinion of the judges in the Northern District of Texas in the case of *Dondi Properties Corp. v. Commerce Sav. & Loan Ass’n*, 121 F.R.D. 284 (N.D.Tex.1988). The judges in that case promulgated a code of civility for civil litigation to end “unnecessary contention and sharp practices between lawyers.” *Id.* at 286.

For over 50 years, the ranks of the ACTL have included some of the most distinguished members of the trial bar. These lawyers have employed the precepts of the Trial Code every day in their practices before American, Canadian and international tribunals. By publishing this annotated version of the Trial Code, the Fellows of the ACTL hope to facilitate the adoption of these aspirational standards of conduct by a new generation of trial lawyers.

It is also the intention of the ACTL that this annotation and its attached supplement will provide the Fellows of the College with material that can be used to prepare a presentation on ethical considerations facing the trial practitioner. The rules and codes of local jurisdictions must be reviewed to ensure the accuracy of the presentation. We encourage each Fellow to develop other hypothetical questions, which we have found to be the best method for presenting this material.

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Preamble

Lawyers who engage in trial work have a specific responsibility to strive for prompt, efficient, ethical, fair and just disposition of litigation. The American College of Trial Lawyers, because of its particular concern for the improvement of litigation proceedings and trial conduct of counsel, presents this Code of Trial Conduct for trial lawyers, not to supplant, but to supplement and stress certain portions of the rules of professional conduct in each jurisdiction. Generally speaking, the purposes and objectives of this Code are embodied in the following considerations:

To a client, a lawyer owes undivided allegiance, the utmost application of his or her learning, skill and industry, and the employment of all appropriate legal means within the law to protect and enforce legitimate interests. In the discharge of this duty, a lawyer should not be deterred by any real or fancied fear of judicial disfavor, or public unpopularity, nor should a lawyer be influenced directly or indirectly by any considerations of self-interest.

To opposing counsel, a lawyer owes the duty of courtesy, candor in the pursuit of the truth, cooperation in all respects not inconsistent with the client's interests and scrupulous observance of all mutual understandings.

To the office of judge, a lawyer owes respect, diligence, candor and punctuality, the maintenance of the dignity and independence of the judiciary, and protection against unjust and improper criticism and attack, and the judge, to render effective such conduct, has reciprocal responsibilities to uphold and protect the dignity and independence of the lawyer who is also an officer of the court.

To the administration of justice, a lawyer owes the maintenance of professional dignity and independence. A lawyer should abide by these tenets and conform to the highest principles of professional rectitude irrespective of the desires of the client or others.

This Code expresses only minimum standards and should be construed liberally in favor of its fundamental purpose, consonant with the fiduciary status of the trial lawyer, and so that it shall govern all situations whether or not specifically mentioned herein.

Standards For Trial Conduct

1. Employment in Civil Cases

It is the right of a lawyer to accept employment in any civil case unless such employment is likely to result in violation of the rules of professional conduct or other law. The lawyer should decline to prosecute a cause or assert a defense obviously devoid of merit, or which is intended merely to inflict harassment or injury, or to procure an unmerited settlement, or in which the lawyer or the lawyer's firm or associates have conflicting interests. Otherwise it is the lawyer's right and duty to take all proper action and steps to preserve and protect the legal merits of the client's position and claims and he or she should not decline employment in any case because of the unpopularity of the client's cause or position.

1.1 Overview

Paragraph 1 acknowledges the right of a lawyer to accept (or decline) employment in civil cases and addresses some of the circumstances the lawyer should consider. Although not obliged to undertake representation, a lawyer should not decline it lightly and should further the goal of the bar to make legal services fully available. Model Code EC 2 25.

Paragraph 1 also emphasizes the seriousness of this undertaking by discouraging lawyers from declining representation simply because a cause or position is unpopular. It is also consistent with the long tradition of the bar to take on causes without regard to popular reaction or sentiment.

This paragraph stresses the contrast between cases in which a lawyer must decline employment (because it would necessarily lead to a violation of a specific ethical prohibition, e.g., conflict of interest, harassment, and cases without merit) and cases in which the lawyer must make a decision based on other grounds. A very difficult situation arises when a lawyer is asked by a court to accept appointment in an extremely unpopular case about which the lawyer has very strong negative personal feelings that could influence the lawyer's judgment. The lesson ought to be that lawyers must do some serious soul searching before accepting or declining such representation.

1.2 Prosecuting or Defending a Cause "Devoid of Merit"

Lawyers should not accept employment if its only goal is to harm or harass another or to procure an unmerited settlement, or if it requires counsel to take a legal position "which is obviously devoid of merit." Presumably, any settlement would be unwarranted in a case that is obviously devoid of merit. This same concept is found in Model Rule 3.1, which counsels against making "frivolous" arguments or assertions, offensively or defensively. An argument that is obviously devoid of merit would also be frivolous.

1.3 Prosecuting or Defending a Cause Despite “Conflicting Interests”

Paragraph 1 instructs a lawyer to decline prosecuting a cause or asserting a defense in which the lawyer or the lawyer’s firm or associates have “conflicting interests.” Paragraph 1 does not expressly refer to “differing” interests, which are discussed in Paragraph 7 and defined in Paragraph 7(a) to include “every interest that will adversely affect the judgment or the loyalty of the lawyer to the client, whether it be a conflicting, inconsistent, diverse or other interest.” Paragraph 7(b) instructs counsel not to represent clients with “differing interests,” and Paragraph 2 instructs counsel to withdraw from representation when “differing or conflicting” interests arise. Despite the different phraseology, the same result is specified under Paragraph 1 and Paragraph 7(b): a lawyer should not represent a client where “conflicting” or “differing” interests exist unless the “clients involved consent after consultation.”

In light of Paragraph 7(a)’s definition of “differing interests,” counsel should construe “conflicting interests” in Paragraph 1 broadly to encompass “inconsistent” and “diverse” interests as well. “Conflicting interests,” therefore, include (but are not limited to) ethical, personal, “litigation,” and “positional” conflicts. Counsel should decline employment if any such conflicts are present unless the client expressly consents to the representation after consultation. However, representation is not permitted even with the client’s consent in some circumstances, (e.g., an attorney cannot represent both the plaintiff and defendant in a single lawsuit).

Paragraph 1 also indicates that a lawyer should decline employment if the lawyer (or the lawyer’s firm) has a conflict of interest, but Paragraph 7(c), which speaks in terms of “differing interests” rather than “conflicts of interest,” allows multiple representations under certain circumstances and should also be consulted. Although it is the near universal rule that a lawyer cannot represent opposing parties in litigation, in some circumstances a lawyer may represent one client in litigation against another client who is being represented in the litigation by a different firm.

1.4 Procuring an “Unmerited Settlement”

A shareholder “strike suit” is a good example of an action that is brought merely to procure an unmerited settlement. The Federal Rules of Civil Procedure contain some safeguards against the ultimate success of this kind of lawsuit. However, they do not directly discourage lawyers from filing these meritless actions initially, and they do not prevent defendants from having to expend significant resources to have them dismissed.

1.5 Representing Clients with Unpopular Causes or Positions

Claims and defenses that arise under the First Amendment to the United States Constitution often involve unpopular causes or positions. Lawyers who have the utmost reverence for constitutional freedoms, may nonetheless avoid representing such clients for fear that the community may view them as personally aligned with the client’s cause. Paragraph 1 encourages lawyers to undertake representation of an unpopular cause if the client’s claim raises a genuine legal issue, such as the extent of the First Amendment’s guarantees.

2. Continuance of Employment in and Conduct of Civil Cases

After acceptance of employment a lawyer, unless discharged, should diligently pursue the matter to an expeditious conclusion. Subject to the rules of the tribunal, a lawyer may withdraw at any time with the consent of the client but if the client's consent cannot be obtained then the lawyer should obtain the approval of the tribunal to withdraw. A lawyer should withdraw from any litigation for reasons which would require refusing employment under paragraph 1 of this Code, or when differing or conflicting interests with the client arise or if continued representation of the client will involve participation in client conduct which the lawyer reasonably believes is criminal or fraudulent, and the lawyer may withdraw if continuing representation of the client will involve participation in client conduct which has as its objective a goal which the lawyer considers repugnant or imprudent. The lawyer shall take reasonable and practicable steps to protect the client's interests from the consequences of withdrawal, such as giving reasonable notice to the client, allowing time for employment of other counsel, conveying to the client papers and property to which the client is entitled and refunding any advance fee which has not been earned. When the lawyer withdraws he or she should render a prompt accounting of all the client's funds and other property in the lawyer's possession.

2.1 Overview

Paragraph 2 first addresses the circumstances in which a lawyer should withdraw from representation, and then suggests the steps that should be taken to avoid prejudice to the client when withdrawal occurs. Paragraph 2 is the converse of Paragraph 1. Paragraph 1 suggests circumstances under which a lawyer should decline employment, and Paragraph 2 suggests that the lawyer withdraw from representation if those same circumstances occur during the course of the representation. Paragraph 2 is similar to Model Rule 1.16(a) and Model Code DR 2-110, but they are much more detailed and should be consulted before attempting to withdraw from representation. Local court rules also generally require permission of the court to withdraw as trial attorney in a pending case even when the client consents to the withdrawal. A dilemma arises if the lawyer wants to withdraw because the lawyer learns his client perpetrated a fraud during the course of the representation. The lawyer may be required to withdraw and to report the fraud to the tribunal

Paragraph 2 permits a lawyer to withdraw if continued representation would involve the lawyer in "client conduct which has as its objective a goal which the lawyer considers repugnant or imprudent." However, Paragraph 1 and Model Code EC 2-28 do not consider "repugnance of the subject matter" a compelling reason to decline representation. Is there a difference between a "goal" that is repugnant and "subject matter" that is repugnant? There probably is. A goal is likely acceptable if a client's aim or intention create a repugnant reaction in the lawyer. A subject matter may be repugnant even when the client's conduct is not intended to offend the legal system, therefore, the lawyer need not withdraw. Paragraph 2 also deals with protecting a client's interests in the event of withdrawal. As with the decision to withdraw, the specific requirements of the forum's code of ethics are often detailed and should be consulted. Local court rules may also have very specific procedures for withdrawal, to ensure that the client's interests are fully protected. A lawyer's obligation to account for and turn over a client's papers and property upon withdrawal from representation is addressed in Model Rule 1.16(d).

Paragraph 2 specifies that the lawyer allow “time for employment of other counsel.” What is the obligation of the lawyer to recommend and work with other counsel if the reason for the withdrawal is that the client was going to engage in illegal or immoral activity and put the lawyer in an untenable ethical position, e.g., by giving testimony that the lawyer knows to be false? There is very little the lawyer can do to assist the new counsel other than turn over the client’s complete file. The lawyer cannot disclose to the new counsel, without the client’s consent, confidential communications received from the client, even communications regarding the client’s intent to give false testimony.

2.2 Withdrawing From Representation in Meritless Action

Paragraph 2 instructs counsel to withdraw from any litigation for the reasons that would require declining employment under Paragraph 1. Thus, even if an action was initially filed in good faith, a lawyer should withdraw from representation if the client insists on pursuing what has become a meritless action.

2.3 Withdrawing from Representation When Differing or Conflicting Interests Arise

Although Paragraph 2 does not address client fraud or criminal conduct, Model Code DR 7-102(B)(1) requires lawyers to reveal to the affected person or tribunal that a client has perpetrated a fraud in the course of the representation if the client refuses to do so. However, if the fraud was not committed by the client in the course of representation and the client has not been called to testify, the lawyer probably does not have a duty to reveal it, indeed, the lawyer has a duty not to reveal it in accordance with the relationship of confidentiality. But see Code DR 7-102(A)(3) which proscribes failing “to disclose that which he is required by law to reveal.” Model Rule 4.1(b) requires disclosure “to avoid assisting a criminal or fraudulent act by a client.” Paragraphs(b)(2) and (3) were added to Model Rule 1.6 by the ABA in August 2003 and allow lawyers to reveal information relating to the representation to prevent or rectify injury to the financial interests of another by reason of client fraud in furtherance of which the client used the lawyer’s services. Model Rule 1.16(b)(2) advises that a lawyer may withdraw from representation if the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent. Model Rule 1.16(b)(3) allows withdrawal if the client has used the lawyer’s services in the past to perpetrate a crime or fraud. Model Rule 1.16(b)(1) now permits withdrawal for any reason as long as it can be accomplished without material adverse effect on the client.

2.4 Goal of Client Conduct “Repugnant” or “Imprudent”

Paragraph 2 advises that a lawyer may withdraw when continued representation involves participation in client conduct that has an objective or goal that the lawyer considers repugnant or imprudent. Paragraph 2 incorporates the reasons for declining employment given in Paragraph 1 and thus requires withdrawal if the lawyer would be asserting a position that is intended merely to harass or injure another. If it is not obvious that the only purpose would be to harass or injure, and the client refuses to give her consent to the lawyer’s withdrawal, then the lawyer may request permission to withdraw from a matter pending before a tribunal only if one of the reasons given in Model Rule 1.16 applies. One of these reasons is that the client’s conduct

renders the representation unreasonably difficult for the lawyer. In *Ashker v. Int'l Business Mach. Corp.*, 607 N.Y.S.2d 488 (App. Div. 1994), a court held that a client's refusal to accept a lawyer's advice, among other things, rendered the representation unreasonably difficult under DR 2-110 (C)(0).

2.5 Protecting Client's Interests from Consequences of Withdrawal

Paragraph 2 advises a lawyer to “render a prompt accounting” of client funds and property in the lawyer's possession upon withdrawing from employment. DR 2-110 was the model for Paragraph 2. It contains no language regarding the rendering of a prompt accounting, but it does require the lawyer to deliver papers and property and to refund unearned fees. DR 2-110(A)(2) and (3). DR 9-102(B)(3) instructs a lawyer to maintain complete records of clients' property and to “render appropriate accounts” to the client, whether or not the lawyer is withdrawing from employment.

Although Paragraph 2 only briefly mentions discharge by the client, the lawyer's duty to take steps to protect the client's interests upon withdrawal is presumed to apply to withdrawal following discharge as well.

3. Court Appointments and Employment in Criminal Cases

A lawyer should not seek to avoid appointment by a tribunal to represent a person except for good cause. Nor should a lawyer decline to undertake the defense of a person accused of a crime merely because of either the lawyer's personal or the community's opinion as to the guilt of the accused or the unpopularity of the accused's position, because every person accused of a crime has a right to a fair trial, including persons whose conduct, reputation or alleged violations may be the subject of public unpopularity or clamor. This places a duty of service on the legal profession and, even though a lawyer is not bound to accept particular employment, requests for services in criminal cases should not lightly be declined or refused merely on the basis of the lawyer's opinion concerning the guilt of the accused, or his or her repugnance to the crime charged or to the accused.

3.1 Overview

Paragraph 3 articulates the long-held view that lawyers serve as guardians of the gateways to justice and should not lightly refuse their assistance to those in need of defense against the power of the state when it seeks to take away their liberty or lives. Court-ordered appointments to represent defendants in criminal cases must be accepted unless the lawyer has good cause for refusal. Paragraph 3 calls upon the best traditions of the profession to be steadfast in our representation of those whose actual or alleged misdeeds make them the subject of public contempt or hatred.

Paragraph 3 recognizes that the lawyer-client relationship is voluntary and that a lawyer has the right to refuse to represent someone. However, it calls on criminal practitioners to move beyond their personal feelings toward the accused or the crime in reaching engagement decisions.

Although there is no civil practice analogue to this paragraph, similar professional considerations underlie Paragraph 4, *infra*, which addresses pro bono service.

4. Pro Bono Publico

A lawyer should render public interest legal service personally and by supporting organizations that provide services to persons of limited means.

4.1 Overview

One of the glories of the legal profession is that it recognizes a basic duty on the part of lawyers to provide free services for the public good. Paragraph 4, which addresses that duty, is similar to Model Rule 6.1. Although the Comment to the Model Rule is broadly applicable to all members of the legal profession, it allows lawyers to discharge their pro bono responsibility by making financial contributions to legal services organizations that serve the indigent if it is not feasible to provide services personally. Fellows have the duty to both serve and contribute. Lawyers who are “skilled and experienced in the trial of cases” (ACTL Bylaws, §1.1) should fulfill their public service obligation by making a direct contribution of their time and talent, as well as providing financial support to service organizations. It is important that senior trial practitioners provide this example of personal service and commitment to the profession to less seasoned attorneys.

