New York City Bar Association
Professional Responsibility Committee
Report on COSAC Proposals
Rules 1.1-1.4, 3.1, 3.2, 3.5-3.9 and 8.1-8.4

The Committee on Professional Responsibility has reviewed COSAC's proposed Rules 1.1 through 1.4, 3.1, 3.2, 3.5 through 3.9 and 8.1 through 8.4. These proposed rules address a wide variety of topics in the area of professional responsibility. Generally, the Committee found that these rules carry forward existing provisions of the New York Code of Professional Responsibility (the "Code"). To the extent that the Proposed Rules modify or amplify provisions of the Code, or fill in gaps in the Code, the Committee believes that the proposed changes are desirable. Thus, while the members of the Committee had proposals for potential changes to certain of the Proposed Rules (or the accompanying commentary), the general view of the Committee was that these Proposed Rules should be adopted.

1. Rules 1.1 and 1.3 -- Obligations of Competence and Diligence

Proposed Rule 1.1 provides that an attorney "should" act with "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," and prohibits "intentional[], reckless[] or repeated[]" failures to act in accordance with that standard. This rule carries forward the requirements of DR 6-101(A)(1) and (2), and DR 7-101(A), and helpfully fleshes out the definition of "competent representation" found in prior law. The limitation of disciplinary sanctions to instances involving "intentional, reckless or repeated" episodes of incompetent conduct is consistent with New York case law under the current Code of Professional Responsibility. This proposed rule does not materially change existing law. While the rule as written should receive approval, the increasing use of temporary or "contract" attorneys by law firms raises quality control issues that might appropriately be addressed by revision to the commentary accompanying Rule 1.1 or Rule 5.1. In any event, the proposed rule and commentary as written is sufficient and should be approved.

Proposed Rule 1.3 establishes, as an aspirational standard, that attorneys "should act with reasonable diligence and promptness" and prohibits "neglect" of "legal matter[s] entrusted to the lawyer." The prohibitory portion of this rule tracks DR 6-101(A)(3), and does not materially change existing law.

2. Rules 1.2 and 1.4 -- Scope of Representation and Communication

Proposed Rule 1.2 states that the client shall determine the nature and scope of the lawyer-client relationship, and that the lawyer shall both abide by the client's decisions concerning the objectives of representation, and consult with the client as to the means by which those objectives are to be pursued.[1] A lawyer shall therefore abide by the client's decision as to

[1] This consultation with the client as to the means of pursuing the client's objectives is in accord with Proposed Rule 1.4. The lawyer's duty to communicate with the client about such matters as settlement is in accord with Proposed Rule 1.4(a)(1), and the requirement that the lawyer consult with the client concerning the means by which the client's objectives are to be pursued is in accord with Proposed Rule 1.4(a)(2).

whether to settle a matter and, in a criminal case, shall abide by the client's decision, "after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." (This enumeration of particular matters as to which the client has final authority -- a matter dealt with only in the ethical considerations accompanying the existing Model Code -- is useful.)

While Proposed Rule 1.2(a) is largely identical to current DR 7-101(A)(1), the new Proposed Rule 1.2(c) appropriately makes explicit that an attorney (i) may act on behalf of a client where impliedly authorized to do so, and (ii) may limit his or her role, "if the limitation is reasonable under the circumstances and the client gives informed consent." With respect to the expansion of the lawyer's role, the client may authorize the attorney to take specific action at the outset of a representation; and, absent a material change in circumstances and subject to Rule 1.4, the lawyer may rely upon such an advance authorization. By explicitly permitting attorneys and clients to agree in advance to limit the attorney's role, Proposed Rule 1.2 accords with long-accepted practice in New York.

