

BEFORE THE
DISTRICT OF COLUMBIA COURT OF APPEALS

COMMENTS OF THE SECTION ON COURTS,
LAWYERS, AND THE ADMINISTRATION OF JUSTICE
OF THE DISTRICT OF COLUMBIA BAR
REGARDING PROPOSED
RULES OF PROFESSIONAL CONDUCT

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November 1988

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"The views expressed herein represent only those of the
Section on Courts, Lawyers and the Administration of Justice of
the District of Columbia Bar and not those of the District of
Columbia Bar or of its Board of Governors."

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SUMMARY

The D.C. Court of Appeals has published for comment proposed Rules of Professional Conduct to replace the existing Code of Professional Responsibility. The proposed Rules are comprehensive, and the Section on Courts, Lawyers, and the Administration of Justice supports the revision in principle. However, in a number of places, the Rules proposed by the Court of Appeals differ significantly from corresponding Model Rules developed by the American Bar Association; in many cases, the Section does not see why the changes were made and is concerned about their potential effect. In other places the proposed Rules differ from the draft submitted by the Board of Governors of the District of Columbia Bar, in ways with which the Section does not agree. Finally, there are a few cases in which the Section recommends that the Rules be revised in a manner that does not restore either the ABA or the Board of Governors language.

These comments highlight the most significant of the differences, and make recommendations about how they should be reconciled.

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The D.C. Court of Appeals has proposed adoption of Rules of Professional Conduct to replace the existing Code of Professional Responsibility. The Section on Courts, Lawyers, and the Administration of Justice of the D.C. Bar and its Committee on Court Rules support in principle the proposed revision. We note, however, that in a number of instances the proposed D.C. Rules differ significantly from the Model Rules developed by the American Bar Association. In many such instances, the Section does not understand the reasoning behind the changes to the ABA Model Rule, and is concerned over the effect of the changes. In other instances, the proposed Rules differ from the draft submitted by the Board of Governors of the D.C. Bar in ways with which the Section does not agree. Finally, there are a few instances in which the Section recommends that the Rules be revised in a manner that does not restore either the ABA or the Board of Governors language. The comments that follow highlight those instances, make recommendations for reconciling the differences, and note other suggestions.

Comments on Scope

The text proposed to the Court by the Bar's Board of Governors said:

Comments . . . provide authoritative guidance concerning the scope of obligations imposed by the Rules, and are intended to be given significant weight in interpreting the Rules and practicing in compliance with them.

Proposed Rules of Professional Conduct, Scope, Comment [1] ("DC Rules"), Board of Governors version. The text adopted by the Court and published for comment provides:

Comments . . . provide guidance for interpreting the Rules and practicing in compliance with them.

DC Rules, Scope, Comment [1]. The Court's version is that of the American Bar Association's Model Rules ("ABA Rules"). But it gives the Court, Bar Counsel, and the Bar greater latitude in

interpreting the Rules than the Board of Governors version, and tends to undercut the guidance provided by the Comments. This becomes particularly significant in light of the role played by the Comments in explaining requirements or prohibitions implicit but unstated in many of the Rules. It is especially important in connection with DC Rules 6.1 and 6.4, which, according to the Comments, are not to be enforced through disciplinary process.

In light of the importance of the Comments in clarifying the Court's expectations of lawyers, the Section recommends that the Board of Governors version of this comment be retained

Rule 1.1 - Competence

Rule 1.1(b), which has no counterpart in the ABA Rule, appears to add a tort standard into the disciplinary rules. The meaning of the resulting two-part rule is not clear, and its ramifications are troubling. Since Rule 1.1(a) and Rule 1.1(b) establish different and potentially inconsistent standards of competence, which is to control? For example, if the Patent bar generally provides an excellent level of representation to its clients, is a lawyer who has provided representation to a client in a patent matter that was fully "competent" within the meaning of Rule 1.1(a) nevertheless guilty of unprofessional conduct because his representation fell below the level of skill and care generally provided by other lawyers in that field? The Rule would seem so to provide. In the Section's view, rules of professional ethics ought to be based on the sort of objective standard provided in Rule 1.1(a), rather than on comparative judgments of the sort inevitable under Rule 1.1(b).