Personal hands on involvement in helping less advantaged members in our society cope with the confusing and often frightening morass of laws that regulate modern life can be satisfying. Lawyers who provide pro bono services will ensure a just and efficient operation of the judicial system. Even the best efforts of judges and court staff to assist unrepresented litigants pale in comparison to the contributions that seasoned advocates can make. Our adversarial system of justice operates best when trained advocates appear on both sides of a case.

5. Continuance of Employment in and Conduct of Criminal Cases

(a) Having accepted employment in a criminal case, a lawyer’s duty, regardless of his or her personal opinion as to the guilt of the accused, is to invoke the basic rule that the crime must be proved beyond a reasonable doubt by competent evidence. The lawyer should raise all valid defenses and, in case of conviction, should present all proper grounds for probation, or in mitigation of punishment. A confidential disclosure of guilt alone does not require a withdrawal from the case, but the lawyer should never offer testimony which the lawyer knows to be false.

(b) The crime charged should not be attributed to another identifiable person unless evidence introduced or inferences warranted therefrom raise at least a reasonable suspicion of such person’s probable guilt.

(c) The prosecutor’s primary duty is not to convict, but to see that justice is done. A public prosecutor or other government lawyer should not institute or cause to be instituted criminal charges when he or she knows or it is obvious that the charges are not supported by probable cause, and shall make timely disclosure to counsel for the defendant, or to the defendant if the defendant

has no counsel, of the existence of evidence, known to the prosecutor or other government lawyers or agencies, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

5.1 Overview

Paragraph 5 emphasizes a lawyer's duty to ensure that a crime be proved beyond a reasonable doubt regardless of the lawyer's personal opinion of the case. A problem can arise when the defendant privately discloses his guilt to the lawyer. However, the lawyer is precluded from offering testimony only when the lawyer knows the testimony is false.

This Paragraph also addresses the duties of the prosecutor and explains that the prosecutor's function is not to ensure conviction, but rather is to see justice done. Accordingly, the prosecutor has the responsibility to turn over exculpatory evidence. These provisions are taken from Model Code DR 7-103(B), *see also* Model Rule 3.8(d); they emphasize that the "win at all costs" mentality is unethical.

5.2 Raising All Valid Defenses or Mitigating the Punishment

A lawyer should do everything within his capability to defend the client adequately. Although the decision regarding the submission of mitigating evidence is a strategic choice that generally does not support a claim of ineffective assistance of counsel, a lawyer violates the ethical obligations under Paragraph 5 if he engages in neither reasonable investigation nor logical argument. In most circumstances, a lawyer's failure to thoroughly investigate the facts of a case is considered unethical. It would also violate this Trial Code.

5.3 Confidential Disclosure of Guilt

A lawyer should never offer testimony that is known to be false. The level of knowledge required before this rule is invoked has been interpreted differently by the courts. Some courts require lawyers to have a "firm factual basis" to reasonably believe that the client intends to commit perjury before the attorney can withdraw from a criminal case. Some courts also require a "clear expression of intent to commit perjury" before an attorney can reveal client confidences to the tribunal. *See, e.g., United States v. Long*, 857 F.2d 436, 444-45 (8th Cir. 1988), cert. denied, *Jackson v. United States*, 502 U.S. 828, 112 S. Ct. 98 (1991).

The standard set forth in Paragraph 5(a) is similar to Model Rule 3.3(a). The narrative approach, under which the attorney calls the defendant to the witness stand but does not engage in the usual question and answer exchange, has been approved in some cases. Under this approach, the attorney permits the defendant to testify in a free narrative manner. *People v. Johnson*, 62 Cal. App. 4th, 608, 624 (Cal. 1998). In an earlier version of the Comments to Model Rule 3.3 and in ABA Formal Opinion 353 (1987) the ABA rejected the narrative approach. But in the Ethics 2000 revisions, the ABA added Comment 7 to Model Rule 3.3, which concludes that the ethics rules are subordinate to the requirements of law. California, New York, the District of Columbia, and Massachusetts all permit the narrative approach. *See Hazard et al., The Law and Ethics of Lawyering*, Fourth Edition Foundation Press 2005, at page 651.

5.4 Attributing Crime to Another Person

If the evidence (or the inferences it warrants) does not raise at least a reasonable suspicion of another person's probable guilt, then Paragraph 5(b) advises counsel not to attribute a charged crime to an identifiable person. The Trial Code does not require that the lawyer actually believe in the guilt of the person to whom the crime is attributed. As long as the evidence raises a reasonable suspicion, the lawyer is not prevented under Paragraph 5(b) from suggesting that another person is guilty of the crime.

5.5 Prosecutor's Duty When there is No Probable Cause

Paragraph 5(c) stresses the unique and important role of prosecutors in the judicial system. A prosecutor's paramount duty is to seek justice rather than simply to obtain a favorable ruling. Model Rule 3.8 contains similar language that precludes the prosecution from pursuing charges it "knows [are] not supported by probable cause." Similarly, withholding important evidence that is helpful to the defense is inappropriate.

6. Confidentiality of Information

(a) It is the duty of a lawyer to preserve his or her client's confidences and secrets and this duty outlasts the lawyer's employment. The obligation to represent the client with undivided fidelity and not to divulge the client's confidences or secrets forbids also the subsequent acceptance of employment from others in matters adversely affecting any interests of the former client and concerning which he or she has acquired confidential information, unless the consent of all concerned is obtained.

(b) 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 (c).

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

- (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; 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.

6.1 Overview

The duty to maintain confidential information between the attorney and client is among the most essential ethical obligations of the attorney. It engenders trust and elicits candor between the attorney and client, two elements vital to the success of any professional

relationship. There are some exceptions, however, reserved for the extraordinary circumstances addressed in Paragraph 6(c).

6.2 Preservation of Client's Confidences

The core of Paragraph 6 is the broad concept of “information relating to representation of a client.” These same matters are covered in Model Rules 1.6 and 1.9(b). Client confidences and secrets must be treated as confidential, and the lawyer has the utmost duty to prevent disclosure. Unless the client consents after appropriate consultation, such information may not be revealed, except in rare instances, even after the representation has terminated. The information cannot be used to the client’s disadvantage absent informed consent. A lawyer must decline representation of a client if the representation would be adverse to a former client’s interest and if it concerns the subject of confidential information relating to the representation of the former client.

Clients must be able to be completely candid with their lawyers so that lawyers can obtain the information needed to perform their professional duties. The attorney-client privilege encourages and protects clients’ candor by ensuring that confidential communications will not be revealed. This is merely a testimonial privilege, however, and it is focused only on communications with the client. By contrast, the duty recognized in Paragraph 6 is far broader and applies in many other circumstances. Lawyers must preserve the confidentiality of client confidences and secrets from any disclosure, whether careless or calculated, and must assert the evidentiary privilege against compelled disclosure.

The duty also extends beyond information obtained from the client in confidence to include all information the lawyer obtains “relating to representation” of the client. Even publicly accessible (but not generally known) information, if obtained in the course of the lawyer’s representation, must be kept confidential. The sweeping breadth of this duty reflects the fiduciary nature of the attorney-client relationship and the pervasive obligation of lawyers to be loyal to their clients.

6.3 Continued Obligation in Subsequent Acceptance of Employment from Others

The lawyer’s obligation to maintain confidentiality extends beyond the lawyer’s actual representation of the client. Confidential disclosure is appropriate only when the consent of all parties concerned is obtained.

6.4 Circumstances Where a Lawyer May Disclose Confidential Information

The exceptions to the duty of confidentiality listed in Paragraph 6(c) are similar to, but narrower than, those in Model Rule 1.6(b). However, not all states have adopted Model Rule 1.6(b). Ethics rules in some jurisdictions require or permit disclosure under broader circumstances. Many jurisdictions have broadened ABA Rule 1.6(b) so as to permit disclosure when necessary to prevent substantial injury to another’s financial interests or properties. These rules also permit disclosure to rectify the consequences of a client’s fraudulent act if the lawyer’s services have been used in furtherance of the fraud. Some states permit use or disclosure “to

rectify past and completed client fraud” while others mandate disclosure in some circumstances of client fraud. *See*, Thomas D. Morgan, “Lawyer Law: Comparing the ABA Model Rules of Professional Conduct With the ALI Restatement (Third) of the Law Governing Lawyers,” Center for Professional Responsibility, American Bar Association (2005). Where the applicable ethics rules of a jurisdiction permit rather than require disclosure, lawyers should consider that client candor and attorney loyalty to the client are best advanced when disclosure of confidential client information is limited to the circumstances permitted by Paragraph 6.

6.5 Disclosure To Establish Claim or Defense

Paragraph 6 permits a lawyer to reveal confidences essential to defend the lawyer’s own behavior or to establish a claim in a controversy between the lawyer and the client. In addition, should a criminal charge or civil claim be brought against the lawyer based upon conduct in which the client was involved, the College recognizes that the confidentiality obligation must yield to the lawyer’s need to defend against those charges as well as any allegations concerning the lawyer’s representation of the client. These permissible disclosures are similar to those found in Model Rule 1.6(b).

7. Differing Interests-Conflicts

(a) “Differing interests” include every interest that will adversely affect the judgment or the loyalty of the lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest.

(b) A lawyer should not represent clients with differing interests, nor should a lawyer represent a client in a matter as to which the client’s interests are materially adverse to the interests of a former client whom the lawyer represented in the same or a substantially related matter, unless the clients involved consent after consultation.

(c) A lawyer should not accept or continue multiple employment if the exercise of the lawyer’s independent professional judgment in behalf of a client will be or is likely to be adversely affected by representation of another client, except that a lawyer may represent multiple clients with respect to the same matter if:

- (1) it is obvious that the lawyer can adequately represent the interests of each client;
- (2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients’ best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful;
- (3) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privilege, and obtains each client’s consent to the common representation; and

- (4) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(d) If a lawyer is required to decline employment or to withdraw from employment under this rule, no partner or associate of the lawyer or the lawyer's firm should accept or continue such employment.

(e) When a lawyer has left one firm and joined another, the lawyer and the lawyer's new firm are disqualified from representing a client in a matter adverse to a client of the former firm if the lawyer acquired confidential information material to the matter while with the former firm.

(f) When a lawyer has terminated an association with a firm, the lawyer's former firm is not prohibited from thereafter representing a client with interests materially adverse to those of a client represented by the departed lawyer and not currently represented by the firm, unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has confidential information material to the matter.

(g) The affected client may waive any conflict arising under subparagraphs (e) and (f) (1) and (2) next above.

(h) Generally judges, arbitrators, or other adjudicative officers should not seek employment with parties or attorneys with matters pending before them, and a former judge, arbitrator, or other adjudicative officer should not represent any person in connection with a matter in which the judge or arbitrator formerly participated personally and substantially as a judge or arbitrator.

7.1 Overview

Paragraph 7 provides conflict of interest rules also found intermittently throughout the Model Rules in 1.7, 1.9, 1.10, 1.11, and 1.12. Although the language differs in a number of respects, overall the Trial Code is in accord with the Model Rules on what constitutes a conflicting interest and how a lawyer should handle such a situation. Many state ethics rules governing conflicts of interest vary significantly and must be consulted. The lawyer's professional duty of loyalty to the client is the overriding mandate of both Paragraph 7 and the Model Rules.

7.2 Representing Clients with Differing Interests

Paragraph 7 addresses "differing interests," a phrase not found in the Model Rules. If the interests at stake in the joint representation of multiple clients will adversely affect the lawyer's exercise of independent professional judgment or loyalty, then the interests of such multiple

clients are deemed “differing,” regardless of whether they are conflicting, inconsistent, or diverse. Differing interests may arise or be recognized before or during the course of a multiple representation. Whenever they arise, the lawyer should not represent multiple clients unless they all consent after consultation.

Paragraph 7 also counsels against representing a client in a controversy where the client’s interests could be adverse to any former client of the attorney. The Model Rules, on the other hand, will allow a lawyer to represent a client despite a concurrent conflict of interest if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing. Model Rule 1.7(b)(1)(2)(3) and (4).

7.3 Client’s Interests are Materially Adverse to the Interests of a Former Client

Paragraph 7 generally precludes lawyers from representing a client when the client’s interests are materially adverse to the interests of a former client. Similarly, the Model Rules provide that if a lawyer’s representation of a client may be compromised by the interests of another current or former client of the attorney, representation is prohibited. Model Rule 1.7(a)(2).

7.4 Independent Professional Judgment Adversely Affected by Representation of Another Client

Paragraph 7 discourages lawyers from representing multiple clients if the representation adversely affects the lawyer’s independent professional judgment on behalf of a client. The Model Rules preclude lawyers from representing multiple clients unless the lawyer reasonably believes she can offer “competent and diligent” counsel. This phrase is analogous to the requirement of “independent professional judgment” in Paragraph 7. *Id.*

7.5 Representation of Multiple Clients with Respect to Same Matter

Paragraph 7 permits lawyers to represent different clients in the same matter so long as certain specific circumstances are met. The Model Rules do not focus on specific situations where this multiple representation is permissible. Instead, it restricts the capabilities of an attorney representing two or more clients in the same matter. For example, Model Rule 1.8(g) states that a lawyer representing two or more clients cannot construct an aggregate settlement of claims by or against the clients unless each client gives informed written consent.

7.6 Effect on a Firm of a Lawyer Declining or Withdrawing from Employment

Paragraph 7 requires that if a lawyer must decline employment or withdraw from representation of a client because of differing interests or conflicts, then every other lawyer in that firm also is precluded from representing the client in that matter. The Model Rules similarly

preclude other lawyers in the same firm from knowingly undertaking that client's representation, unless the prohibition is based on a personal interest of the prohibited lawyers and does not pose a risk to the representation of the remaining lawyers in the firm. Model Rule 1.10(a). The Model Rules do permit other lawyers in a firm that employs a former government lawyer to represent a client in connection with a matter in which the lawyer participated, provided the former lawyer is timely screened from any participation in the matter, receives no part of the fee and, where applicable, written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule. Model Rule 1.11(b)(1) and (2).

7.7 Lawyer Leaves One Firm and Joins Another

If a lawyer leaving one firm and joining another has confidential information related to a client, then the lawyer and the new firm are precluded from representing another client in a matter adverse to the client of the former firm. In contrast, the Model Rules do not preclude representation, but do preclude that lawyer from using confidential information to the disadvantage of another client or revealing information relating to the representation with respect to a client. Model Rules 1.9(c)(1) and (2). The rules of many states presume the receipt of confidential information by the departing lawyer, so these rules should be consulted.

7.8 Ramifications of Firm's Representation of a Client when a Lawyer Responsible for the Client Disassociates from the Firm

Paragraph 7(f) and the Model Rules 1.10(b)(1) and (2) use nearly identical language to provide that when a lawyer disassociates from a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer, unless the matter is substantially related to that in which the formerly associated lawyer represented the client or a lawyer remaining with the firm has confidential material information.

7.9 Conflicting Interests for Judges, Arbiters, and Other Adjudicative Officers and Employment

The language in Paragraph 7(h) that discourages judges, arbiters and other adjudicative officers from seeking employment from parties or attorneys with matters before them, is identical to the language in the Model Rules. Unlike the Model Rules, the Trial Code does not codify an exception based on informed written consent by the parties. Model Rule 1.12(a). However, use of the modifier "generally" in this Paragraph suggests that some exceptions may exist.

8. Professional Colleagues and Conflicts of Opinion

(a) A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. Either the original counsel or additional counsel may decline association as colleagues if it is objectionable to either, but if the lawyer first retained is relieved, another may come into the case

(b) When lawyers jointly associated in a cause cannot agree as to any matter vital to the interests of a client, the conflict of opinion should be frankly stated to the client for final determination. The client's decision should be accepted unless the nature of the difference makes it impracticable or inappropriate for the lawyer whose judgment has been overruled to cooperate effectively; in this event it is the lawyer's duty to ask to be relieved.

(c) Efforts, direct or indirect, in any way to interfere with the professional employment of another lawyer are improper. However, a lawyer should not decline to pursue a claim against another lawyer on a client's behalf merely because the prospective defendant is a member of the same profession.

8.1 Overview

Paragraph 8(a) addresses situations in which the client suggests the assistance of additional counsel. Paragraph 8(b) addresses situations in which lawyers jointly associated in a cause cannot agree as to any matter vital to the interests of the client. Both paragraphs 8(a) and 8(b) apply to circumstances in which multiple lawyers are involved in the representation of a single client. The concerns raised here do not arise if the lawyers are members of the same firm, or one of the lawyers is a supervisor of the other. Model Rules 5.1 and 5.2 govern the lawyers' ethical responsibilities in that situation. Paragraph 8(c) addresses the issue of lawyers interfering in the professional employment of another. Paragraph 8 has no direct counterpart in the Model Rules.