We recommend, however, that the Comment to Proposed Rule 1.2(c) should be more expansive about what constitutes a client's informed consent to limiting the lawyer's role. The City Bar's Formal Opinion 2001-3, entitled "Limiting the Scope of an Attorney's Representation to Avoid Client Conflicts," notes in this connection, "In obtaining consent from the client, the lawyer must adequately disclose the limitations on the scope of the engagement and the matters that will be excluded. In addition, the lawyer must disclose the reasonably foreseeable consequences of the limitation. In making such disclosure, the lawyer should explain that separate counsel may need to be retained, which could result in additional expense, and delay or complicate the rendition of legal services." We believe that similar language should be added to the Comment to Proposed Rule 1.2(c).

To be sure, the Comment specifies that a client may revoke authority granted to her attorney at any time, but does not state the consequences if the revocation occurs after a point in which the attorney's actions have made the revocation meaningless absent a major about-face by a lawyer who is convinced that wielding the authority that the client is now attempting to revoke nonetheless serves the client's best interests. The Comment also discusses, without satisfactorily resolving, the attorney's role when hired by a client, such as an insurer, to represent another client, an insured, whose interests may vary from those of the insurer. Ultimately, however, for the most part, because an action against the client's wishes constitutes a violation of Proposed Rule 1.2, the Proposed Rule forces the attorney to defer to the client's wishes, unless the client "appears to be suffering diminished capacity," in which case "the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14." The lawyer's actions vis-à-vis the client are further informed by the Comment, which states that all agreements concerning the lawyer's representation of a client "must accord with the Rules of Professional Conduct and other law."

Proposed Rule 1.2(d), admonishing a lawyer not to "counsel a client to engage or assist a client in conduct that the lawyer knows is criminal or fraudulent," is drawn from DR 7-106(A)(7). However, by prohibiting conduct that is "criminal or fraudulent," the proposed rule usefully tightens the "illegal or fraudulent" standard under the existing rule. The COSAC Commentary states that "criminal conduct" is a "more specific term," and the distinction would

appear to allow the lawyer to advise the client to engage in certain "illegal" but non-criminal conduct, if the presumed civil penalty for such conduct is less than the presumed cost of compliance with the law. In such an instance, under the Proposed Rule, the attorney may with impunity counsel the client to engage in the illegal conduct, rather than being confined to explaining to the client the consequences of engaging in the illegal conduct -- a limitation that would still apply, under Proposed Rule 1.2, for "criminal or fraudulent" conduct.[2]

In addition, under Proposed Rule 1.2, a lawyer's representation of a client, including representation by appointment, "does not constitute an endorsement of the client's political, economic, social or moral views or activities." This distinction between the lawyer and the client's causes -- also found in ethical considerations that accompany the existing Model Code -- appropriately encourages lawyers to do *pro bono* work and to represent causes with which they disagree. While this exhortation may not be a necessary component of rules of conduct, its inclusion reflects a commitment to the underprivileged in the legal profession that is laudable and, no doubt in some instances, beneficial.

As the Comment notes, the lawyer and client may disagree concerning the means to be used to accomplish the client's objectives. Thus, the Rule does not prescribe -- nor should it -- how such disagreements are to be resolved. The Comment merely admonishes attorneys to consult with "[o]ther law," and to "consult with the client and seek a mutually acceptable resolution of the disagreement." The Comment in fact recognizes the limited value of that advice, since it goes on to state that if efforts at resolution of a dispute between the lawyer and the client are "unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation," or the client may discharge the lawyer, as permitted by Proposed Rule 1.16.

Proposed Rule 1.4, dealing with the attorney's obligation to communicate with her client regarding certain matters relevant to the representation, is not found in the existing

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[2] Proposed Rule 1.2(d) appropriately acknowledges that a lawyer "may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." Moreover, commentary to the proposed rule notes that a lawyer may give "an honest opinion about the actual consequences that appear likely to result from the client's conduct." Thus, although the client may use "advice in a course of action that is criminal or fraudulent of itself," the lawyer, whose opinion the client has consulted, is not considered a party to the client's action. The Commentary further states that "[t]here is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity," but fails to flesh out the barriers and fences by which the lawyer should be governed in order to avoid crossing the line. However, in accord with Proposed Rules 4.1(b) and 1.6(b)(3), the Comment notes that the lawyer may be forced to withdraw or to "give notice of the withdrawal and to disaffirm any opinion, document, affirmation or the like."

disciplinary rules. However, the new rule is consistent with existing EC 7-8 and EC 9-2. This rule is desirable, and should be approved.