The procedural ramifications of this new rule are even more troubling. If a bar proceeding and a civil action for malpractice are instituted at the same time, it appears likely that the bar proceeding will supplant the civil action. This Court's Rule XI provides that disciplinary matters "shall not be deferred or abated because of . . . pending criminal or civil litigation, unless authorized by the Board [on Professional Responsibility] in its discretion for good cause shown." And the outcome of the disciplinary proceeding may well have a collateral estoppel effect in the civil action. See University of Tennessee v. Elliott, 478 U.S. 788, 796-99 (1986); Decius v. Marriott Corp., 402 A.2d 841, 843 (D.C. 1979). In the Section's view, bar disciplinary proceedings are ill-suited to be the forum for the trial of legal malpractice cases.

For these reasons, the Section recommends that Rule 1.1(b) be deleted.

Rule 1.4 - Communication

The Comment proposed to the Court by the Bar's Board of Governors said that

A client is entitled to whatever information the client wishes about all aspects of the subject matter of the representation unless the client expressly consents not to have certain information passed on. The lawyer must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations. The lawyer must initiate and maintain the consultative and decision making process if the client does not do so and must ensure that the ongoing process is thorough and complete.

DC Rule 1.4, Comment [2], Board of Governors version. The text adopted by the Court and published for comment omits this Comment entirely. The Court's version is closer to that of the ABA Rules; but the Board of Governors version addresses an issue that goes to the very legitimacy of a lawyer's right to act as attorney: the informed consent of the client to the lawyer's acts and the client's knowledgeable participation in making decisions about his or her own case. No explanation is given of why this language was omitted.

The Section recognizes, however, that placing on counsel the responsibility to "initiate and maintain" an "ongoing process" of consultation may be unnecessarily burdensome and even inappropriate (e.g., in those cases where the client has given complete instructions to counsel and stated that he or she does not wish to be further troubled by the matter). Accordingly, the Section recommends that the Board of Governors proposed comment be retained, with the exception of its last sentence, which should be omitted.

Rule 1.5 - Fees

DC Rule 1.5(e)(2) permits a division of fees among lawyers not in the same firm only if:

the client is advised, in writing, of the identity of the lawyers who will participate in the representation, of the contemplated division of responsibility, and of the effect of the association of lawyers outside the firm on the fee to be charged.

This goes far beyond the requirements of the ABA Rule, which provides only that the client be advised of, and not object to, the participation of all lawyers involved. In commercial or multiple-party suits, where depositions are to be taken in a number of jurisdictions, this may mean giving notice to a client every time counsel is associated for even the most limited of purposes. To the extent that the DC Rule has a consumer-protection purpose, it is in part defeated by the multiplication of paperwork involved in giving written notice.

The Section suggests that the Court's aims can best be served by retaining the flexibility inherent in the ABA Rule, and accordingly recommends that ABA Rule 1.5(e)(2) be retained in place of the proposed DC Rule.

Rule 1.6 - Confidentiality

DC Rule 1.6(c)(2) authorizes disclosure of client secrets to prevent tampering with witnesses, jurors, or court personnel. It has no counterpart in the ABA Rule. While the DC Rule's end is undoubtedly laudable, disclosure of client secrets has traditionally been limited to prevention of crimes involving serious bodily harm, or where "the facts in the attorney's possession indicate beyond reasonable doubt that a crime will be committed." DC Code of Professional Responsibility, Disciplinary Rule 4-101(C)(3) & n.16 ("DR 4-101(C)(3)") (emphasis added); see DC Rule 1.6, Comments [12] and [16].

Permitting disclosure of client confidences and secrets merely because a lawyer "believes" that it is "likely" that bribery or intimidation otherwise will occur means that a significant proportion of such disclosures will take place where no such consequences actually would have occurred. Although bribery and intimidation are certainly serious offenses, they do not involve death or injury (as in Rule 1.6(c)(1)), and the Section does not believe it is necessary to authorize the disclosure of client secrets except under the circumstances permitted by existing practice.

Accordingly, the Section recommends that Rule 1.6(c)(2) be adopted in the following form:

To prevent the bribery of intimidation of witnesses, jurors, court officials, or other persons who are involved in proceedings before a tribunal if the facts in the lawyer's possession indicate beyond reasonable doubt that such crimes will be committed absent disclosure of the client's confidences or secrets by the lawyer.