8.2 Client's Request of Additional Counsel

As with most matters in Paragraph 8, it is the client's ultimate decision to determine whether additional counsel is appropriate.

8.3 Conflicts of Opinion between Multiple Counsel

The client has absolute control over the determination of the dispute. The client resolves conflicts of opinion, even if the client's decision is impractical or inappropriate, in which case it is the lawyer's duty to ask to be relieved.

8.4 Impropriety of Interfering With Another Lawyer's Judgment

The ethical obligations provided in Paragraph 8(c) are based on the principle that one lawyer not interfere with the employment of another. It further provides that a lawyer should not decline to pursue a claim against another lawyer on a client's behalf simply because the proposed defendant is a lawyer.

9. Fees

No division of fees for legal services is proper except with other lawyers. Division of legal fees among lawyers not in the same firm is proper only if:

(a) The division complies with, and is permitted by, the applicable law or rules governing the lawyer's conduct; and

(b) The client is informed in writing and does not object to the participation of all the lawyers involved; and

(c) The total fee charged is reasonable and, unless the additional lawyer adds value to the representation, not more than the client would have been charged if such division of legal fees had not occurred.

9.1 Overview

This Paragraph serves the dual role of assuring both the professional independence of attorneys by disallowing fee-splitting with non-lawyers and the fairness to the client of the amount of fee charged.

9.2 Division of Fees with Non-Lawyers

The Code contains a flat prohibition against sharing fees with any non-lawyer. Such prohibitions are also found in other professional codes, including the Model Code DR 3-102 and Model Rule 5.4. Thus, a lawyer paying money to a "runner" or a doctor who refers injured patients for representation is dividing "fees" with a non-lawyer. Model Rule 5.4(a)(3) allows profit-sharing with non-lawyer employees of a law firm.

9.3 Division of Fees with Another Lawyer

The division of fees among lawyers who are not in the same law firm is permitted when three prerequisites have been met: 1) applicable state laws or rules allow it, 2) the client is informed in writing and agrees, and 3) the fee is reasonable and not more than it would be had a single lawyer handled the matter. Note that Model Rule 1.5(e)(2) and some state rules of professional conduct also require disclosure to the client of the share that each lawyer is to receive and joint responsibility for the matter.

Courts in states that have adopted the Model Code have flatly rejected finder's fees (or "forwarding fees") between lawyers under Model Code DR 2-107. The apparent rationale for the prohibition is that it may encourage sending clients to whoever will pay the largest referral fee, as opposed to the most competent attorney. Various ethics rules limit the services for which an attorney can bill, and ours is a profession in which we do not expect clients to pay an attorney who performs no work and accepts no responsibility for the client's case. Note, however, that in certain jurisdictions, such fee splitting for referrals is allowed under special circumstances, such as where the existence of a specialty certification permits an attorney to split fees for a mere referral (*see, e.g.*, N.J. Rules of Court 1:39-6). Such exceptions exist to encourage the referral of matters to counsel who are objectively recognized as competent.

9.4 Reasonableness of Fees

The Trial Code does not provide guidelines about how to assure that only a “reasonable” fee is charged but this is covered by numerous other professional codes. These codes include factors such as the time involved, the difficulty of the cause, the skill required, the fee customarily charged, the nature and duration of the relationship with the client, the extent to which the case precludes the lawyer from taking on other work, etc. The Trial Code makes clear that the fee is to be reasonable, and not enhanced by the mere fact that lawyers from more than one firm represent the client. However, unlike Model Rule 1.5(e) or Model Code DR 2-107 (A)(3), Paragraph 9(c) of the Trial Code recognizes an exception when the “additional lawyer adds value to the representation.” According to the commentary of the Legal Ethics Committee of the American College of Trial Lawyers, the exception “is intended to permit the total fee to be larger than it would have been if there had been no division of fees where the additional lawyer is a specialist or otherwise adds value to the representation, and does not merely perform some service that the original lawyer would normally have performed as part of the representation.”

10. **Relations with Clients**

(a) A lawyer should not purchase or otherwise acquire a proprietary interest in the cause of action or subject matter of the litigation the lawyer is conducting for a client, except that the lawyer may acquire a lien granted by law to secure the lawyer’s fee or expenses and contract with a client for a reasonable contingent fee in those civil cases in which a contingent fee is permitted.

(b) While representing a client in connection with contemplated or pending litigation, a lawyer should not advance or guarantee financial assistance to the client, except that the lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence the repayment of which may be contingent on the outcome of the matter.

(c) A lawyer representing an indigent client may pay the court costs and litigation expenses on behalf of such client.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) (1) A lawyer who represents two or more clients should not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement and of the participation of each client in the settlement.

(2) A lawyer who represents two or more criminal defendants should not participate in an aggregated plea agreement as to guilty pleas unless each

defendant is informed about the existence and nature of all the pleas being offered and the participation of each defendant in each plea agreement and each defendant consents to such an aggregated plea agreement.

10.1 Overview

Paragraph 10 addresses issues relating to a lawyer's representation of a client and the conduct necessary to assure that the lawyer remains motivated to obtain an outcome in the client's interest, rather than one that will fulfill the lawyer's financial needs, or the interests of someone other than the client. Thus, this Paragraph prevents the lawyer from maintaining a financial stake in the outcome by acquiring a proprietary interest in the cause of action (with the exception of a reasonable contingent fee or lien to secure fees and expenses) or financing the litigation (with the exception of paying court costs for an indigent client). It also prohibits counsel from obtaining literary or media rights in the case while the representation continues. Finally, it sets limits on making aggregate settlements for multiple clients, or aggregate plea agreements when representing more than one defendant in a criminal matter.

10.2 Financial Assistance to the Client

Paragraph 10(a) provides that a lawyer cannot obtain a proprietary interest in a client's case, although it allows contingent fees (if otherwise permitted) and the use of liens to secure attorney fees and costs.

Paragraph 10(b) is virtually identical to Model Code DR 5-103(B) in terms of advancing costs for a matter, except that it does not require that the client remain ultimately liable for expenses. In fact, Paragraph 10(c) specifically permits a lawyer to pay the costs of an indigent client. This is consistent with Model Rule 1.8(e) but would not be permitted under the literal terms of Model Code DR 5-103. Note that it is only the costs of the litigation that a lawyer may advance on the client's behalf. It is not proper to provide financial assistance to the client pending resolution of a litigation. Thus, an attorney engaged to pursue a worker's compensation claim on behalf of a man injured in an industrial accident was found to have violated ethics rules by loaning money to the client to assist him in paying rent. *Cleveland Bar Ass'n v. Mineff*, 73 Ohio St. 3d 281, 652 N.E.2d 968 (1995).

A lawyer must consult the law applicable in the forum before entering into any fee agreement that relieves the client of responsibility for costs.

10.3 Rights to Publicity

As media coverage of trials has increased exponentially over the last decade, it has become more and more common for lawyers to make a name for themselves as a result of participation in these cases. Paragraph 10(d) seeks to assure that the client's interests always remain above those of counsel and prohibits the lawyer from negotiating an agreement that would give the lawyer literary or media rights to the client's story before representation of the client concludes. This is consistent with the prohibition contained in Model Code DR 5-104(B) and Model Rule 1.8(d). Some courts, however, have recognized that an indigent criminal

defendant may waive this prohibition, based on the fact that media rights may be the client's only asset. *Maxwell v. Superior Ct.*, 30 Cal.3d 606, 639 P.2d 248(1982).

10.4 Representation of Multiple Clients

Another development in recent years is the aggregation of litigation. As more multi-plaintiff cases are brought, counsel must be ever vigilant against the risk of not treating each client as an individual with interests that are specific to the client. When a class action is certified, court approval of an aggregate settlement assures the settlement is fair to each class member. In the absence of such court oversight, however, the lawyer who represents more than one client must be assiduously careful that every client, even those with common interests, are properly represented. Under Paragraph 10(3), no aggregate settlement should be made unless each client provides informed consent, which requires that each be fully informed as to the nature and extent of all claims, the total settlement, and the participation of others in the settlement. An aggregate settlement can only be accepted by counsel if every client consents.

Similarly, a lawyer who represents more than one criminal defendant may not participate in an aggregate plea agreement unless all defendants have been fully informed about the existence and nature of all pleas.

11. Upholding the Honor of the Profession

(a) It is the duty of every lawyer to protect the Bar against the admission to the profession of persons who are unfit because of morals, character, education or traits of character. A lawyer should affirmatively assist courts and other appropriate bodies in promulgating, enforcing and improving the requirements for admission to the Bar.

(b) Lawyers should strive at all times to uphold the honor and dignity of the profession and to improve the administration of justice, including the method of selection and retention of judges.

(c) Every lawyer has the duty to protest by all proper means the appointment or election to the bench of persons whom the lawyer believes are not fully qualified by character, temperament, ability and experience. If the lawyer is unable to reach a considered and informed judgment about the person's qualifications for appointment or election to the bench, the lawyer must then refrain from writing, speaking or taking any other action in favor of or in opposition to that individual's appointment or election to the bench.

(d) A lawyer cannot knowingly condone perjury or subornation of perjury before any tribunal. A lawyer should report such perjury or subornation of perjury to the tribunal in which such conduct occurred.

(e) Subject only to applicable law governing disclosure of confidential information between lawyer and client, a lawyer having information that another lawyer has violated the applicable disciplinary rules must report such wrongful conduct to the appropriate professional disciplinary authority.

11.1 Overview

This Paragraph addresses four methods by which every lawyer may help assure that the law remains an honorable profession. The Trial Code aspires to be a code of conduct under which attorneys will police themselves and do their part to see to it that those who are admitted to, and remain members of, the Bar are worthy of the title “attorney at law.” Similarly, lawyers are encouraged to speak out and to take steps to ensure that those who become judges are qualified by temperament and ability to sit as triers of fact and law. Finally, this Paragraph recognizes that nothing dishonors trial practice more than the presentation of perjured testimony before the trier of fact. Therefore, lawyers may neither condone nor suborn perjury and are to report it whenever it occurs.

11.2 Admission to the Bar

Each state sets its own standards for admission to its Bar and employs Bar Examiners who are charged with determining whether a lawyer should be granted or should maintain the right to practice. Notwithstanding this, the Trial Code also recognizes that the practice of law is not a right, but a privilege and Paragraph 11(a) makes it the duty of every lawyer to protect the Bar by preventing the admission of persons who are unfit to practice law because of moral, character, or educational deficiencies. It is apparent that elements of subjectivity are involved in judging these traits but they are capable of some objective definition. Lawyers should remember that “morals” are defined by reference to principles of right and wrong and therefore lawyers should adhere to “right” principles and eschew “wrong” principles. Paragraph 11 differentiates “character” from “traits of character” and both are necessary in judging the fitness of one to be a lawyer. “Character” is defined as a complex of ethical and mental traits. “Traits of character” is something different from “character” and focuses on individual elements of character as opposed to character as a whole.

11.3 Reporting Lawyer Conduct

Model Rule 8.3 require lawyers to report others who have violated professional rules that raise “a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” Paragraph 11(e) does not include such language but rather simply states that one should report to the appropriate professional disciplinary authority whenever there is a violation of a disciplinary rule. This raises the question of whether even trivial disciplinary violations should be reported. Although when Paragraph 11 was drafted, the College knew of the “substantial” requirement in the Model Rule and did not adopt that wording, Paragraph 11(e) should probably be read to impliedly exempt trivial matters in order to avoid practical problems of enforceability. Query, however, whether any conduct sufficiently important to be addressed by a disciplinary rule may be considered insubstantial.

11.4 Appointment of Judges

Paragraphs 11(b) and (c) address the role of lawyers in the appointment of judges. A lawyer’s duty to contribute toward improving the administration of justice includes getting involved in the manner in which judges are selected and maintained. This may include efforts

to adopt non-partisan judicial selection procedures in states that still elect judges on a partisan political basis or merit selection procedures for federal judges by which lawyer and lay panels screen judicial applicants and recommend names. Other examples include efforts to improve civil and criminal procedure rules and to make judicial pay more equitable.

Paragraph 11(c) places a duty on every lawyer to “protest by all proper means” the selection or election of judges who are not fully qualified by character, temperament, ability and experience. This does not necessarily mean that a lawyer is obliged to attempt to defeat appointment of a judicial candidate without prior trial experience. Where the process used to protest judicial candidates is not confidential, adherence to this Paragraph may threaten the lawyer’s ability to fully protect a client’s interests. For instance, is it reasonable for Paragraph 11(c) to require a trial lawyer to express opposition to a candidate who may soon be sitting in judgment of a client’s trial? There is an obvious balance to strike as the lawyer’s goal must always be to do what is in the client’s best interests.

11.5 Reporting Perjury

Paragraph 11(d) prohibits a lawyer from knowingly condoning perjury or suborning perjury. The College does not define this obligation further but it can be assumed that “knowingly” means actual knowledge of the falsity of the statement. The Model Rules define “knowingly” as actual knowledge that can be inferred from the circumstances. Model Rule 1.0(f). Model Rule 3.3(a)(3) states that “A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.”

Model Rule 3.3 Comment (7), states that the duties apply to all lawyers but recognizes that criminal defense attorneys may be required to use narrative testimony in some jurisdictions. Comment (10) sets forth remedial measures including remonstrating confidentiality with the client, advising the client of the lawyer’s duty of candor to the Court and seeking client’s cooperation respecting withdrawal or correction of the false statements.

When the perjury may come from a non-party witness, a lawyer has an absolute duty not to present the perjured testimony, even against the client’s wishes.

12. Lawyer as a Witness

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

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so because subject to a conflict of interest prohibited by Rule 1.7 or Rule 1.9 of the ABA Model Rules of Professional Responsibility.

(c) A lawyer should never conduct or engage in experiments involving any use of the lawyer's own person or body except to illustrate in argument what has been previously admitted in evidence.

12.1 Overview

This Paragraph, which derives from Model Rule 3.7, reflects the profession's longstanding recognition of the utter inconsistency between the role of advocate and witness. Thus, a lawyer may not conduct the trial of a case in which the lawyer will likely testify as a witness unless compliance with the rule is justified by the triviality of the subject matter of the testimony or the significance of the detriment the lawyer's withdrawal will cause to the client. The latter exception will normally arise only if the need for the lawyer's testimony becomes apparent late in the trial preparation process.

12.2 Lawyer as a Witness

An advocate on behalf of a client cannot also appear as a witness in the client's case. The College recognizes, however, that there are times when circumstances may necessitate the lawyer also play the part of a witness. Generally, however, unless the testimony relates to a non-consequential matter, or would impose an undue hardship on the client, those exceptional circumstances will not be met. Thus, an attorney with a lengthy relationship with a client, who knows from first-hand interactions the client's mental status, may not represent that client in a conservatorship proceeding. *See State ex rel. Nebraska State Bar Ass'n v. Neumeister*, 449 N.W.2d 17 (Neb. 1989) (holding that testimony by an attorney in a guardianship case regarding his client's fitness was "substantive" and therefore violated the advocate-witness rule). On the other hand, an attorney may testify in a case to support his client's position where he had represented the client for six years in two other related suits and has intimate knowledge of the case. *See McElroy v. Gaffney*, 529 A.2d 889 (N.H. 1987) (holding that disqualification would constitute an "unreasonable hardship" in these circumstances, because the attorney was "uniquely qualified" to represent plaintiff and substantial financial hardship would result from his disqualification).

12.3 Acting as Witness in Trial by Another Lawyer in the Firm

Subparagraph 12(b), like the Rule it follows, recognizes the realities of practice in a large law firm. Some jurisdictions have not made this modification in the traditional rule, and lawyers must conform their conduct to the applicable ethical rules.

12.4 Demonstrations

The prohibition in subparagraph 12(c) against lawyers using their own bodies in experiments or demonstrations at trial is an oddity in the Trial Code, but it is a good parallel to the general rule that lawyers should never confuse the roles of advocate and witness. As the Arizona Supreme Court stated, “[A]n adversary system works best when the roles of the judge, of the attorneys, and of the witnesses are clearly defined. Any mixing of those roles inevitably diminishes the effectiveness of the entire system.” *Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 624 P.2d 296, 300 (Ariz. 1981).