3. Rules 3.1 and 3.2 -- Prohibition on Frivolous and Dilatory Conduct

A. *Rule 3.1*

Proposed Rule 3.1 provides that a lawyer shall not "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." The Proposed Rule defines "frivolous" as conduct that (a) "is completely without merit in law and fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," (b) "has no substantial purpose other than to delay or prolong the resolution of the litigation" or to "harass or maliciously injure another," or (c) "asserts factual statements that are false."

At first blush, Proposed Rule 3.1 appears to have a two-pronged standard: (1) it must have a basis in both law and fact, and (2) it cannot be frivolous. Yet, the two prongs overlap, since one of the definitions of "frivolous" is "conduct" that is "completely without merit in law and fact." The emphasis upon both "law" and "fact," differentiates Proposed Rule 3.1 from New York Court Rules Section 130-1.1(c), which defines "frivolous" as conduct lacking merit in "law" rather than lacking merit also in "fact." Proposed Rule 3.1's emphasis upon combined law and fact thereby suggests the contextual nature of law, which cannot exist in a vacuum, or be allowed to serve as a tool of sophistry. The need to combine law with fact further suggests the extent to which substantive law and procedural law reinforce each other, and the lawyer's need, in bringing or defending a proceeding, to be cognizant of law and fact alike.

The contextual nature of law is also reflected in the Proposed Rule's distinction between a lawyer's role in a "proceeding," and the same lawyer's role in a "criminal proceeding" or a "proceeding that could result in incarceration." When the potential penalty is so severe, the Proposed Rule allows the lawyer to "require that every element of the case be established," even when the lawyer may know, or suspect, that the case in favor of the defendant may not be particularly well grounded in law and/or fact.

Context, and the combination of law and fact, also inform the Proposed Rule's second definition of "frivolous:" conduct that "has no substantial purpose other than to delay or prolong the resolution of the litigation." According to this definition, a lawyer may be acting perfectly within the contours of the law, and nonetheless be guilty of "frivolous" conduct when that conduct "has no substantial purpose other than to delay or prolong the resolution of the litigation." "Fact" is also central to the third definition of "frivolous," which is conduct that "asserts material factual statements that are false."

The Proposed Rule 3.1's emphasis upon "fact" is neither static nor mundane, however, but is rather at once aspirational and real. Under the Proposed Rule, conduct is "frivolous" if it "is completely without merit in law and fact," but also if it "cannot be supported by a reasonable argument for an extension, modification or reversal or existing law." Thus, as long as there is a "reasonable argument for an extension, modification or reversal of existing law," the lawyer need not be wedded to the existing law. As the Comment to Proposed Rule 3.1

suggests, a lawyer may take a position that the lawyer believes will not ultimately prevail. The comment is somewhat misleading, however, in suggesting that lawyers need only "determine that they can make good faith arguments in support of their client's positions" to avoid frivolous conduct. Rather, Proposed Rule 3.1 requires a "reasonable argument for an extension, modification or reversal of existing law," not simply a "good faith" argument. "Reasonable" is, after all, an objective standard, while "good faith" is arguably a subjective one. Hence, although Proposed Rule 3.1 grants the attorney flexibility in permitting the attorney to act on the basis of an "extension, modification or reversal of existing law," the attorney must act "reasonably" in doing so.

B. *Rule 3.2*

Proposed Rule 3.2 provides that a lawyer shall not "use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense." This proposed rule raises three key concerns.

First, the use of the word "substantial" will leave room for judgment in the application of the rule. What one lawyer thinks is a "substantial purpose" another might believe to be insubstantial. One might criticize the rule for the large amount of discretion that it leaves, but such criticism would, we think, be off the mark. Any rule like this needs discretion, because the situations to which the rule might be applied will be so various. What constitutes a "substantial purpose" will have to be defined through the common law method -- repeated application of the rule.