DC Rule 1.6(d)(2) permits a lawyer to reveal client secrets "when permitted by the Rules or required by law or court order." Although this provision continues prior D.C. practice, see DR 4-101(C)(2), it has no counterpart in the ABA Rules. It raises significant questions concerning a lawyer's responsibilities that are not answered in the DC Rules: what must a lawyer do when subpoenaed to reveal client secrets? Comments [25] and [26] shed some light on this; but the amendments to "Scope," Comment [1], show that the Court did not intend the Comments to be authoritative in guiding lawyers' conduct. Moreover, the Comments to the Rule avoid the question whether "reasonable effort[s] to appeal" an order include committing contempt in order to provide a basis for appeal. It is unclear whether a lawyer may commit a contempt to protect client secrets; or whether a lawyer must commit a contempt if the court refuses a stay pending appeal.

These substantial questions should be addressed in a Comment to the Rule. Unless they are addressed and resolved, the Section recommends that DC Rule 1.6(d)(2) be deleted.

DC Rule 1.6(d)(4) authorizes a lawyer to reveal client secrets "when the lawyer has reasonable grounds for believing that a client has impliedly authorized disclosure . . . in order to carry out the representation." This language has no counterpart in the corresponding ABA Rule. Comments [10] and [11], discussing implicit authorization, are identical to the ABA Model Comments on this subject.

In order to resolve potential ambiguities over the reason for including this additional provision, the Section urges the Court to include explanatory comments for this Rule, along the lines of DC Code of Professional Responsibility, Ethical Consideration 4-2 ("EC 4-2") and EC 4-3.

Minority Statement as to Rule 1.6(d)(3)

DC Rule 1.6(d)(3) allows counsel to use client secrets to defend himself or herself against criminal charges, disciplinary proceedings, or civil claims. A minority of the Section is deeply concerned by this, at least insofar as it involves charges or claims brought against a lawyer by someone other than a client or former client. The rule creates two classes of people with respect to the handling of client secrets: lawyers and everyone else. If a third party is accused of a crime, and the client has told counsel that client committed the crime, counsel may not reveal the client's confidence to protect the innocent defendant. But if counsel is charged with the same crime, counsel may reveal the client's confidence to protect himself or herself. Although this continues existing practice, see DR 4-101(C)(4), it is exceedingly troubling that lawyers accord themselves more favorable treatment than that granted to equally innocent third parties. The minority would permit the use of client secrets in cases where the client has made the accusation or provided the information according to which the lawyer has been wrongly charged; but in all other cases, the minority can see no reason why lawyers should enjoy a privilege denied to any other person. The minority urges that Rule 1.6(d)(3) be modified accordingly.

Rule 1.7 - Conflicts (General)

The DC Rule is significantly different from the ABA Rule, and draws fine distinctions (e.g., between representing a client in connection with a matter and representing a client's position with respect to a matter) that the Section finds confusing and likely to give rise to disputes. While permitting some potential conflicts, the DC Rule also creates a waiver standard that is impossible to meet: Rule 1.7(c)(1) allows potential conflicts if there is "full disclosure of . . . the possible adverse consequences." The Section questions whether it is possible to anticipate and describe all the possible adverse consequences of a potential conflict that becomes actual. Finally, in view of the national nature of the practice of many District of Columbia law firms, the Section believes that it is particularly desirable to have a uniform national rule in the area of conflicts of interest.

In light of these problems and the lack of any stated rationale for altering the ABA Rule, the Section recommends that the ABA Rule be retained.

Rule 1.8 - Conflicts (Transactions)

DC Rule 1.8(d), which limits a lawyer's financial assistance to a client, presents at least three serious ambiguities.

First, while ABA Rule 1.8(e) expressly permits a lawyer to "pay" the court costs and litigation expenses of an indigent client, the corresponding DC Rule permits counsel to "provide" such expenses. It is not clear whether the different language is intended to have a different meaning -- for example, that the "provi[sion]" of expenses is only an advance. The use of a different word certainly might give rise to an argument to that effect.

Second, the DC Rule allows payment of unspecified "other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding." It may well be, in some cases, that direct financial assistance to a client -- for example, payment of the client's rent or other living expenses -- is "reasonably necessary" for that purpose. Yet the prohibition of such financial assistance is the core of what Rule 1.8(d) and its predecessor, DR 5-103(B), are intended to prevent. In the absence of a comment so indicating, we assume that the drafters did not intend to permit such personal financial assistance, but the language of the Rule appears to allow it.

Third, it is not at all clear from the structure of the single sentence that constitutes Rule 1.8(d) whether the phrase, "which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding," modifies only the final type of assistance permitted by the Rule ("other financial assistance") or whether it is a necessary condition of providing any of the assistance specified (court costs, etc.).