13. **Relations with Opposing Counsel**

(a) The lawyer, and not the client, has the sole discretion to determine the accommodations to be granted opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client’s rights, such as extensions of time, continuances, adjournments, and admission of facts. Consequently, the lawyer need not accede to a client’s demand that the lawyer act in a discourteous or uncooperative manner toward opposing counsel.

(b) A lawyer should adhere strictly to all express promises to, and agreements with, opposing counsel, whether oral or in writing, and should adhere in good faith to all agreements implied by the circumstances or by local custom. When a lawyer knows the identity of a lawyer representing an opposing party, the lawyer should not take advantage of the opposing lawyer by causing any default or dismissal to be entered without first inquiring about the opposing lawyer’s intention to proceed.

(c) A lawyer should not participate in offering or making an agreement in which a restriction on a lawyer’s right to practice is part of the settlement of a controversy between private parties.

(d) A lawyer should avoid disparaging personal remarks or acrimony toward opposing counsel, and should remain wholly uninfluenced by any ill feeling between the respective clients. The lawyer should abstain from any allusion to personal peculiarities and idiosyncrasies of opposing counsel,

(e) A charge of impropriety by one lawyer against another in the course of litigation should never be made except when relevant to the issues of the case; provided, however, that if the impropriety amounts to a violation of applicable disciplinary rules, the lawyer should report such wrongful conduct to the appropriate professional disciplinary authority. *See* paragraph 11(e) hereof.

13.1 Overview

Paragraph 13 articulates the ideals of professionalism as applied to relations with opposing counsel. Lawyers who overstep the bounds of professionalism often justify their conduct by arguing that they are merely zealously representing their clients. This argument stems from Canon 7 of the Model Code which states “A Lawyer Should Represent a Client

Zealously Within the Bounds of the Law.” A more careful analysis of the Model Code reveals that the sentiment expressed in Paragraph 13 of the Trial Code is actually reflected in DR 7-101 entitled “Representing a Client Zealously.” The drafters of the Model Rules, perhaps cognizant of examples of overzealous representation, removed the concept of “Zealous Representation” and replaced it with the concept stated in Model Rule 1.3 of “Diligence and Promptness.” Comment [1] to Model Rule 1.3 recognizes a lawyer’s duty to act “with zeal in advocacy” but tempers that duty with “professional discretion in determining the means by which a matter should be pursued.” Model Rule 1.2 sets out in some detail the allocation of authority between client and lawyer, leaving to the lawyer the means by which the representation is to be carried out, as long as the lawyer consults the client with respect to those means. Model Rule 1.4(a) requires the lawyer to consult with the client about the means employed to seek the client’s objectives and further requires the lawyer to advise the client about limitations imposed on the lawyer’s conduct by the Rules of Professional Conduct.

13.2 Authority Reserved to the Lawyer

Paragraph 13(a) reserves to the lawyer the authority to handle all of the routine matters between opposing counsel at the lawyer’s sole discretion. Caution should be exercised by the lawyer in taking this freedom too far. A lawyer should always consult with the client about all but the most mundane aspects of representation. If a client insists on a course of conduct that violates the lawyer’s professionalism, the lawyer should refuse to follow the client’s instructions. Withdrawal from representation might even become necessary if the client insists on conduct that violates the spirit of Paragraph 13(a).

13.3 Agreements with Opposing Counsel and Compliance with Local Custom

Paragraph 13(b) requires fairness in dealing with opposing counsel. Model Rule 3.4 dealing with fairness to opposing party and counsel is not as broad as 13(b). Indeed, the drafters of the Model Rules chose to leave out entirely the previous requirements of complying with local custom contained in both ABA Canon 25 and Model Code DR 7-106(C)(5). The justification for removing this requirement was that such a requirement is too vague to be an enforceable rule of conduct. The Fellows of the ACTL believe that compliance with known local custom is an essential element of professional conduct.

13.4 Notification to Opposing Lawyer of Default or Dismissal

Paragraph 13(b) sets forth a unique requirement of notifying opposing counsel before causing any default or dismissal. Again, the idea is that if you know a lawyer represents the opposing party, you should not seek to gain a default or dismissal without first notifying that lawyer and finding out his or her intention to proceed.

13.5 Restriction on a Lawyer’s Right to Practice

Paragraph 13(c) states the traditional rule that a lawyer’s right to practice should not be restricted. The obvious reason for this rule is to maintain the freedom of choice that clients enjoy in selecting counsel. Model Code DR 2-108 and Model Rule 5.6 contain similar provisions.

13.6 Avoiding Acrimony Toward Opposing Counsel

Paragraph 13(d) encourages respectful conduct between counsel. Under the Model Code EC 7-37 expresses this same sentiment. Model Rule 3.5 simply states that a lawyer shall not “engage in conduct intended to disrupt the tribunal” and Comment (5) applies this rule to a deposition as well.

13.7 Charge of Impropriety

The first clause of Paragraph 13(e) permits a charge of impropriety when relevant to the issues of the case. An example might be a disciplinary proceeding or a malpractice case. Otherwise, counsel should not accuse the other side of impropriety unless the conduct does actually constitute a violation of applicable disciplinary rules. In that case, the matter should be reported to the appropriate authorities. Some lawyers routinely refer to improper conduct by the other side in matters such as discovery disputes. Accusing the other side of “disingenuous conduct” is very common in motion and appellate briefs. Paragraph 13(e) cautions lawyers to avoid such accusations of impropriety. Of course, when there is actual misconduct it should be reported to the appropriate authority as required by Model Rule 8.3 and Model Code DR 1-103.

14. Relations with Witnesses

(a) A lawyer should thoroughly investigate and marshal the facts. Subject to the provisions of paragraph 15 hereof and to constitutional requirements in criminal matters, a lawyer may properly interview any person, because a witness does not “belong” to any party. A lawyer should avoid any suggestion calculated to induce any witness to suppress evidence or deviate from the truth. However, a lawyer may tell any witness that he or she does not have any duty to submit to an interview or to answer questions propounded by opposing counsel unless required to do so by judicial or legal process.

(b) A lawyer should not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce. A lawyer should not advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of becoming unavailable as a witness. However, except when legally required, it is not a lawyer’s duty to disclose any evidence or the identity of any witness.

(c) A lawyer should not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witnesses’ testimony or the outcome of the case. A lawyer, however, may advance, guarantee or acquiesce in the payment of:

- (1) expenses reasonably incurred by a witness in attending or testifying;
- (2) reasonable compensation to a witness for the witness’s loss of time in attending or testifying;
- (3) a reasonable fee for the professional services of an expert witness.

(d) A lawyer may advertise for witnesses to a particular event or transaction but not for witnesses to testify to a particular version thereof.

(e) A lawyer should never be unfair or abusive or inconsiderate to adverse witnesses or opposing litigants, or ask any question intended not legitimately to impeach but only to insult or degrade the witness. A lawyer should never yield in these matters to contrary suggestions or demands of the client or allow any malevolence or prejudices of the client to influence the lawyer's action.

14.1 Overview

Paragraph 14 carries forward the theme established in Paragraph 13. A lawyer should deal fairly and professionally with discovery matters including the handling of witnesses. The Restatement of Law Governing Lawyers (the "Restatement") published by the American Law Institute in late 2000, deals with these issues in §§ 116 and 117.

14.2 Interviewing Witnesses

Paragraph 14(a) is generally covered in Model Rules 4.1 to 4.4. Under the Model Code, these matters were discussed in EC 7-27 and 7-28. DR 7-109 contains many of the ideas expressed in Paragraph 14.

14.3 A Lawyer Should Not Advise a Witness to Become Unavailable

The sentiment of Paragraph 14(b) is expressed in DR 7-109(B). Paragraph 14(b) of the Trial Code should be compared to Paragraph 7(e) of the Pretrial Code which provides that a lawyer should not obstruct another party's access to a nonparty witness or induce a witness to evade or ignore process.

14.4 Payment to Witnesses

Again, these matters were addressed specifically in the Model Code at EC 7-28 and DR 7-109(C). Such payments are also addressed in the Restatement at § 117.

14.5 Advertising for Witnesses

This section is self-explanatory and the reasons for it should be obvious.

14.6 Abusive Conduct

The Restatement addresses such conduct in § 106. The Model Code addressed these matters in EC 7-25, 7-27, and DR's 7-106(C)(2) and 7-109(B). The application to actual trial is easily understood, but note the same principle applies to discovery depositions.

15. Communicating with One of Adverse Interest

During the course of representation of a client, a lawyer should not:

(a) Communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter, unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so. Opposing parties themselves may communicate directly with each other without the consent of their lawyers, and a lawyer may encourage the client to do so, although the lawyer may not use the client as a surrogate to engage in misconduct.

(b) In case of an organization represented by a lawyer in the matter, the lawyer should not communicate concerning the matter with persons presently having a managerial responsibility on behalf of the organization, or with any person whose act or omission in connection with the 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. Unless otherwise provided by law, this rule does not prohibit communications with former employees of the organization, but during such communications the lawyer should be careful not to cause the former employee to violate the privilege attaching to attorney-client communications.

(c) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that he or she is disinterested, but should identify the lawyer's client. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

15.1 Overview

The basic rules for communicating with a person of adverse interest are set forth. Paragraph 15 first addresses dealing with a represented person. While opposing parties should be encouraged to deal directly with one another, lawyers should never contact the opposing party without permission from that party's lawyer. In the case of an organization, case law varies on this subject from jurisdiction to jurisdiction. This is recognized in the College's Code of Pretrial Conduct Paragraph 7(c), which deals with this subject. Finally, a lawyer must adequately explain to an unrepresented person the lawyer's role in the matter.

15.2 Dealing with a Represented Party

The Model Rules deal with this subject in rules 4.1 to 4.4. The Model Code dealt with the issue in DR 7-104(A)(1)(2) as well as EC 7-18 and 7-21.

15.3 Dealing with an Organization

Many lawyers are confused about the rules relating to dealing with an organization represented by an opposing counsel. Most lawyers recognize that contacting present employees is problematic. However, even certain present employees may be contacted by opposing

counsel according to a recent Ohio Ethics Opinion (Opinion 2005-3, February 4, 2005). In most jurisdictions contacting former employees of a represented organization is considered appropriate. However, even with former employees, caution must be exercised to avoid encouraging the employee to violate the attorney-client privilege. Model Rule 4.2 should be consulted. Comment (7) to that rule authorizes contact with former employees of a represented organization. Special caution should be exercised when considering contacting key former employees of an adverse party, as different standards may apply. See, e.g., *Rent-Club Inc. v. Transamerica Rental Corp.*, 811 F. Supp. 651, 657 (M.D. Fla. 1992), *aff'd* 43 F-3d 1439 (11th Cir. 1995); *Kaiser v. American Telephone & Telegraph et al.*, 2002 WL 1362054 (D. Ariz. April 5, 2002)

15.4 Dealing with Unrepresented Persons

Model Rule 4.3 and Restatement § 103 contain similar provisions to Paragraph 15(c). The underlying conduct addressed in the case of *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n.*, 121 F.R.D 284 (N.D. Tex. 1988) involved a failure to adequately notify the unrepresented person of the lawyer's role in the matter.

16. Relations with the Judiciary

(a) A lawyer should be courteous and may be cordial to a judge but should never show marked attention or unusual hospitality to a judge, uncalled for by their personal relations. A lawyer should avoid anything calculated to gain or having the appearance of gaining special personal consideration or favor from a judge.

(b) Subject to the foregoing and to the provisions of paragraph 23 hereof, a lawyer should defend or cause to be defended judges who are subjected to unwarranted and slanderous attacks, for public confidence in our judicial system is undermined by such statements concerning the character or conduct of judges. It is the obligation of lawyers, who are also officers of the court, to correct misstatements and false impressions, especially where the judge is restrained from defending himself or herself.

16.1 Overview

Paragraph 16 does not deal with courtroom decorum. Rather, this paragraph deals with attempts by lawyers to curry favor with judges. Of course, it is recognized that judges are lawyers too and all judges probably have many lawyers who are personal friends. Such friendships are not addressed in this rule. The other subject of this rule is protection of public confidence in our judicial system. Lawyers must show respect for the courts and step up to defend judges when they are unable, because of judicial ethics, to defend themselves.

16.2 Marked Attention to a Judge

Paragraph 16(a) expresses the same sentiment as set forth in Paragraphs 113 and 114 of the Restatement. Reference should also be made to Canon 2B of the Model Code of Judicial Conduct. Model Rule 3.5 and Model Code EC 7-36 address these issues.

16.3 Defending the Judiciary

Paragraph 16(b) recognizes that public confidence in our judicial system is undermined by attacks on the character or conduct of judges. Lawyers are reminded not to engage in these unwarranted attacks and to defend judges who are subject to such wrongful attacks. Model Rule 8.2(a) is addressed to lawyers who make such unwarranted attacks on the integrity of judges. But see Model Rule 8.3(b) requiring lawyers to inform the appropriate authority if the lawyer knows that a judge has committed a violation of applicable rules of conduct.

17. **Courtroom Decorum**

(a) A lawyer should conduct himself or herself so as to preserve the right to a fair trial, which is one of the most basic of all constitutional guarantees. This right underlies and conditions all other legal rights, constitutional or otherwise. In administering justice, trial lawyers should assist the courts in the performance of two difficult tasks: discovering where the truth lies between conflicting versions of the facts, and applying to the facts as found, the relevant legal principles. These tasks are demanding and cannot be performed in a disorderly environment. Unless order is maintained in the courtroom and disruption prevented, reason cannot prevail and constitutional rights to liberty, freedom and equality under law cannot be protected the dignity, decorum and courtesy which have traditionally characterized the courts of civilized nations are not empty formalities. They are essential to an atmosphere in which justice can be done.

(b) During the trial, a lawyer should always display a courteous, dignified and respectful attitude toward the judge presiding, not for the sake of the judge's person, but for the maintenance of respect for and confidence in the judicial office. The judge, to render effective such conduct, has reciprocal responsibilities of courtesy to and respect for the lawyer who is also an officer of the court. A lawyer should vigorously present all proper arguments against rulings or court demeanor the lawyer deems erroneous or prejudicial, and see to it that a complete and accurate case record is made. In this regard, the lawyer should not be deterred by any fear of judicial displeasure or punishment.

(c) In advocacy before a court or other tribunal, a lawyer has the professional obligation to represent every client courageously, vigorously, diligently and with all the skill and knowledge the lawyer possesses. It is both the right and duty of the lawyer to present the client's cause fully and properly, to insist on an opportunity to do so and to see to it that a complete accurate case record is made without being deterred by any fear of judicial displeasure or punishment. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of the attorney does not permit, much less does it demand of a lawyer for any client, violation of law or any manner of fraud or chicanery. The lawyer must obey his or her conscience and not that of the client.

(d) In performing these duties, a lawyer should conduct himself or herself according to law and the standards of professional conduct as defined in codes, rules and canons of the legal profession and in such a way as to avoid disorder or disruption in the courtroom. A lawyer should advise the client appearing in the courtroom of the kind of behavior expected and

required of the client there, and prevent the client, so far as lies within the lawyer's power, from creating disorder or disruption in the courtroom.

17.1 Overview

One of the problems trial lawyers face (and, perhaps, sometimes deserve) is a loss of public trust. The public's perception may be influenced by the gradual but inexorable corrosion of the profession's behavior as exhibited in recent public trials. Professionalism requires lawyers to be honest, respectful and courteous to litigants, opposing advocates and the Court. Lawyers, as officers of the Court, should disdain meanness, sharp practice and overly aggressive behavior. They should promote justice and the swift and inexpensive resolution of disputes. The ACTL Trial Code is intended to identify and encourage the conduct to which the best in the profession aspire, not to create the lowest floor of acceptable behavior.

17.2 Behavior in the Courtroom

Paragraph 17 nominally requires lawyers to maintain an orderly environment in the courtroom. The Trial Code's purpose, however, is not to preserve empty, historical formalities. Courtroom decorum, courtesy and dignity are essential to the conduct of a principled process for determining the truth, protecting the rights of citizens, and maintaining respect for the system of justice itself. Without such a process, the right to a fair and impartial trial cannot be guaranteed as the constitution requires.

17.3 Behavior Toward the Court

Subparagraph 17(b) places reciprocal duties on the lawyer and judge to treat each other with courtesy, dignity and respect. It also requires a lawyer to present all proper arguments not only against rulings deemed erroneous, but also against "court demeanor" that is "erroneous or prejudicial". Lawyers must make a complete and accurate record in those situations without "fear of judicial displeasure or punishment."