Second, unlike the currently most analogous rule in the Model Code, DR 7-102(A)(1), which proscribes means that "serve merely to harass or maliciously injure another," proposed Rule 3.2 focuses solely on behavior that delays or causes expense. The proposed Rule is thus somewhat narrower than the Disciplinary Rule. We do not think that the relatively narrow focus of the Proposed Rule is a matter of concern. Undue delay and needless expense are significant concerns in the litigation process, and a rule directed at avoiding them is thus appropriate. Other rules may be directed to harassment or malicious injury.

Third, the Proposed Rule is prohibitory -- forbidding lawyers from behaving improperly -- whereas the version of this rule found in the ABA Model Rules imposes an affirmative duty on lawyers to expedite proceedings. It is difficult to evaluate whether the affirmative rule has merit absent information about how it has worked in practice. In any event, the negative phrasing of this rule parallels existing DR 7-102(A)(1).

4. Rule 3.5 -- Impartiality of Judges and Jurors

Proposed Rule 3.5 prohibits (a) improper efforts to influence a court, (b) *ex parte* communications with the court, (c) efforts to influence jurors or prospective jurors "by means prohibited by law," (d) *ex parte* communications with veniremen, (e) improper communications with jurors after the jury is discharged, and (f) "conduct intended to disrupt a tribunal." The Proposed Rule is an amalgam of ABA Rule 3.5 and Disciplinary Rules 7-108 and 7-110. The proposed rule raises three concerns.

First, in two of its provisions it prohibits attorneys from acting "by means prohibited by law." See Proposed Rule 3.5(a) (prohibiting efforts to influence the Court "by means prohibited by law"); 3.5(c) (prohibiting efforts "to influence a juror or prospective juror by means prohibited by law. These prohibitions raise two questions: (a) what benefit does it serve to have a disciplinary sanction that merely tracks extant law? and (b) could one be accused of violating either of these sections even if one were not found to have violated the extant law, e.g., if one were acquitted in a criminal trial, would these provisions be effective?

Second, Proposed Rule 3.5(f), which prohibits conduct "intended to disrupt a tribunal," is problematic because of the unclear relation between such conduct and conduct giving rise to contempt. Is conduct "intended to disrupt a tribunal" (i) different from, (ii) greater than, (iii) less than, or (iv) the same as, conduct that may give rise to a contempt sanction? If different, how? If the same as, then is the rule necessary or is the contempt sanction enough? If conduct "intended to disrupt a tribunal" is less severe than conduct giving rise to contempt, then there is a serious question whether the Proposed Rule would improperly stifle aggressive, but lawful, litigation tactics and advocacy. This issue should be addressed by revision to the commentary accompanying Proposed Rule 3.5.

Third, members of the Committee expressed the concern that, although Proposed Rule 3.5 is modeled in part on existing DR 7-108, it fails to carry forward the explicit prohibitions in DR 7-108(D) and (E) on (i) post-discharge questions or comments "that are calculated . . . to influence the juror's actions in future jury service," and (ii) "vexatious or harassing investigation of either a member of the venire or a juror." COSAC's proposal inadequately explains these omissions. Although the COSAC commentary suggests that paragraphs (c), (d) and (e) of Proposed Rule 3.8 are "broader" than DR 7-108(D) and "prohibit communications calculated to influence [a] juror's action in future jury service," the Committee does not believe that comment accurately characterizes COSAC's proposed language. While the members of the Committee do not believe that the omission of prohibitions found in current DR 7-108(D) and (E) is reason to disapprove Proposed Rule 3.5, the Committee believes that, at a minimum, the commentary to Proposed Rule 3.5 should be modified to make clear that the proposed rule encompasses those prohibitions.