With respect to the lawyer's ability to "pay" expenses, the existing DC provision represents an intentional change from the ABA Model Code which, as initially adopted by this Court in 1972, permitted a lawyer only to "advance or guarantee" such expenses, "provided the client remains ultimately liable." This amendment was adopted in 1980, primarily in recognition of the fact that much public interest and pro bono litigation could not otherwise be conducted. Potential constitutional issues would also be raised by a prohibition on the payment of litigation expenses by public interest groups. The District of Columbia, having led the nation in abandoning the rule that the client must always be liable for expenses, should not regress now that the

rest of the country has caught up. Nor should such payment be conditioned on a determination by the lawyer -- presumably subject to later second-guessing by the disciplinary board -- that the payment was "reasonably necessary" for the case to proceed. On the other hand, lawyers should not be permitted to become the financial underwriters of their client's lives; such general support poses too great a threat of undermining the appropriate nature of a lawyer-client relationship.

Existing DR 5-103(B) provides that a lawyer may "pay" litigation-connected expenses, without limitation, but does not permit financial assistance to the client beyond that limit. The Section believes that provision draws the correct lines, without ambiguity, and accordingly recommends that its language be retained as new Rule 1.8(d).

Rule 1.9 - Conflicts (Former Client)

DC Rule 1.9(b) forbids use of client information against a former client absent the client's consent. The ABA Rule permits use of such information when the client consents or "when the information has become generally known." The D.C. version of the rule distinguishes between lawyers and third parties, to the disadvantage of lawyers. The Section does not discern a good reason for permitting everyone except former counsel to use information that has entered the public domain.

Accordingly, the Section recommends that ABA Rule 1.9 be retained.

Rule 1.11 - Successive Gov't & Private Employment

ABA Rule 1.11(c)(2) prohibits a government attorney from negotiating for employment with a party or attorney for a party in a matter in which the government attorney is personally and substantially participating. The DC Rule contains no such prohibition. The Section feels that this omission gives rise to the risk of significant abuse, even recognizing that special considerations obtain in a city where many lawyers are employed by the government. We note, however, that both the federal and District of Columbia governments have legislated on this issue. See 18 U.S.C. § 208 (1982); D.C. Code § 1-619.2 (1981). We assume that this was the reason for omitting the ABA provision from the DC Rules. On this assumption, the Section has no objection to the omission of ABA Rule 1.11(c)(2).

Rule 1.12 - Former Arbitrator

The ABA Rule provides that former nonpartisan arbitrators and former judges (or other adjudicative officers or their clerks) are disqualified from representing anyone in a matter in which they personally and substantially participated, absent consent of all parties. The ABA Rule also provides a ban on negotiating for employment, similar to that imposed on lawyers by ABA Rule 1.11(c)(2). The DC Rule does not extend to judges and does not include the ban on negotiating for employment. It may be that the Court wished to establish rules of judicial conduct separate from lawyers' rules of professional conduct; but in the absence of a parallel proposal for judicial standards, the Section is concerned that this omission gives rise at least to the appearance of a substantial risk of abuse.

Accordingly, the Section recommends that the language of the ABA Rule be retained.

The ABA Rule provides for imputed disqualification. The DC Rule does not. In the interest of consistency (in the treatment of lawyers and judicial officers) the disqualification provisions should be restored.

Rule 1.13 - Organization as Client

The ABA Rule provides specific guidance on what counsel should do when an officer, employee, or other person associated with an organizational client acts in breach of duty to the client, or in an unlawful fashion likely to be imputed to the client; and what to do when an institutional client persists in unlawful conduct. The DC Rule omits these provisions. In view of the difficult issues presented by these situations, any standards that can help guide counsel should be retained.

Accordingly, the Section recommends that ABA Rule 1.13(b)-(c) be retained.

Rule 1.15 - Safekeeping Property

DC Rule 1.15(d) provides that advances of fees and costs "become the property of the lawyer upon receipt." This has no counterpart in the ABA Rule, and seems to undercut the idea that unearned funds and unexpended fees are maintained in trust. Indeed, if advanced costs are the property of the lawyer, they may be spent even if no costs are later incurred and the funds must be repaid. Normally, such funds would be kept in a separate

trust account and unexpended until required. Denominating them as the lawyer's property raises the risk that an imprudent lawyer may spend them and find, when they are to be repaid, that he or she hasn't the cash on hand.