17.4 Independence of Counsel

Subparagraph 17(c) requires the lawyer "to present the client's cause fully and properly, to insist on an opportunity to do so and to see to it that a complete accurate case record is made without being deterred by any fear of judicial displeasure or punishment." Thus, the decision the lawyer makes in how best to present the case cannot be influenced by concerns that the judge may disapprove. A lawyer should never be dissuaded from raising appropriate objections for fear of "annoying" a judge. By the same token, counsel must balance the obligation to represent a client's interests and desires against the ethical obligations of the profession. A lawyer may not engage in improper court room tactics at the client's insistence.

18. Trial Conduct

- (a) In appearing in a professional capacity before a tribunal, a lawyer should not:

- (1) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (2) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (3) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (4) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (5) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (6) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (i) the person is a relative or an employee or other agent of a client; and
 - (ii) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.
- (7) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the lawyer's intent not to comply;
- (8) engage in undignified or discourteous conduct which is degrading to a tribunal.

(b) A lawyer shall not in an adversary proceeding communicate ex parte with a judge or other official before whom the proceeding is pending except as permitted by law.

(c) A question should not be interrupted by an objection unless the question is then patently objectionable or there is reasonable ground to believe that matter is being included which cannot properly be disclosed to the jury.

(d) A lawyer should not engage in acrimonious conversations or exchanges involving personalities with opposing counsel. Objections, requests and observations should be addressed to the court. A lawyer should not engage in undignified or discourteous conduct which is degrading to a court procedure.

(e) Where a court has already made a ruling in regard to the inadmissibility of certain evidence, a lawyer should not seek to circumvent the effect of that ruling and get the evidence before the jury by repeated questions relating to the evidence in question, although a lawyer is at liberty to make a record for later proceedings of the basis for urging the admissibility of the evidence in question.

(f) Examination of jurors and of witnesses should be conducted from the counsel table or from some other suitable distance except when handling documentary or physical evidence, or when a hearing impairment or other disability requires that the lawyer take a different position.

(g) A lawyer should not attempt to get before the jury evidence which is improper. In all cases in which a lawyer has any doubt about the propriety of any disclosures to the jury, a request should be made for leave to approach the bench and obtain a ruling out of the jury's hearing, either by propounding the question and obtaining a ruling or by making an offer of proof.

(h) A lawyer should arise when addressing or being addressed by the judge except when making brief objections or incidental comments. A lawyer should be attired in a proper and dignified manner in the courtroom, and abstain from any apparel or ornament calculated to call attention to himself or herself.

18.1 Overview

Paragraph 18 goes to the heart of the expectations that the ACTL has of its Fellows in “maintaining and improving the standards of trial practice.” Although much of Paragraph 18 is based on the Model Rules and the Model Code, subparagraphs (c), (e), (f), (g) and (h) have no counterpart in either. Local rules of courts (or even of particular judges) or local customs may require, e.g., the examination of witnesses from the podium, or define what constitutes “proper” and “dignified” attire. Generally speaking, violations of the aspirations set forth in these subparagraphs do not violate codes of ethical conduct unless they are so egregious that they disrupt the judicial process. Nevertheless, they embody courtesies at the heart of civility and decorum that enhance the judicial process.

Paragraphs 18(a)(1) through (6) are taken verbatim from Model Rule 3.4. Paragraphs 18(a)(1), (2), and (3) also have counterparts in Model Code DR 7-102. Paragraph 18(a)(4) prohibits frivolous discovery requests and requires compliance with legitimate requests by opposing counsel. This is identical to Model Rule 3.4(d), but there is no direct counterpart in the Model Code. Model Code DR 7-106(C)(7) prohibits “intentionally or habitually violating any

established rule of procedure or of evidence,” which presumably includes frivolous discovery requests and failures to comply.

Paragraph 18(a)(6) prohibits a lawyer from requesting a person to refrain from voluntarily giving relevant information to another party, although there are exceptions. *See also* Paragraph 14(a), Relations with Witnesses, discussed *supra*. This subsection mirrors Model Rule 3.4(f), but once again there is no direct counterpart in the Model Code. It should be emphasized that nothing in Paragraph 18 prohibits a lawyer from advising a person of the right to decline an interview by opposing counsel.

Paragraph 18(a)(7), which is identical to Model Code DR 7-106(C)(5), requires compliance with known local customs. This section was dropped from Model Rule 3.4 because it was thought to be “too vague to be a rule of conduct enforceable as law.” ABA, *Annotated Model Rules of Professional Conduct* (3d ed.) at 326.

Paragraph 18(d) prohibits discourteous conduct toward the court and is similar to both Model Code DR 7-106(C)(6) and Model Rule 3.5(d). It is broader than those rules in specifically proscribing “acrimonious conversations or exchanges involving personalities with opposing counsel.” While such conduct is arguably degrading to a court procedure and, therefore, a breach of ethics, it is unlikely that it would result in a disciplinary violation unless it was repeated or especially egregious. Nonetheless, the Paragraph spells out what conduct is expected in the court room, and trial attorneys should strive to do more than simply avoid disciplinary sanctions. Compliance with Paragraph 18 not only enhances respect for the system, it also makes the judicial process more efficient by eliminating unnecessary diversions.

18.2 Obstructing Access to or Altering, Destroying, or Concealing Evidence

Paragraph 18(a)(1) was adapted from Model Rule 3.4(a), which provides that a lawyer “shall not *unlawfully* obstruct another party’s access to evidence or *unlawfully* alter, destroy, or conceal a document or other material having *potentially evidentiary value*.” (Emphasis added.) The Model Code approaches this subject somewhat differently: a lawyer “shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.” Model Code DR 7-109(A); *see also* Model Code EC 7-27. A related but more general ethical obligation is described in Model Code DR 7-102(A)(3), (7), which provide that a lawyer shall not “conceal or knowingly fail to disclose that which he is *required by law* to reveal” and shall not “counsel or assist his client in conduct that the lawyer knows to be *illegal or fraudulent*.” (Emphasis added.) The Model Rule thus encompasses a broader category of evidence than the Model Code provisions, and some commentators have construed it to include items that foreseeably have some relevance to anticipated litigation. *See* Fortune, Underwood, and Imwinkelried, *Modern Litigation and Professional Responsibility Handbook: The Limits of Zealous Advocacy* (hereinafter “Fortune, Underwood, and Imwinkelried”) § 5.13 at 236 (1996). The ABA Commentary views Model Rule 3.4(a) as creating a duty to preserve records rather than a duty to disclose evidence. ABA, *Annotated Model Rules of Professional Conduct*, 5th ed., Rule 3.4 at 350 (2002).

Commentators have construed the term “unlawful” in Model Rule 3.4(a) as extending beyond purely criminal conduct to include “noncriminal conduct that constitutes fraud.” See 1 Hazard & Hodes, *The Law of Lawyering*, § 3.4:200, at 626 (1998 Supp.) (hereinafter “Hazard & Hodes”); Fortune, Underwood, and Imwinkelried, *supra*, § 5.13 at 236 (citing Hazard & Hodes); See also Model Rule 3.4(f). The Court found violations of both Model Rule 3.4(a) and Model Rule 3.4(f) in *Harlan v. Lewis*, 141 F.R.D. 107, 113-15 (E.D. Ark. 1992), *aff’d*, 982 F.2d 1255 (8th Cir. 1993), in which an attorney was sanctioned in a medical malpractice action for suggesting to a nonparty physician that he not testify, and for expressly requesting that another nonparty physician not talk with plaintiffs’ attorney.

18.3 Falsifying Evidence

Paragraph 18(a)(2), which is derived from Model Rule 3.4(b), prohibits lawyers from falsifying evidence. See also Model Code EC 7-26.

18.4 Offering an Illegal Inducement to a Witness

Paragraph 18(a)(2) is based on Model Rule 3.4(b). Both provisions bar lawyers from offering an inducement to a witness that is prohibited by law. See also, Model Code EC 7-28. ABA commentary on Rule 3.4(b) suggests that the phrase “prohibited by law” should be interpreted broadly to include not only criminal bribery but also monetary inducements that fall short of being criminal because of a missing element and those that are prohibited by the common law or non-criminal statutory provisions. See, e.g., ABA, *Annotated Model Rules of Professional Conduct*, 5th ed., Rule 3.4 at 351, 352 (2002), and the cases therein.

18.5 Knowingly Disobeying Court Rules or Orders

Paragraph 18(a)(3) is also taken from Model Rule 3.4(c). Model Code DR 7-106(A) also instructs lawyers not to disregard or advise a client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding. See also Model Code EC 7-25.

18.6 Abusing Pretrial Procedure

Paragraph 18(a)(4) of the Code broadly advises lawyers how to handle pre-trial discovery issues.

18.7 Alluding to Irrelevant or Inadmissible Evidence at Trial

Paragraph 18(a)(5) of the Code is somewhat related to Paragraph 18(g), discussed *infra*. Both provisions involve the impropriety of attempting to present improper evidence before a jury or tribunal. See also Model Rule 3.4(e); Model Code DR 7-106(C)(1); Model Code EC 7-25 (“a lawyer should not by subterfuge put before a jury matters which it cannot properly consider.”). There are times during a trial when the inexperience of an adversary or the erroneous rulings of a judge would allow a lawyer to put clearly inadmissible evidence before a jury. Under this Paragraph, the attorney should not take advantage of such opportunities.

18.8 Asserting Personal Knowledge or Stating Personal Opinion

Paragraph 18(a)(5) advises lawyers not to assert personal knowledge of facts in issue unless they are testifying, or to state personal opinions with respect to a person's credibility, culpability, or guilt, or the justness of a cause, and is similar to Model Rule 3.4(e), Model Code DR 7-106(C)(3) and (4), and Model Code EC 7-24. Counsel must always maintain the role as presenter of the facts, leaving it to the jury to decide how to interpret them. While it is of course appropriate to suggest how the evidence should be viewed, a lawyer should never state his or her own opinion of the evidence. Some professional organizations provide explicit rules of professionalism that address this prohibition, providing that it is improper, for example, for a lawyer to tell the jury "I am convinced," "I believe," "I am satisfied," or "I think," instead of saying "the evidence proves" or "the evidence is clear." *See, e.g.*, Mississippi Bar Association Professionalism Handbook ("Miss. Bar Assoc. Handbook"), Chapter Seven, V. Trial Conduct, B. Practical Observations, Numbers 3 and 4.

18.9 Requesting Persons Refrain from Voluntarily Giving Information

Paragraph 18(a)(6) was adapted from Model Rule 3.4(f)(1), which provides that a lawyer may not request a person other than a client to refrain from voluntarily giving relevant information to another party unless that person is a relative, employee, or other agent of a client and the lawyer reasonably believes the person's interests will not be adversely affected by refraining from giving such information. *See* Model Rule 3.4(f)(2). The rationale for this paragraph lies at the very heart of a lawyer's obligation to support the administration of justice by having the adversarial system discover the truth between conflicting versions of the facts. *See* Paragraph 17. By denying an adversary access to relevant facts from potential witnesses, a lawyer betrays that obligation. In criminal cases, this can have constitutional implications. In a case where a prosecutor directed an important witness not to speak to lawyers for the defense, one court reversed the convictions finding that the prosecutor's conduct "significantly interfered with the defendants' constitutionally guaranteed right to effective counsel because their counsel were denied the opportunity to adequately prepare a defense." *State v. Hammler*, 312 So. 2d 306, 309, 313 (La. 1975). Such an instruction was improper not only under Paragraph 18(a)(6), but also Paragraph 18(a)(1), discussed *infra*, because the prohibition against obstructing another party's access to evidence includes "access" to witnesses. The same prohibition applies to defense counsel. *Matter of Alcantara*, 676 A.2d 1030, 1035 (N.J. 1995) (lawyer publicly reprimanded for telling codefendants not to testify against a client in a criminal matter in violation of Rule 3.4(f)).

18.10 Failing to Comply with Known Local Customs of Courtesy or Practice

Paragraph 18(a)(7) is taken from Model Code DR 7-106(C)(5). *See also* Model Code EC 7-38. There is no direct counterpart to Paragraph 18(a)(7) in the Model Rules. The intent of the subparagraph is to promote courtesy and fairness. An adversary has the right to expect that known local practices will be observed unless advised to the contrary. Ignoring or taking advantage of those expectations is obviously unfair to the opponent and leads to retaliatory conduct that degrades the entire process.

18.11 Degrading the Tribunal

Paragraph 18(a)(8) is taken from Model Code DR 7-106(C)(6). *See also* Model Code EC 7-10. Although there is no direct counterpart to Paragraph 18(a)(8) in the Model Rules, Model Rule 3.5(d) prohibits lawyers from engaging in “conduct intended to disrupt a tribunal.” An illustration of such conduct is found in *United States v. Dowdy*, 960 F.2d 78, 82 (8th Cir. 1992) where a contempt citation against trial counsel was upheld. The Court noted that counsel’s flouting of direct orders and vivid display of disdain for the court and its rulings threatened to shift the focus of the trial from the facts to the lawyer and her relationship with the trial judge, and hampered the administration of justice by diverting the jury’s attention from the issues before it. The language used in Paragraph 18(a)(8) is very similar to that in Paragraph 18(d), which is discussed below.

18.12 Ex Parte Communications

Paragraph 18(b) prohibits ex parte communications with judges or other officials before whom an adversary proceeding is pending unless the law otherwise permits such communications. *See also* Model Rule 3.5(b), Model Code DR 7-110(B) and Model Code EC 7-35. The courtroom is supposed to be a level playing field for both sides to a dispute. Participating in ex parte communications with those who oversee the proceeding is anathema to this concept. Even when all involved are able to maintain impartiality, such communications threaten the public perception of fairness and must be avoided.

18.13 Interrupting the Examiner

Paragraph 18(c) provides that a lawyer should not interrupt a question by interposing an objection “unless the question is *then* patently objectionable or there is a reasonable ground to believe that matter is being included which cannot properly be disclosed to the jury.” (Emphasis added.) There is no direct counterpart to Paragraph 18(c) in the Model Rules.

18.14 Acrimonious Exchanges with Opposing Counsel

Paragraph 18(d) prohibits “undignified or discourteous conduct which is degrading to a court procedure” and “acrimonious conversations or exchanges involving personalities with opposing counsel.” *See* Model Code DR 7-106(C)(6). It further advises lawyers to address all objections, requests, and observations to the court. *See also* Model Code EC 7-37. Although there is no direct counterpart in the Model Rules, Model Rule 3.5(d) prohibits lawyers from engaging in “conduct intended to disrupt a tribunal.” *See* discussion of Paragraph 18(a)(8), *infra*, for an illustration of discourteous conduct that is degrading to a tribunal.

18.15 Circumventing Evidentiary Rulings

There is no direct counterpart to Paragraph 18(e) in the Model Rules. Under this Paragraph a lawyer should not attempt to circumvent the effect of an unfavorable evidentiary ruling. *See also* Model Code EC 7-37. This Paragraph incorporates concepts found elsewhere in the Trial Code, all of which are intended to assure that only properly admissible evidence is

presented to the jury. See Paragraphs 18(a)(2), 18(a)(5), and 18(g). A lawyer may, however, make a record of the basis for admitting the evidence a judge has ruled inadmissible.

18.16 Examining Witnesses

Paragraph 18(f) advises that a lawyer should generally examine jurors and witnesses from the counsel table or at some other suitable distance from the witness stand. Local court rules (or a particular judge's rules) prescribe rules for questioning witnesses or jurors and should be consulted. There is no direct counterpart to Paragraph 18(f) in the Model Rules.

Even if there is no local court rule requiring a lawyer to examine witnesses or jurors from a specified place in the courtroom, a lawyer should avoid standing so close to witnesses or jurors that his presence causes them to become uncomfortable and amounts to taking unfair advantage of the lawyer's central position in the process.

18.17 Presenting Improper Evidence Before the Jury

Paragraph 18(g) cautions lawyers that they should not attempt to present improper evidence to a jury. Doubts about the propriety of disclosing evidence to the jury should be resolved at a sidebar conference. Related provisions include Paragraph 18(a)(5) and (e), discussed *infra*. There is no direct counterpart to Paragraph 18(g) in the Model Rules but Model Code EC 7-25 provides that "a lawyer should not by subterfuge put before a jury matters which it cannot properly consider."

18.18 Addressing the Judge

Paragraph 18(h) is straightforward. Unless the court directs otherwise, lawyers should always stand whenever addressing a judge in order to show appropriate respect for the office. This Paragraph, which has no counterpart in the Model Rules or Model Code, also directs lawyers to dress "in a professional and dignified manner." A lawyer should avoid wearing anything "calculated to call attention to himself or herself." Although the interpretation of this Paragraph may be highly subjective, the wearing of accessories intended to influence a jury's deliberations should be avoided. For instance, during the trial of a medical malpractice case concerning a misdiagnosis of breast cancer, it would probably be improper for counsel to don a breast cancer awareness ribbon.

19. Relations with Jurors

(a) Before the trial of a case, a lawyer connected therewith should not communicate with or cause another to communicate with anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case.

(b) Before the jury is sworn to try the cause, a lawyer may investigate the prospective jurors to ascertain any basis for challenge, provided there is no communication with them, direct or indirect, or with any member of their families. But a lawyer should not conduct or cause, by

financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.

(c) A lawyer should disclose to the judge and opposing counsel any information of which the lawyer is aware that a juror or a prospective juror has or may have any interest, direct or indirect, in the outcome of the case, or is acquainted or connected in any manner with any lawyer in the case or any partner or associate or employee of the lawyer, or with any litigant, or with any person who has appeared or is expected to appear as a witness, unless the judge and opposing counsel have previously been made aware thereof by voir dire examination or otherwise.

(d) During the trial of a case a lawyer connected therewith should not communicate with or cause another to communicate with any member of the jury, and a lawyer who is not connected therewith should not communicate with or cause another to communicate with a juror concerning the case.

(e) The foregoing rules do not prohibit a lawyer from communicating with veniremen or jurors in the course of official proceedings.

(f) Subject to any limitations imposed by law, it is the lawyer's right, after the jury has been discharged, to interview the jurors to determine whether their verdict is subject to any legal challenge. After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer should not ask questions or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service.

(g) All restrictions imposed herein upon a lawyer should also apply to communications with or investigation of members of a family of a venireman or a juror.

(h) A lawyer should reveal promptly to the court improper conduct by a venireman or a juror or by another toward a venireman or a juror or a member of the juror's family of which the lawyer has knowledge.

(i) A lawyer should scrupulously abstain from all acts, comments and attitudes calculated to curry favor with any juror, such as fawning, flattery, actual or pretended solicitude for the juror's comfort or convenience or the like.

19.1 Overview

Paragraph 19 of the Code is largely taken from Model Code DR 7-108; in fact, subsections (a), (d), (e), (g), and (h) are identical. There is no direct counterpart in the Model Rules.

Paragraph 19(b) is taken in part from Model Code DR 7-108(e), which prohibits vexatious or harassing investigations of veniremen and jurors. However, Paragraph 19(b) also specifically acknowledges the right to conduct an investigation of a prospective juror, while this

is implicit in Model Code DR 7-108(e). There is also no direct counterpart to this paragraph in the Model Rules.

Paragraph 19(c) places an affirmative duty on trial attorneys to disclose certain information that could serve as a basis of a challenge for cause. Neither the Model Rules nor the Model Code contain a similar provision. This additional duty is designed to “safeguard the impartiality that is essential to the judicial process” Model Code EC 7-29.

Paragraph 19(f) is taken, in part, from Model Code DR 7-108(D), and specifically recognizes the right of a lawyer to interview jurors after a verdict to determine whether it may be subject to any legal challenge. This concept is implicit in Model Code DR 7-108(D), but is not addressed directly. Nothing in these rules appears to prohibit a lawyer from interviewing jurors in a professional manner after the verdict to gain information on their thinking processes or for other reasons unrelated to establishing cause to challenge the verdict. However, local rules of court (or of particular judges) may prohibit post-verdict interviews with jurors.

Paragraph 19(i) prohibits conduct that is intended to curry favor with jurors. There is no direct counterpart in either the Model Code or the Model Rules, although Model Code EC 7-36 addresses the subject. Although it is unlikely that such conduct is sufficiently well defined to be considered unethical under either the Model Code or the Model Rules, it is nevertheless unprofessional and should be avoided. Paragraph 19(i) prohibits even solicitude for the comfort of a juror who is in distress or uncomfortable. The obvious and proper response in that situation is to bring the problem to the court’s attention.

19.2 Pre-Trial Communications with Prospective Jurors

Paragraph 19(a), which is derived from Model Code DR 7-108(A), advises lawyers not to communicate directly or indirectly with prospective jurors before trial. *See also* Model Rule 3.5(c)(1) (prohibiting lawyers from seeking to influence prospective jurors “by means prohibited by law”); *and* Model Code EC 7-29 (“[t]here should be no extrajudicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case”).

19.3 Investigating Jurors

Paragraph 19(b) is derived from Model Code DR 7-108(A), (E), and (F) and permits the investigation of prospective jurors as long as the lawyer does not communicate with the prospective jurors or their family members or conduct a vexatious or harassing investigation. *See also* Model Rules 3.5, 4.4; Model Code EC 7-29, 7-30 (“Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.”) Paragraph 19(g) is derived from Model Code DR 7-108(F) and extends its restrictions on a lawyer’s communications with or investigation of jurors to family members of the jurors as well. *See also* Model Code EC 7-31.

19.4. Disclosing “Interested” Jurors

Paragraph 19(c) has no direct counterpart in either the Model Rules or the Model Code. However, its purpose is self-evident. The ability to have a fair, impartial trial is at risk if a juror has an interest in the outcome or knows the parties, witnesses or lawyers. If the lawyer is aware of this, it must be disclosed to the court.

19.5 Communications with Jurors During Trial

Paragraph 19(d), which is derived from Model Code DR 7-108(B), advises lawyers not to communicate, either directly or indirectly, with jurors during trial. *See also* Model Rule 3.5(b); Model Code EC 7-29 (“There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or a juror about the case.”) However, this prohibition of course does not apply to communications with veniremen or jurors in the course of official proceedings. Paragraph 19(e) *See* Model Code DR 7-108(C).

19.6 Interviewing Jurors After Trial

Model Code DR 7-108(D) is the basis for Paragraph 19(f), which allows lawyers to interview jurors after they are discharged but forbids questions or comments that are calculated merely to harass or embarrass a juror or to influence the juror’s actions in future cases. *See also* Model Rule 4.4; Model Code EC 7-29 (“Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected.”). In some jurisdictions, however, such communications are specifically prohibited and local rules must govern counsel’s conduct.

19.7 Revealing Juror Misconduct to the Court

Paragraph 19(h) of the Code, which is derived from Model Code DR 7-108(G), requires that lawyers promptly reveal juror misconduct to the court. *See also* Model Code EC 7-32 (“Because of his duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venireman, a juror, or a member of the family of either should make a prompt report to the court regarding such conduct.”)

19.8 Influencing a Juror

Paragraph 19(i) instructs lawyers to avoid attempts to “curry favor” with jurors. Although there is no direct counterpart to Paragraph 19(i) in the Model Rules, Model Rule 3.5(a) states that “a lawyer shall not seek to influence a judge, *juror*, *prospective juror* or other official by means prohibited by law.” (Emphasis added.) One example of an attempt to “curry favor” with the jury or to “cater to the jury” is the expression of concern for their physical comfort during a trial. *See* Mississippi Bar Association Professionalism Handbook (“MBA Handbook”), Chapter Seven, IV. Impartiality and Decorum of the Tribunal -- Rule 3.5, B. Practical Observations, Number 6 (noting that it is the duty of the trial judge, not the lawyer, to see to the jury’s comfort).

20. Diligence and Punctuality

(a) Every effort consistent with the legitimate interests of the client should be made to expedite litigation and to avoid unnecessary delays, and no dilatory tactics should be employed for the purpose of harassing an adversary or of exerting economic pressure on an adversary or to procure more fees.

(b) A lawyer should be punctual in fulfilling all professional commitments, including all court appearances and, whenever possible, should give prompt notice to the court and to all other counsel in the case of any circumstances requiring his tardiness or absence.

(c) A lawyer should make every reasonable effort to prepare thoroughly prior to any court appearance.

(d) A lawyer should comply with all court rules and see to it that all documents required to be filed are filed promptly. A lawyer should, in civil cases, stipulate in advance with opposing counsel to all non-controverted facts; should give opposing counsel, on reasonable request, an opportunity in advance to inspect all non-impeaching evidence of which the law permits inspection; and, in general, should do everything possible to avoid delays and to expedite the trial.

(e) A lawyer should promptly inform the court of any settlement, whether partial or entire, with any party, or the discontinuance of any issue.

20.1 Overview

The Trial Code encourages conduct expediting litigation and avoiding unnecessary delays, and more specifically with abstaining from dilatory tactics to harass an adversary, exert economic pressure on an adversary, or produce more fees. All trial lawyers are aware that the inherent delays, expense and inconvenience of litigation can be exploited to influence the outcome in the system of justice. Many litigants are aware of this potential and urge their lawyers to delay or overwhelm an adversary purely to pressure the adversary into a settlement. These tactics are both common and a violation of the attorney's duty to the system of justice.

20.2 Expediting Litigation

Subparagraph 20(a) catalogues and condemns some of the principal incentives to improperly exploit the litigation process: to harass or pressure an opponent or to inflate the fee to be charged for legal services. The Trial Code seeks not only to discourage these practices, but places an affirmative duty on a lawyer to expedite the process in the client's legitimate interest. This goal of expediting the process should be consistent with the "legitimate interest" of the client rather than the "interests" of the client. In other words, counsel should neither deliberately rush, nor unduly delay, a case as a tactic in litigation that does not serve a client's goal of achieving a fair result based on the law and by means consistent with the fair administration of justice.

There are times when the length of a litigation causes economic hardships to a client. The Trial Code addresses this in Paragraph 10. See *supra*.

20.3 Encouraging Punctuality

Subparagraph 20 (b) requires lawyers to be punctual for all professional commitments, which would include meetings with clients, meetings with adverse lawyers, depositions, and court appearances. The preamble to the Model Rules requires a lawyer to be prompt in all professional functions. There is no substantive difference.

20.4 Preparing Thoroughly

Subparagraph 20(c) requires a lawyer to make every reasonable effort to prepare thoroughly prior to a court appearance. It is more specific, but substantively identical to, Model Rule 1.1, which provides that competent representation requires, *inter alia*, thoroughness and preparation reasonably necessary for the representation.

20.5 Complying with Filing Requirements

Subparagraph 20(d) requires compliance with all court rules and prompt filing of all court documents. In civil cases, it also requires a stipulation as to all non-controverted facts. In criminal cases, the prosecution is required to prove all facts beyond a reasonable doubt. Therefore there is no duty on the part of defense counsel to stipulate to anything. See, e.g., *U.S. v. Delay*, 500 F.2d 1360 (8th Cir. 1974). The duty to do everything possible to avoid delays and expedite trials is repeated. It also includes a duty to give opposing counsel an opportunity on reasonable notice to inspect all “non-impeaching evidence” legally required. What constitutes “non-impeaching” evidence is not always clear. A lawyer is not expected to anticipate the need for every document that will be used to impeach testimony at trial, but merely to provide the documents that counsel believes are relevant to the case in chief of each party.

20.6 Informing the Court of Settlements

Subparagraph 20(e) requires lawyers to inform the court promptly of all settlements, full or otherwise, with one or more parties. The court must also be informed of “the discontinuance of any issue”. It is unlikely that the Paragraph is meant to be taken literally. During litigation, parties take and abandon positions with some degree of frequency. Similarly, settlement discussions often occur over long periods before they are formally finalized. Should an oral agreement in principle that has been reached by counsel trigger the duty to inform the court or does it apply only after all settlement documents have been signed? When does it apply if the settlement agreement provides for large payments in future years and the parties would like the court to retain jurisdiction? A rule of reason should be applied in construing Paragraph 20 (e) and the timing of notification of the Court.

21. Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the

representation. A lawyer should never attempt to handle a legal matter without preparation adequate in the circumstances nor neglect a legal matter entrusted to him or her. Similarly, if a lawyer knows or should know that he or she is not competent to handle a legal matter, the lawyer should not attempt to do so without associating with a lawyer who is competent to handle it.

21.1 Overview

Paragraph 21 is somewhat broader than Paragraph 20(c), which deals only with preparation for court appearances. Paragraph 21 incorporates language in Model Rule 1.1 specifying that competent representation requires legal knowledge, skill, thoroughness, and preparation. A lawyer's duty is stated negatively, i.e., never neglect a legal matter or attempt to handle a matter without adequate preparation. To fulfill this duty the Paragraph obliges the lawyer to associate with another lawyer who is competent to handle the matter.

21.2 Measure of Competence

Competence may be measured by what an average, qualified, and reasonably competent lawyer would do in similar circumstances. One holding himself or herself out as a specialist may accept a standard of care equal to the reasonable attorney practicing in that specialty. Competence is not the same as acting for the client in good faith. However, when weighing a lawyer's decisions or recommendations, good faith can be an important element. *See Restatement (Third) of Law Governing Lawyers §52 (2000).*

22. Honesty, Candor and Fairness

(a) The conduct of a lawyer before the court and with other lawyers should at all times be characterized by honesty, candor and fairness.

(b) A lawyer should never knowingly misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook. A lawyer should not in argument assert as a fact that which has not been proved, or, in those jurisdictions in which a side has the opening and closing arguments, mislead an opponent by concealing or withholding positions in an opening argument upon which the lawyer's side then intends to rely.

(c) In presenting a matter to a tribunal a lawyer should not cite authorities known to have been vacated or overruled or cite a statute that has been repealed without making a full disclosure to the tribunal and counsel, and the lawyer should disclose legal authority in the controlling jurisdiction known to be directly adverse to the position of the client and which is not disclosed by opposing counsel, and, the identities of the clients the lawyer represents and, when required by court rule, of the persons who employed him or her.

(d) A lawyer should be extraordinarily careful to be fair, accurate and comprehensive in all ex parte presentations and in drawing or otherwise procuring affidavits.

(e) A lawyer should never attempt to place before a tribunal, jury, or public evidence which the lawyer knows is clearly inadmissible, nor should the lawyer make any remarks or statements which are intended improperly to influence the outcome of any case.

(f) A lawyer should not propose a stipulation in the jury's presence unless the lawyer knows or has reason to believe the opposing lawyer will accept it.

(g) A lawyer should never file a pleading or any other document known to be false in whole or in part.

(h) A lawyer should not disregard or circumvent or advise a client to disregard or circumvent a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but a lawyer may take appropriate steps in good faith to test the validity of such rule or ruling.

(i) A lawyer who receives information clearly establishing that the client has, in the course of the representation, perpetrated a fraud upon a tribunal, should promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer should reveal the fraud to the affected tribunal. If a lawyer receives information clearly establishing that a person other than the client perpetrated a fraud upon a tribunal, the lawyer should promptly reveal the fraud to the tribunal.

22.1 Overview

This paragraph emphasizes the importance of an attorney to exercise professional judgment in litigation, as well as honesty, candor, and fairness. Also, the Paragraph explains the attorney's duty to not falsify legal sources or misrepresent information to the court. Finally, the Paragraph stresses that attorneys should never submit evidence that they know is inadmissible.

22.2 Honesty

Subparagraph 22(a) requires lawyers to be honest, candid, and fair with both the court and other lawyers at all times. Does honesty with other lawyers mean that any "gamesmanship" in settlement negotiations is improper? The answer is "no," at least where the conduct is recognized and understood as customary.

22.3 Citing Legal Sources

Lawyers are prohibited from misstating the contents of written papers, legal authorities, witness testimony, argument of opposing counsel and facts in issue. Lawyers should not withhold arguments during opening statements that they intend to make in closing argument in order to mislead an opponent. Lawyers have a duty not to cite an overruled case or repealed statute without full disclosure. Controlling authority that is directly adverse to one's client, if not disclosed to the tribunal by opposing counsel, must be disclosed to the tribunal and to opposing counsel. A lawyer must also disclose the identity of clients and, if required by court rule, the person who employed the lawyer.

22.4 Ex parte Communications with the court

Subparagraph 22(d) exhorts counsel to be “extraordinarily careful” to be “fair, accurate and comprehensive” in ex parte communications with a court. Being “comprehensive” probably requires presenting adverse facts to the tribunal to ensure fairness during the trial.

22.5 Preparation of affidavits

The last part of subparagraph 22(d) requires extraordinary care in drafting or otherwise procuring affidavits to be fair, accurate, and comprehensive.

22.6 Inadmissible evidence

Subparagraph 22(c) requires that a lawyer “never” attempt to introduce evidence known by the lawyer to be “clearly” inadmissible. This provision is not violated if the lawyer has a good faith “nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law. Cf. F.R.Civ.P. 11(b)(2). Nor is it violated by technically inadmissible but nonprejudicial testimony that is intended to help move a trial along. A lawyer is also admonished not to make statements that are “intended improperly” to influence the outcome of a case. This can be particularly difficult in a case subject to dueling leaks and “not for attribution” statements in politicized cases. Nonetheless, the Trial Code expects such conduct of its Fellows.