Accordingly, the Section recommends that the first sentence of DC Rule 1.15(d) be deleted.

Rule 1.16 - Declining/Terminating Representation

ABA Rule 1.16(b)(6) allows counsel to withdraw if "other good cause for withdrawal exists." The DC Rule omits this provision. The Section suggests that it is impossible to make provision in advance for all of the circumstances in which withdrawal would be justified. The ABA Rule allows a determination to be made on a case-by-case basis in situations not foreseen by the Rule.

Accordingly, the Section recommends that the ABA Rule 1.16(b)(6) be retained.

Rule 3.2 - Expediting Litigation

DC Rule 3.2(b), which has no counterpart in the ABA Rule, requires counsel to "make reasonable efforts to expedite litigation consistent with the interests of the client." The Section believes that the standard established in this rule is so vague as to be unenforceable. Further, we are concerned that, even if enforceable, the vagueness of the standard may lead to unnecessary disciplinary litigation. In any case, by its own terms the standard would apply in very different ways to counsel representing clients with different interests. It would be exceedingly difficult, if not impossible, to develop a consistent and principled body of law interpreting this rule.

Accordingly, the Section recommends that DC Rule 3.2(b) be deleted.

Rule 3.3 - Candor Toward Tribunal

DC Rule 3.3(b) deals with the sensitive issue of what criminal defense counsel may do when the client insists on offering testimony that counsel knows to be false. Unlike the Board of Governors version, the rule proposed by the Court allows

only one avenue: putting the client on the stand but refusing to question the client or argue the false testimony to the jury. The Section is troubled by this approach.

Because a criminal defendant has an absolute right to testify in his own defense, Rock v. Arkansas, 107 S. Ct. 2704 (1987); see Brooks v. Tennessee, 406 U.S. 605 (1972), state rules that interfere with or burden the exercise of this right are unconstitutional. This does not mean, of course, that a lawyer may not dissuade or even threaten a client whom he or she believes intends to commit perjury. See Nix v. Whiteside, 475 U.S. 157 (1986). But since the client's testimony cannot be known either to the court or -- with certainty -- to counsel, a client who insists on testifying over the protests of counsel must be allowed to take the stand.

The Board of Governors version of DC Rule 3.3(b) adopted a sensitive and flexible approach to the conflict that inevitably arises when a criminal defendant chooses to testify under these circumstances. It recognizes that a lawyer should be permitted to withdraw, but not under circumstances in which withdrawal would "seriously harm the client," such as in the midst of trial. It also permits a lawyer to conduct an examination of the client in the ordinary manner, and to argue the client's testimony to the jury.

The version proposed by the Court, however, requires counsel to place the client on the stand to testify in narrative fashion, and prohibits counsel from arguing the client's testimony. This procedure not only distances the lawyer from the client, but implicitly places the lawyer's personal credibility on the side of the prosecution. By failing to argue the client's testimony, the lawyer is in effect "vouching" against the client.

While in the abstract there may seem to be little value to a rule which permits a flexible response to client perjury in criminal cases, in practice there are two significant advantages to the Board of Governors approach. First, in contrast to the situation in Nix v. Whiteside, in which it was accepted as a matter of fact that the client's proposed testimony was false, the truth or falsity of the client's version of events is rarely so clear in reality. A lawyer should be permitted to dissuade a client from testifying falsely based upon knowledge gained from other sources, but that knowledge will rarely rise to the level of certainty. "Knowledge" will actually fall somewhere along the spectrum between certainty and ignorance. The lawyer's ability to respond should be flexible enough to deal with situations in which the lawyer strongly disbelieves the client's testimony, but does not know with absolute certainty that it is false.

The danger in the rule as proposed is that it may serve to intimidate defense lawyers from presenting testimony that conflicts with apparently credible prosecution evidence, but which the lawyer does not know to be false. Sharp conflicts are characteristic of criminal trials. A lawyer who faces disciplinary action if he or she allows a client to testify in an ordinary examination may sacrifice the client's interests to his or her own, even if the lawyer does not actually know the client's testimony will be false. The potential chilling effect of the proposed rule will be as great on truthful testimony as on false testimony.

There is an inherent tension between the Sixth Amendment and a lawyer's ethical and moral obligations to the judicial process. The Section believes that the Board of Governors version has struck a more appropriate balance between these competing interests. Accordingly, the Section recommends that Rule 3.3(b), Board of Governors version, be retained.