22.7 Stipulations

Subparagraph 22(f) prohibits a lawyer from proposing a stipulation in the jury’s presence unless the lawyer believes opposing counsel will agree to it.

22.8 Pleadings

Subparagraph 22(g) enjoins a lawyer not to file any pleading or other document that is known to be false in whole or in part. This is a specific application of the general injunction in Paragraph 22(a) to be honest, candid, and fair, and is similar to other specific applications in subparagraphs 22(b), 22(c) and 22(d).

22.9 Following Rulings

Subparagraph 22(h) requires counsel not to circumvent or disregard a rule or ruling of a tribunal or to advise a client to do so. This does not mean that an attorney may not question or challenge the validity of a rule or ruling. Rather, it encourages counsel to test questionable rulings by “appropriate steps.”

22.10 Reporting improper conduct

Subparagraph 22(i) requires a lawyer to take steps to have a client or non-client rectify a fraud upon a tribunal, or to disclose the fraud to the tribunal if the lawyer has information that clearly establishes it. There appears to be no time limitation on this duty and the duty is

presumably perpetual. Compare to Model Rule 3.3, which sets forth a similar duty that only continues to “the conclusion of the proceeding.” Model Rule 3.3(C).

23. Publicity Regarding Pending Litigation

Because a lawyer should try the case in court and not in the newspapers or through other media, a lawyer should not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

23.1 Overview

Paragraph 23 is taken from Model Rule 3.6(a). The College has always deemed it a fundamental principle of trial advocacy that lawsuits should be decided in courts of law by judges and juries on the basis of properly admitted evidence, rather than in the “court” of public opinion on the basis of “evidence” that often has dubious evidentiary value.

23.2 Responding to Publicity

The College has not adopted as part of its Trial Code the so-called “right of response” in Model Rule 3.6(L). It permits a lawyer to respond in a measured manner to adverse publicity about a client. This seems to embody an element of fair play, but the College is concerned that it would encourage a back and forth colloquy and could make matters worse. *See generally American College of Trial Lawyers, Report on Fair Trial of High Profile Cases*, pp. 7-8 (1998).

24. The Trial Lawyer’s Duty in Summary

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render, any service or advice encouraging or inviting disrespect of the law, whose ministers we are, or of the judicial office, which we are bound to uphold. Much less should a lawyer sanction or invite corruption of any person or persons exercising a public office or private trust, nor should a lawyer condone in any way deception or betrayal of the public. When indulging in any such improper conduct, the lawyer invites stern and just condemnation. Correspondingly, a lawyer advances the honor of the profession and the best interests of the client when he or she encourages an honest and proper respect for the law, its institutions and ministers. Above all, a lawyer will find the highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest person and as a patriotic and loyal citizen.

24.1 Overview

This is an aspirational statement that summarizes the duties of trial lawyers in a general sense. It does not appear in the Model Rules. It rightly depicts the practice of law as a profession and a calling. The Trial Code is intended to guide lawyer conduct in trial practice. But it is the incessant devotion to the higher principles of trust, candor, honesty, loyalty and public duty

upon which the lawyer’s privileges and responsibilities are based. In an important sense, this statement is the heart of what a trial lawyer must aspire to achieve every day.

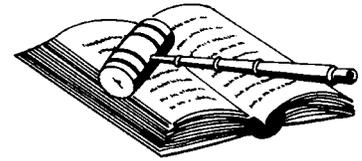
25. Scope of the Code of Trial Conduct

This Code of Trial Conduct is intended to provide guidance for a lawyer’s professional conduct except insofar as the applicable law, code or rules of professional conduct in a particular jurisdiction require or permit otherwise. It is a guide for trial lawyers and should not give rise to a cause of action, create a presumption that a legal duty has been breached, or form the basis for disciplinary proceedings not called for under the applicable disciplinary rules.

25.1 Overview

Paragraph 25 is intended to discourage the growing trend to introduce violations of disciplinary rules as a basis for liability in legal malpractice cases. Some courts have held that nonconformance to a disciplinary rule shows a breach of the lawyer’s standard of care, even though a breach of the rule itself would not impose liability. Other courts, however, adhere to the sentiment found in the last sentence of Paragraph 25. See, e.g., *Greening v. Klamen*, 652 S.W.2d 730, 734 (Mo. Ct. App. 1983) (holding “that the disciplinary rules alone do not form a basis for a cause of action in legal malpractice”); *Bross v. Denny*, 791 S.W.2d 416, 420 (Mo. Ct. App. 1990) (holding that “introduction of the disciplinary rules in legal malpractice cases as evidence of the standard of care is prohibited”). Neither the Code nor the comments contained herein undertake to define standards of civil liability of lawyers for professional conduct. The Code is a guide for trial lawyers and therefore is not intended to give rise to a private cause of action or create a presumption that a legal duty has been breached.

AMERICAN COLLEGE OF TRIAL LAWYERS



Code of Trial Conduct Teaching Supplement

Problem 1

An attorney has represented an elderly woman for many years and has frequently observed her. After the woman moved to a nursing home, her relatives petitioned for a conservatorship, alleging that she had become mentally incompetent. The attorney could be an important witness in that proceeding given his observations of her physical and mental condition.

Can the attorney properly represent his elderly client in resisting appointment of a conservator?

Answer to Problem 1

Paragraph 12(a) of the ACTL Code of Trial Conduct provides:

12. Lawyer as a Witness
 - (a) A lawyer should not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
 - (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.

Paragraph 12(a), derived from ABA Model Code of Professional Responsibility (“Model Code”) 3.7, reflects the profession’s longstanding recognition of the inconsistency between the role of advocate and witness. This inconsistency mandates that an advocate on behalf of a client not also appear as a witness in the client’s case. While Paragraph 12(a) provides three exceptions to the general rule, the exceptions concern either non-consequential subject matter, or apply only in exceptional circumstances where a substantial hardship to the client would result.

Problem 1 involves a conservatorship proceeding. The facts of the problem indicate that the lawyer’s testimony would most likely concern the client’s mental status. This is substantive testimony and does not fall into one of the Paragraph 12(a) attorney-witness exceptions. If the lawyer believes that he is likely to testify, it would violate the advocate-witness rule for the attorney to represent his elderly client in the conservatorship proceeding. *See State ex rel. Nebraska State Bar Ass’n v. Neumeister*, 449 N.W.2d 17 (Neb. 1989) (finding that “[i]t is against sound principles of professional ethics for one who knows that he is to be called as a material witness in a case to appear as attorney therein.”)

Problem 2

An attorney must testify in a case to support his client's position. He has represented the client for six years in two other related suits and has intimate knowledge of the case.

Can the attorney properly represent the client in the case?

Answer to Problem 2

Paragraph 12(a)(3) of the ACTL Code of Trial Conduct provides:

12. Lawyer As A Witness

- (a) A lawyer should not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
 - (3) disqualification of the lawyer would work substantial hardship on the client.

Therefore, while it is generally unacceptable for an attorney to both represent a client and testify at the client's trial, an exception exists if the attorney's disqualification would lead to substantial hardship. Generally, this exception arises only if the need for the lawyer's testimony becomes apparent late in the trial preparation process.

The case of *McElroy v. Gaffney*, 529 A.2d 889 (N.H. 1987), from which this problem was derived, provides an illustration of what constitutes substantial hardship. In *McElroy* the Court held that an attorney may testify in a case to support his client's position where he had represented the client for six years in two other related suits and had intimate knowledge of the case. The Court held that disqualification would constitute an "unreasonable hardship," because the attorney was "uniquely qualified" to represent the plaintiff and substantial financial hardship would result from his disqualification.

In this problem, the attorney can likely represent the client. If the attorney were disqualified, it may place a "substantial hardship on the client," since the attorney had intimate knowledge of the client's case.

Problem 3

A lawyer represents a plaintiff in a lawsuit. The plaintiff has instructed the lawyer to pursue the case very aggressively. The defendant's lawyer requests an extension of time to answer the complaint. The plaintiff tells her lawyer that no extension should be granted to the defendant.

What should the plaintiff's lawyer do?

Answer to Problem 3

Paragraph 13(a) of the ACTL Code of Trial Conduct provides:

13. Relations With Opposing Counsel
 - (a) The lawyer, and not the client, has the sole discretion to determine the accommodations to be granted opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admission of facts. Consequently, the lawyer need not accede to a client's demand that the lawyer act in a discourteous or uncooperative manner toward opposing counsel.

Paragraph 13 articulates the ideals of professionalism as applied to relations with opposing counsel. Charles Wolfram, in his oft-cited treatise *Modern Legal Ethics*, discusses this issue at section 11.5 entitled "Advocates and Adversary Lawyers." At page 610 he states:

"Mutual respect, candor, and fairness between opposing lawyers can be very helpful in avoiding unnecessary and unproductive disputes about minor or diversionary matters. By professional tradition in many communities, lawyers will accept the word of other lawyers virtually with the same affect as a bond or similarly formal undertaking. If such agreements are breached without justification, and particularly if the circumstances suggest that the breaching lawyer has dealt sharply with his or her adversary, courts have occasionally imposed discipline." Wolfram, Charles. *Modern Legal Ethics*. Section 11.5: Advocates and Adversary Lawyers, p. 610.

Paragraph 13(a) reserves to the lawyer the authority to handle all routine matters with opposing counsel at the lawyer's sole discretion, including extensions of time and requests for continuances. Attorney's are cautioned that Model Rule 1.4(a) requires consultation with clients about all but the most mundane aspects of representation. If a client insists on a course of conduct that violates the lawyer's professionalism, however, the lawyer should refuse to follow the client's instructions. Withdrawal from representation might even become necessary if the client insists on conduct that violates the spirit of Paragraph 13(a).

In this problem, an extension of time is an accommodation that should be granted to the opposing party. If the client insists on taking a course of conduct that violates Paragraph 13, withdrawal may become necessary.

Problem 4

A lawyer represents a hospital in a very serious medical malpractice case. The plaintiff's lawyer has been a very effective advocate for his client. He has conducted thorough discovery and he knows more about the operation of the hospital than most of the people who work there. The hospital administrator instructs the defense lawyer to settle the case and obtain an agreement from the plaintiff's lawyer never to bring another case against the hospital.

May the two lawyers make such an agreement?

Answer to Problem 4

Paragraph 13(c) of the ACTL Code of Trial Conduct provides:

13. Relations With Opposing Counsel
 - (c) A lawyer should not participate in offering or making an agreement in which restriction on a lawyer's right to practice is part of the settlement of a controversy between private parties.

Paragraph 13(c) is based upon Model Rule 5.6(b) and prohibits the practice of conditioning settlement with a plaintiff on the agreement of plaintiff's counsel not to represent defendant(s) other plaintiffs in similar litigation against the defendant. This paragraph articulates the traditional rule that a lawyer's right to practice should not be restricted. The reason for this rule is to maintain the freedom of choice that clients enjoy in selecting counsel.

This problem is a classic example of an agreement to restrict the plaintiff's lawyer's right to practice. In this scenario, the defense lawyer should refuse to present such a condition in the first place. If such a proposal is presented to the plaintiff's attorney, he should decline any provision that would prohibit his acceptance of a future client's claim against the hospital.

Problem 5

A defense attorney in a criminal case meets with a witness before trial. She tells the witness that she should not show up for trial even though she is under subpoena. The witness does show up at trial and the defense lawyer attempts to horseshed her in the hallway before she goes on the stand.

Is the attorney's conduct proper?

Answer to Problem 5

Paragraph 14(b) of the ACTL Code of Trial Conduct provides:

14. Relations With Witnesses
 - (b) A lawyer should not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce. A lawyer should not advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of becoming unavailable as a witness. However, except when legally required, it is not a lawyer's duty to disclose any evidence or the identity of any witness.

Paragraph 14 carries with it the same theme of professionalism articulated in Paragraph 13. This paragraph mandates that a lawyer deal fairly and professionally with all discovery matters, including the handling of witnesses. Paragraph 14(b) is taken verbatim from the ABA Model Code of Professional Responsibility ("Model Code") DR 7-109(A) and (B). Additionally, this Paragraph should be compared to Paragraph 7(e) of the American College of Trial Attorneys Pretrial Code, which provides that a lawyer should not obstruct another party's access to a nonparty witness or induce a witness to evade or ignore process.

In this problem, it was improper for the lawyer to tell the witness to ignore a subpoena. If the witness were not subpoenaed then, according to Charles Wolfram, there still may be a question about a lawyer's freedom to tell a witness that the witness could go home from a trial. *See State v. Martindale*, 215 Kan. 667, 527 P.2d 703 (1974), cited at Wolfram, *id.* at 647. Regarding horseshedding or outright coaching, the lawyer must exercise great care. Some judges will prohibit lawyers from speaking with a non-client witness during a recess in the testimony to guard against improper influence. *See Wolfram* at 647-649.

Problem 6

A defense lawyer is deposing the plaintiff in a birth control device case. He asks her about her entire sexual history not for any legitimate purposes of discovery but rather to embarrass her in front of her husband.

Is this line of questioning proper?

Answer to Problem 6

Paragraph 14(e) of the ACTL Code of Trial Conduct provides:

14. Relations With Witnesses

- (e) A lawyer should never be unfair or abusive or inconsiderate to adverse witnesses or opposing litigants, or ask any question intended not legitimately to impeach but only to insult or degrade the witness. A lawyer should never yield in these matters to contrary suggestions or demands of the client or allow any malevolence or prejudices of the client to influence the lawyer's action.

Paragraph 14 requires fairness and professionalism in the handling of witnesses. A lawyer must function in a manner that is calculated to seek the truth and should not ask questions for the sole purpose of insulting or degrading a witness.

Unfortunately, the Rules of Civil Procedure in federal court and most corresponding state rules do not adequately address the problem of harassing and embarrassing witnesses during discovery. Presumably, such harassment during trial would be swiftly dealt with by the trial judge. But trial judges do not generally have enough time to monitor everything that goes on during the discovery process. As a result, trial lawyers must themselves police such conduct.

While it may be proper to inquire about the sexual history of the plaintiff in certain types of litigation, this problem assumes that the purpose is merely to embarrass the plaintiff. Therefore the conduct is contrary to the spirit of Paragraph 14(e).

Problem 7

An attorney who appears regularly before a probate judge, invites that judge to go on an elk hunting trip to Montana. The attorney and the judge are not social friends. The attorney offers to pick up the tab for the week in Montana.

Is the attorney's conduct proper?

Answer to Problem 7

Paragraph 16(a) of the ACTL Code of Trial Conduct provides:

16. Relations With The Judiciary

- (a) A lawyer should be courteous and may be cordial to a judge but should never show marked attention or unusual hospitality to a judge, uncalled for by their personal relations. A lawyer should avoid anything calculated to gain or having the appearance of gaining special personal consideration or favor from a judge.

Paragraph 16(a) addresses any attempts by lawyers to gain favor with judges. While it is recognized that many judges have lawyers who are personal friends, the subject of this provision is the protection of personal confidence in the judicial system.

In this problem, even if the judge and the attorney were social friends, the conduct would still be beyond what is proper. If the attorney and the judge are close friends, then it is proper for the attorney to buy a reasonable wedding gift for the judge's daughter. But regularly paying for the judge's golf game might be improper for even a close friend. It often comes down to a question of degree. To avoid ever having to answer the question, judges and lawyers should be very careful in their relationships with each other.

Problem 8

A client comes to visit an attorney to discuss a new case. The client is a defendant in a criminal case that has been assigned to Judge Jones. The client tells the attorney that he has heard that Judge Jones can be bought.

What actions should the attorney take?

Answer to Problem 8

Paragraph 16(b) of the ACTL Code of Trial Conduct provides:

16. Relations With The Judiciary
 - (b) Subject to the foregoing and to the provisions of Paragraph 23 hereof, a lawyer should defend or cause to be defended judges who are subjected to unwarranted and slanderous attacks, for public confidence in our judicial system is undermined by such statements concerning the character or conduct of judges. It is the obligation of lawyers, who are also officers of the court, to correct misstatements and false impressions, especially where the judge is restrained from defending himself or herself.

Paragraph 16(b) recognizes that public confidence in our judicial system is undermined by attacks on the character or conduct of judges. Lawyers must show respect for the courts and are not to engage in unwarranted attacks on the judiciary. Lawyers must also step up to defend judges when they are unable, because of judicial ethics, to defend themselves from wrongful attacks. The duty to defend is qualified by the provisions of Paragraph 23 regulating publicity about pending litigation and requiring that cases are tried in the courts and not in the media. The duty “to correct misstatements and false impressions” appears to be broader than the duty to defend judges against “unwarranted and slanderous” attacks and may be applicable even when the statement is partly true.

In this problem, the attorney should immediately clear up the client’s impression of the judicial system. The attorney should do this forcefully and should in no way feed the client’s cynicism about the judicial system. Milder forms of this discussion occur every day. There is a lot of cynicism about our public institutions but it is very important that attorneys not contribute to that cynicism. Even in casual cocktail conversation attorneys should not buy into the perceptions of others about corruption in the legal system. However, in those rare cases where there is corruption, attorneys should not hesitate to report judges to the appropriate prosecutor or disciplinary authority.

Problem 9

The trial judge obviously is irritated that the jury trial is consuming more time than the court had anticipated in its scheduling. When annoyed, the judge is known to make petulant rulings or to belittle counsel in front of the jury. The judge informally announces to counsel that the examination of a key witness will be limited to one half hour on direct and twenty minutes on cross. The witness has important testimony that cannot be fully or persuasively developed in less than an hour. A determined objection to the ruling on the record will likely influence the substantive rulings the judge makes in the case.

Should the lawyer be deterred by fear of judicial displeasure or punishment directed to the lawyer, or rather should the lawyer be motivated by the effects on the outcome of the client's case?

Answer to Problem 9

Paragraph 17(b) of the ACTL Code of Trial Conduct provides:

17. Courtroom Decorum
 - (b) During the trial, a lawyer should always display a courteous, dignified and respectful attitude toward the judge presiding, not for the sake of the judge's person, but for the maintenance of respect for and confidence in the judicial office. The judge, to render effective such conduct, has reciprocal responsibilities of courtesy to and respect for the lawyer who is also an officer of the court. A lawyer should vigorously present all proper arguments against rulings or court demeanor the lawyer deems erroneous or prejudicial, and see to it that a complete and accurate case record is made. In this regard, the lawyer should not be deterred by any fear of judicial displeasure or punishment.

Paragraph 17 requires lawyers to maintain an orderly environment in the courtroom. Paragraph 17(b) requires both judges and lawyers to treat each other with courtesy, dignity, and respect. This includes the requirement that lawyers present all proper arguments not only against rulings deemed erroneous, but also against "court demeanor" that is "erroneous or prejudicial." A lawyer must make a complete and accurate record without the fear of punishment.

Therefore in this problem, the attorney should be motivated by the effects on the outcome of the client's case and not by the fear of "judicial displeasure or prejudice." The attorney should make the objection in order to make a complete and accurate record for the client.

Problem 10

A lawyer represents the defendant in a personal injury action. The plaintiff was driving past defendant's home when an unidentified object came through his open window and struck him in the eye, causing a serious injury. Defendant's eleven-year-old son was allegedly operating a lawn mower near the time of plaintiff's injury. A representative of the defendant's insurance company learns that, on the day of plaintiff's injury, defendant's son and a friend had both mowed the lawn before noon, and later shot a BB gun across the road. The lawyer reviews the contents of the insurance claim file, which contains an account of the BB gun incident and two photographs of the BB gun, but concludes that this information should not be produced because the BB gun does not relate to the civil action as described in the complaint.

During pre-trial discovery, plaintiff requests production of all photographs "which in any manner relate to the lawsuit" and submits an interrogatory inquiring about photographs that were taken as part of the investigation. During plaintiff's deposition, he reiterates his belief that a rock struck his eye. Defendant's attorney responds that all photographs will be produced, but he does not identify or produce the BB gun photos.

Did the lawyer violate the ethical standards governing the production or disclosure of evidence to opposing counsel?

Answer to Problem 10

Paragraph 18(a)(1) of the ACTL Code of Trial Conduct provides:

18. Trial Conduct

- (a) In appearing in a professional capacity before a tribunal, a lawyer should not:
 - (1) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

Additionally, Paragraph 18(a)(4) provides:

- (a) In appearing in a professional capacity before a tribunal, a lawyer should not:
 - (4) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

Paragraph 18 goes to the heart of the expectations that the ACTL has of its Fellows in “maintaining and improving the standards of trial practice,” and embodies courtesies at the heart of civility and decorum that enhance the judicial process. Additionally, both 18(a)(1) and 18(a)(4) are taken from Model Rule 3.4.

The facts of this problem are from *Mississippi Bar v. Land*, 653 So.2d 899, 909 (Miss. 1994). In deciding this case, the Mississippi Supreme Court found that plaintiff’s discovery requests encompassed the material that defense counsel failed to reveal, and that defense counsel’s motion for a protective order was not filed until *after* plaintiff moved to compel discovery. The court noted that it was not up to the lawyer to determine whether the material was privileged and that he should have objected and left the matter to the court to decide. *Id.* at 907. In a strongly worded dissent, the presiding judge stated this “rewards those that draft broad, vague and sweeping discovery requests and punishes the attorney who interprets those broad discovery requests narrowly.” *Id.* at 910. The Court ultimately decided that the lawyer’s conduct in concealing evidence and misleading opposing counsel warranted a one-year suspension from the practice of law. *Id.* In *Abrahamson v. Trans-State Express*, 92 F.3d 425; 1996 U.S. App. LEXIS 20114 (6th Cir. 1996), the failure of an attorney to disclose a statement by a driver who was involved in a fatal accident led to a six-month suspension. *See Cincinnati Bar Ass’n v. Marsick*, 81 Ohio St. 3d 551, 692 N.E.2d 991 (1998) (Ohio’s Supreme Court held that attorney’s suppression of evidence when responding to interrogatories during discovery was misconduct warranting sanction of suspension of practice of law for six months.).

The lawyer’s actions in this problem also are contrary to Paragraph 18(a)(4). This Paragraph prohibits frivolous discovery requests and requires compliance with legitimate requests by opposing counsel. As described by the Mississippi Supreme Court, the lawyer’s conduct did not fulfill the lawyer’s ethical obligation under Paragraph 18(a)(4) to “make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party.” The lawyer made no effort to comply with the interrogatories and document requests regarding photographs. Although the lawyer responded to plaintiff’s discovery request in accordance with his narrow construction of the complaint, it is highly debatable whether that construction was reasonably justified. Plaintiff’s pleading allegations were made “upon information and belief,” and plaintiff was denied access to information from which he could have learned of an alternative theory of liability.

Problem 11

A judge rules at trial that a particular piece of evidence, prejudicial to the lawyer's client, is inadmissible. Opposing counsel nevertheless asks two questions about the evidence from different angles, in an apparently deliberate attempt to get improper evidence before the jury. Determined not to allow a reference to the objectionable evidence for a third time, the lawyer anticipates the next question and objects before it is completed.

Did the lawyer act ethically by objecting to opposing counsel's question in this manner?

Answer to Problem 11

Paragraph 18(c) of the ACTL Code of Trial Conduct provides:

18. Trial Conduct
 - (c) A question should not be interrupted by an objection unless the question is then patently objectionable or there is reasonable ground to believe that matter is being included which cannot properly be disclosed to the jury.

Ordinarily a lawyer should not interrupt another lawyer's question to a witness. However, opposing counsel in the problem demonstrated a total lack of regard for the trial court's evidentiary ruling, demonstrated by opposing counsel's persistence in the objectionable line of questioning. Under these circumstances, a lawyer has reasonable grounds to believe that opposing counsel is including evidence that cannot properly be disclosed to the jury. The first attorney may properly object to the question before the damage is done.

Problem 12

The prosecutor, clerk of court, court reporter, and sheriff are in the courtroom with the jury venire before *voir dire* begins on the morning of trial in a criminal case involving possession of cocaine with the intent to distribute. The defendant, his counsel, and the trial judge have not yet entered the courtroom. After the clerk of court greets the jury venire and tells them that “we appreciate coming to jury service,” the prosecutor addresses the jury as follows:

We’re glad to have you and we do appreciate you. I know you all would rather be doing something else, but I hope you find it a rewarding experience. You’re the backbone of our system, and you make it work, and that’s the truth. And like I say, I hope it’s not too much of an inconvenience. If you do feel you have genuine hardships, then you should talk to the judge about that. Again, we appreciate having you.

Are these comments appropriate?

Answer to Problem 12

Paragraph 19(a) of the ACTL Code of Trial Conduct provides:

19. Relations With Juries
 - (a) Before the trial of a case, a lawyer connected therewith should not communicate with or cause another to communicate with anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case.

Paragraph 19(a) is derived from Model Code DR 7-108(A) and advises lawyers not to communicate directly or indirectly with prospective jurors before trial. *See also* Model Rule 3.5(c)(1) (prohibiting lawyers from seeking to influence prospective jurors “by means prohibited by law”); *and* Model Code EC 7-29 (“[t]here should be no extrajudicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the

In this problem, the comments made by the prosecutor are clearly wrong according to Paragraph 19(a). The jury venire has been summoned to try a case in which the prosecutor represents the state. It is improper to address the jury in this manner out of the presence of the judge and opposing counsel, and outside the context of *voir dire*. In the case from which the hypothetical is derived, the court determined that the *ex parte* communications with the prospective jurors were “clearly forbidden by Rule 3.5(b) of the Rules of Professional Conduct.” *State v. Washington*, 626 So.2d 841, 843 (La. App. 2d Cir. 1993). The court declared a mistrial based on the prosecutor’s misconduct.

Problem 13

A lawyer completes a criminal case in which his client has been found guilty. Jurors have also been selected to try another criminal case in which the same attorney represents the defendant. As the attorney is leaving the courthouse after the verdict, he sees two jurors who had served in the case. He approaches them to determine how he can improve his trial skills, and they talk about the concluded case for ten minutes before a third juror approaches. The third juror, who served on the concluded case and has also been selected to serve on the new case, attempts to join the group's discussion. The lawyer replies that he may do so as long as he does not talk about the new case, and the group discussion about the concluded case continues for another ten minutes. The lawyer discusses his view of a lawyer's role in defending a person he knows to be guilty, and the third juror asks the lawyer questions about his background and legal training.

Is the discussion with the third juror appropriate under relevant ethical standards?

Answer to Problem 13

Paragraph 19(d) of the ACTL Code of Trial Conduct provides:

19. Relations With Jurors

- (d) During the trial of a case a lawyer connected therewith should not communicate with or cause another to communicate with any member of the jury, and a lawyer who is not connected therewith should not communicate with or cause another to communicate with a juror concerning the case.

Paragraph 19(d) advises lawyers not to communicate, either directly or indirectly, with jurors during trial.

Based upon Paragraph 19(d), the discussion in this problem is clearly improper. The third juror has been selected to try a case in which the attorney represents the defendant, and his participation in the group's discussion with the lawyer clearly contravenes Paragraph 19(d). In the case from which the hypothetical is derived, the Supreme Court of South Carolina found that the lawyer's action violated South Carolina DR 7-108(B)(1), *inter alia*, and warranted a public reprimand. *Matter of Delgado*, 279 S.C. 293, 306 S.E.2d 591, 596 (1983), *cert. denied*, 464 U.S. 1057 (1984). Rejecting as invalid the lawyer's claim that he was faced with a "Hobson's choice" because he risked offending the juror if he refused to converse with him, the court recommended that a lawyer in this situation "politely but immediately excuse himself from a conversation with (or one joined by) a sitting juror or 'with anyone he knows to be a member of the venire from which the jury will be selected for the trial of [a] case' in which he is counsel." *Delgado*, 306 S.E.2d at 593 (citing South Carolina DR 7-108(A) and (B)).

Paragraph 19(d) and South Carolina DR7-108(B)(1) absolutely prohibit a lawyer connected with a case from communicating with jurors even if the communication is not about the case. The court in *Delgado* found that the wording of South Carolina DR 7-108(B)(1) “could not be less ambiguous.” *Id.* at 593. Although the lawyer and jurors did not discuss the case for which the third juror had been selected, the court noted that South Carolina DR 7-108(B) was intended “not only to prevent an intentional attempt to bias or prejudice a juror but to prevent the appearance of impropriety and the possibility of one attorney gaining advantage in a trial by befriending or becoming intimate with a juror through ‘innocent’ conversation.” *Id.* at 593. In this case, the witness who reported the incident had overheard the lawyer telling the three jurors that the “tables were stacked against the Defense because the Prosecution had such resources to work with to make a case.” *Id.* This comment could be viewed as an intentional attempt to bias a juror by gaining sympathy for the defense.

Problem 14

A lawyer represents a plaintiff in a wrongful death action against two doctors and the medical center where the doctors performed the allegedly negligent operation on plaintiff's wife. On the evening of the third day of jury deliberations, one of the jurors telephones a vascular surgeon at a local hospital in order to ask questions about issues in the case. The juror also tells the surgeon that the jury is going to find in favor of one of the doctors, and that she is the swing vote with regard to the other doctor and the medical center. The surgeon relays this information to opposing counsel, who immediately contacts the trial court. However, opposing counsel does not tell the trial court or plaintiff's counsel what the juror said about the likely verdict.

Does opposing counsel's failure to inform the court and plaintiff's counsel about the content of the juror's phone call constitute an ethical violation?

Answer to Problem 14

Paragraph 19(h) of the ACTL Code of Trial Conduct provides:

19. Relations With Jurors

- (h) A lawyer should reveal promptly to the court improper conduct by a venireman or a juror or by another toward a venireman or a juror or a member of the juror's family of which the lawyer has knowledge.

Paragraph (h), which is derived from Model Code DR 7-108(G), requires that lawyers reveal jury misconduct to the court. Neither Paragraph 19(h) nor Model Code DR 7-108(G) specifically address the question presented in the hypothetical. Both provisions require lawyers to "reveal promptly to the court improper conduct" by the juror, but neither specifically requires full disclosure of any information obtained from a juror who has acted improperly. In the case from which the hypothetical is derived, the surgeon actually contacted defense counsel's law firm partner, who then notified the trial court of the juror's misconduct. *See Bell v. Mt. Sinai Medical Ctr.*, 95 Ohio App. 3d 590, 599; 643 N.E.2d 151, 158 (Ohio Ct. App. 1994). The partner originally thought he might have told counsel for the doctors about the jury's stance as to the one doctor, but he later informed the court that he was mistaken and submitted an affidavit in which he repeated that he had kept this information to himself. *Id.* Concluding that there was *no attorney misconduct* in the case, the trial court denied plaintiff's motion for new trial. *Id.* Plaintiff's counsel, without knowing about the jury's determination as to the one doctor, had agreed to excuse the juror and continue with a jury consisting of seven members. *Id.* at 600, 643 N.E.2d at 158. The trial court nevertheless denied plaintiff's motion for a mistrial as the worst possible solution since there was no indication that any prejudice resulted from the withholding of the information, but advised plaintiff's counsel that it would entertain a motion for judgment notwithstanding the verdict or new trial after the verdict. *Id.* at 598, 643 N.E.2d at 157. The jury found in favor of both doctors, but was unable to enter a verdict with regard to the medical

center's liability. *Id.* at 591, 643 N.E.2d at 152. The trial court then ordered a new trial on plaintiff's claims against the medical center. *Id.*

On appeal, plaintiff's counsel argued that the trial court had allowed defense counsel to profit from its unethical conduct by denying plaintiff the right to withdraw his previous consent to proceed with less than eight jurors, and by failing to order a mistrial or a new trial after this information was discovered. *Id.* at 598, 643 N.E.2d at 157. The appellate court did not discuss plaintiff's argument that defense counsel had violated Model Code DR 7-108(G), *inter alia*, concluding that "a trial court is vested with wide discretion when confronted with a motion for new trial." *Id.* The court of appeals affirmed, finding no abuse of discretion. *Id.* at 599, 643 N.E.2d at 157.

The *Bell* case illustrates that it can be difficult to determine how fully a lawyer must disclose juror misconduct. Arguably, the lawyer (or partner) should have disclosed the juror's statement about the likely verdict so that plaintiff's lawyer would have had all relevant information before agreeing to proceed with less than eight jurors. *See, e.g.*, Model Code DR 7-102(A)(3) ("In his representation of a client, a lawyer shall not . . . [c]onceal or knowingly fail to disclose that which he is required by law to reveal."); Model Code DR 1-102(A)(4), (5) ("A lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation" [or] . . . that is prejudicial to the administration of justice.")

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