ABA Rule 3.3(d) requires counsel in an ex parte proceeding to give the tribunal all material facts, even those adverse to his client. The DC Rule omits this requirement. Recognizing that an attorney's principal loyalty is to the client, the fact remains that an ex parte proceeding is extraordinary, and calls upon the court to issue a remedy before the other side can be heard from. In such cases, an officer of the court has a duty of candor that goes beyond offering only truthful evidence; it is in some ways analogous to the duty to make the court aware of controlling precedent, even if adverse.

Accordingly, the Section recommends that the requirement of ABA Rule 3.3(d) be retained.

Minority Statement as to DC Rule 3.3(b)

A minority of the Section believes that DC Rule 3.3(b) should be retained in the form proposed by the Court. While recognizing all of the concerns expressed by the majority in its statement, we are profoundly troubled by the prospect of a lawyer standing by while the client gives testimony "that the lawyer knows to be false," DC Rule 3.3(b) (emphasis added). We note that the term "'knows' . . . denotes actual knowledge of the fact in question," DC Rules, Terminology. Thus, in most cases Rule 3.3(b) will not apply, since -- as the majority points out -- counsel will not know that the client is being untruthful. In cases where counsel has actual knowledge that the client is committing perjury, counsel should not be made a party to the perjury.

The minority also notes that DC Rule 3.3(a)(4) prohibits a lawyer from offering testimony known to be false, except as provided in Rule 3.3(b). ABA Rule 3.3(a)(4) prohibits a lawyer from offering testimony known to be false, and requires a lawyer to take "reasonable remedial measures" if he or she "comes to know" that evidence already offered is false. The minority recommends that the ABA Rule be adopted in place of the DC Rule, except as provided in DC Rule 3.3(b). The DC Rules will thus provide counsel with guidance for all situations, not just those rare cases in which a criminal defendant is actually known to be committing perjury.

Rule 3.4 - Fairness to Opponents

DC Rule 3.4(f), which limits a lawyer's authority to instruct a witness not to cooperate with an opposing party, is identical to ABA Rule 3.4(f). However, it omits an important limitation which is imposed by D.C. law in criminal cases: the obligation of a prosecutor to refrain from interfering with defense efforts to obtain information. The prosecution may legitimately believe, for example, that a witness's interests will not be adversely affected if the witness refuses to cooperate with the defense. It is still forbidden to counsel the witness not to speak to the defense. Gregory v. United States, 125 U.S. App. D.C. 140, 369 F.2d 185 (1966), cert. denied, 396 U.S. 865 (1969). The rule as drafted could be read to authorize prosecutors to request that government employees such as police officers, DEA agents, FBI agents, or medical examiners refuse to speak to defense counsel.

Accordingly, the Section recommends that the Court adopt the following additional language for Rule 3.4(f):

- (3) However, a lawyer representing the government shall not request that a witness refrain from voluntarily giving information to an attorney or investigator for the defendant in a criminal case.

Rule 3.6 - Trial Publicity

The ABA Rule prohibits public statements that "will have a substantial likelihood of materially prejudicing" the proceedings, establishes presumptions, and creates exemptions. The DC Rule prohibits statements that "will create a serious and imminent threat to the impartiality of the trier of fact," and gives no guidance. Recognizing the existence and importance of

the First Amendment, the Section nevertheless believes that counsel have an obligation to restrain themselves in the exercise of their rights insofar as it may interfere with the administration of justice (in the broader sense of the term).

Accordingly, the Section recommends that ABA Rule 3.6 be retained in place of DC Rule 3.6.

Minority Statement as to Rule 3.6

The Rule proposed by the Court restricts the extrajudicial statements of counsel more broadly than the Board of Governors draft, but less broadly than the ABA Rule. While the Section's majority urges a return to the ABA Rule, a minority of the Section believes that Rule 3.6 should be adopted in the form proposed by the Board of Governors, essentially for the reasons stated in the Board's comments to its version.

The rulemaking actions of this Court are, of course, subject to the limitations on government restriction of speech imposed by the First Amendment; those restrictions require that any such restrictions be narrowly tailored to achieve their legitimate ends. In the minority's view, the Board of Governors version of this Rule adequately serves the purpose of assuring a fair trial; thus, the broader rules proposed by the Court and by the ABA are subject to serious constitutional question.

In particular, the Court's expansion of the rule to cover nonjury trials seems unnecessary. Judges are often exposed to material that is far more prejudicial than press reports about the extrajudicial statements of counsel. For example, a judge in a criminal case often will hear a defendant's confession to the crime with which he has been charged, suppress that confession because it was improperly obtained, and then try the case. If a judge can be trusted to exercise impartial judgment based on the admissible evidence in such a case -- which no one questions -- then surely he or she will not be influenced by media reports of counsel's statements.

By contrast, the Board of Governors and the Court's use of a heightened standard of harm ("a serious and imminent threat to the impartiality of the finder of fact") is an important improvement over the loose formulation of the ABA draft ("a substantial likelihood of materially prejudicing an adjudicative proceeding"), which also explicitly prohibits a large variety of statements that are not necessarily likely to cause such harm. The Section minority accordingly prefers the Court's proposed Rule to that of the ABA.

Rule 3.8 - Responsibilities of Prosecutor

The Committee is concerned by the omission of some elements of the ABA Rule, notably including ABA Rule 3.8(b) (prosecutor shall attempt to insure that accused is advised of right to counsel and given opportunity to seek counsel). It is essential to our system of justice that the prosecution in a criminal case be scrupulous to extend to the accused every right and every fundamental fairness. Insofar as the DC Rule omits any obligation contained in the ABA Rule, the Section recommends that such obligation be restored.

In addition, the Section notes that DC Rule 3.8(j), contained in the Board of Governors version, was deleted by the Court. Although this Rule, prohibiting issuance of a grand jury subpoena for the testimony of counsel absent judicial approval, has no counterpart in the ABA Rules, the Section approves of the principle. On the other hand, the Section also feels that it properly belongs in the procedural rules of the Superior Court, not in the Rules of Professional Conduct.

Accordingly, the Section strongly urges the adoption of a Rule of Criminal Procedure corresponding to DC Rule 3.8(j), Board of Governors version.

Rule 4.2 - Communicating with Adverse Parties

In prohibiting a lawyer from communicating with a party known to be represented by another lawyer, the ABA Rule appears to place governmental parties on the same footing as private parties, but includes a provision permitting communications that are "authorized by law." In a comment, the ABA notes that such permitted communications include "the right of a party to a controversy with a government agency to speak with government officials about the matter." While the Section believed that this formulation outlined a proper balance between the rights of the government as litigant and the constitutional right of a party to petition the government, the scope of a party's "right to speak with government officials" about matters in litigation is nowhere explained, and the result is that lawyers are left largely in the dark about their ethical obligations.

The DC Rule is clearer, and thus an improvement over the ambiguity surrounding the ABA Rule; but the Section feels that it goes too far in permitting contacts with employees at non-policy-making levels. Such employees -- for example, the truck driver involved in an accident who would be a codefendant in a civil

suit against a private employer -- should be treated the same for purposes of this rule whether they are employed by the government or by a private employer. Where an employee may not be named as a party solely because of his status as an employee of the government, he should no more be subject to questioning by opposing counsel than his counterpart in the private sector. Communications with such persons should not be permitted without the consent of counsel.

Accordingly, the Section recommends that DC Rule 4.2 be amended by deleting the word "non-governmental" each time it appears in paragraph (a), and adding the following sentence to the end of paragraph (c): "However, this Rule does not prohibit communications by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client, whether or not those grievances, or the lawyer's communications, relate to matters that are the subject of litigation."

Minority Statement as to Rule 4.2

A minority of the Section, while agreeing that low-level employees "should be treated the same for purposes of this rule whether they are employed by the government or by a private employer," does not agree that such employees should be shielded from all communication with opposing counsel except upon the consent of their employer's lawyer. The minority believes that the proposed DC Rule, which permits a lawyer to communicate with such employees -- governmental and nongovernmental -- after appropriate disclosures, is the proper approach. See District of Columbia Bar, Committee on Legal Ethics, Opinion 129 (1983). If an employer wishes to caution its employees against such communication, it generally (although not always) may do so, see Rule 3.4(f); but the fact that an employer may want to discourage its employees from speaking with opposing counsel does not, in the minority's view, make it unethical for opposing counsel to seek to communicate with them, after disclosing his or her identity and the fact that he or she represents a party with interests adverse to those of the employer.

Rule 8.2 - Judicial & Legal Officials

ABA Rule 8.2(a), which has no DC counterpart, prohibits false statements about the qualifications or integrity of a judicial or public legal official, or a candidate for such office. The Comment to the Rule strongly suggests that it is aimed at lawyer assessments of judicial performance (e.g., in connection with retention or appointment) and election campaigns.

As in cases involving public statements over matters in litigation, see Rule 3.6, members of the Bar have responsibilities to the system of justice that transcend their personal right of expression. In light of those responsibilities, and since the expression at issue involves false statements, the Section recommends that ABA Rule 8.2(a) be retained.

Minority Statement as to Rule 8.2

A minority of the Section believes that the Board of Governors and the Court were correct in omitting ABA Model Rule 8.2(a). As the Supreme Court reminded us earlier this year, "speech critical of those who hold public office" is "[o]ne of the prerogatives of American citizenship" (quoting Baumgartner v. United States, 322 U.S. 665, 673-74 (1944)), which "inevitably, will not always be reasoned or moderate; . . . public officials will be subject to 'vehement, caustic, and sometimes unpleasantly sharp attacks,' New York Times [Co. v. Sullivan], 376 U.S. 254] at 270 [(1964)]," Hustler Magazine v. Falwell, 108 S. Ct. 876, 879-80 (1988).

Judges are no less public officials than are legislators or executive officers, and should be no less subject to public criticism. Lawyers are no less citizens than are nonlawyers, and should be no less entitled to criticize judges -- indeed, they are often the only citizens with the knowledge and ability effectively to do so.

Of course, publishing a false statement of fact "with knowledge that it [is] false or with reckless disregard of whether it [is] false or not" is not protected by the First Amendment. Times v. Sullivan, 376 U.S. at 279-80. But a judge who is the subject of such statements has, no less than any other public official, a remedy in a civil action for libel or slander. ABA Rule 8.2(a) gives judges -- as opposed to all other public officials -- the power directly to punish lawyers for false speech, and specifically for false speech about judges! This is particularly troublesome because it is the judges themselves who (as a group) are the injured parties, the supervisors of the prosecutors (since Bar Counsel and the Board on Professional Responsibility are arms of the Court), and the ultimate adjudicators of the complaint. Moreover, in an action for libel the defendant is constitutionally entitled to have a jury determine whether he or she made the alleged statement, whether it was false, whether it was made with the requisite level of culpability, and whether any sanction should be severe or mild. By contrast, ABA Rule 8.2(a) gives judges and "public legal offi-

cials," and only them, the means to impose severe sanctions upon a person for allegedly false speech without the protection of a jury trial.

This rule does not deal with conduct amounting to contempt of court, which remains subject to the usual civil and criminal sanctions, but with public statements by lawyers about the "qualifications or integrity" of judges and other "public legal officials" -- a subject that is plainly a matter of public concern. The minority believes that in these circumstances judges ought to have no greater privilege than other public officials, and lawyers ought to have the same legal protections as other citizens.

Rule 9.1 - Discrimination in Employment

DC Rule 9.1, which has no counterpart in the ABA Rules, makes it a violation of legal ethics for a lawyer to violate D.C. Code § 1-2512 (prohibiting employment discrimination based on listed criteria). Since an employer's relationships with his or her employees is not generally thought of as part of the "practice of law," which is what these Rules purport to regulate, see Scope, Comment [2], the Section wonders why it was considered necessary or appropriate to include this violation of statute in these Rules.

Does the inclusion of this provision indicate that the Court views the violation of D.C. Code § 1-2512 as more egregious, or more connected to the practice of law, than the violation of other provisions of the Human Rights Law in which a lawyer might engage? Or as more egregious -- or somehow more connected to the practice of law -- than the violation of other legal obligations of employers (such as payment of the minimum wage, the withholding and payment to the government of appropriate taxes on employees' wages, nonretaliation against employees who perform jury duty, or maintenance of a safe workplace) which a lawyer might contravene when acting in his or her capacity as an employer? If not, why should not these matters also be included in these Rules?

There are at least two, and in most cases four, specialized fora to which complaints of employment discrimination can be brought, at the complainant's option: the D.C. Human Rights Commission, the D.C. Superior Court, the Equal Employment Opportunity Commission, and the U.S. District Court. By contrast, the Office of Bar Counsel and the Board on Professional

Responsibility are not well suited to manage adversary litigation in which complicated statistical and evidentiary matters are often involved.

For these reasons, the Section recommends that Rule 9.1 be deleted.