5. Rule 3.6 -- Trial Publicity

Proposed Rule 3.6 prohibits lawyers from making extrajudicial statements that the lawyer knows or reasonably should know will be publicly disseminated and "will have a substantial likelihood of materially prejudicing an adjudicative proceeding" in which the lawyer is participating or has participated. The Proposed Rule enumerates types of statements that the lawyer may make (Proposed Rules 3.6(b), 3.6(d)), and types that the lawyer presumptively may not make (Proposed Rule 3.6(c)).

The Proposed Rule is generally similar in content to DR 7-107 and ABA Model Rule 3.6. The only point that we note here is that whereas DR 7-107(A) provides that a lawyer shall not make certain statements that "*a reasonable person* would expect to be disseminated by means of public communication" [emphasis added], the Proposed Rule provides that a lawyer shall not make certain statements that "*the lawyer* knows or reasonably should know will be disseminated by means of public communication,." (Proposed Rule 3.6(a) [emphasis added]).

The substitution of the "reasonable lawyer standard" for the "reasonable person standard," is noted by COSAC, and appears to be reasonable, indeed wise. Lawyers may have a better understanding than non-lawyers of under what circumstances their remarks may be publicly disseminated, and they should be held to a higher standard than non-lawyers.

6. Rule 3.7 -- Witness/Advocate Rule

Proposed Rule 3.7 deals with the circumstances under which an attorney is disqualified from acting as counsel in a matter in which he or she will also be a witness, and generally incorporates the substance of existing DR 5-102. There are, however, a number of incremental changes from existing law that are desirable and should be approved.

As noted in the COSAC Commentary, the major changes from the New York Code are that Proposed Rule 3.7(a)(3) eliminates the phrase "because of the distinctive value of the lawyer as counsel in the particular case," a factor in the New York Code that detracts from the balancing required under (a)(3) between the interests of the client and those of the tribunal and the opposing party.

Proposed Rule 3.7(a)(5), the Commentary notes, has no analogue in the New York Code. It emphasizes the role of the judge in deciding the balancing of interests required under paragraph (a)(3), e.g. weighing the potential prejudice to opposing parties and any confusion on the part of a lay trier of fact from the dual roles as attorney and witness against the harm to the client resulting from disqualification.

Also, Comment [5] states that the disqualified testifying lawyer may participate fully in pretrial representation and motions outside the presence of a lay fact-finder but restricts participation during the trial to "consultation" with the lawyer handling the trial outside of the presence of a lay fact-finder.

7. Rule 3.8 -- Special Responsibilities of Prosecutors

Proposed Rule 3.8, relating to the responsibilities of prosecutors and other government attorneys in criminal cases, incorporates and substantially expands upon existing DR 7-103.

Paragraph (a). The first clause of paragraph (a) incorporates the substance of DR 7-103(A), but clarifies and strengthens the existing rule. Under existing DR 7-103(A), a prosecutor may not bring criminal charges when he or she "knows or it is obvious" that probable cause is lacking. The proposed rule makes clear that the standard as to when criminal charges may be brought is an objective one, by replacing "knows or it is obvious" with "knows or reasonably should know." The latter clause of paragraph (a), prohibiting continued prosecution of a case where the prosecutor "knows or reasonably should know" that there is not sufficient evidence to "establish a prima facie showing of guilt," imposes a requirement that, although not found in the existing Code, is desirable.

Paragraph (d). This paragraph, relating to the obligation of prosecutors to disclose exculpatory or mitigating evidence, incorporates the substance of DR 7-103(B), but (i) clarifies the timing of disclosure of such evidence to the defense. To the extent that this rule

suggests that a prosecutor may delay disclosure of evidence in mitigation of sentence, the proposed rule may be undesirable. The rule also usefully makes clear that courts have the authority to alter a prosecutor's disclosure obligations. Overall, this proposed rule is acceptable.

Paragraphs (b), (c), (e), and (f). These paragraphs impose new requirements relating to the rights of unrepresented defendants, respect for the attorney-client relationship, pretrial publicity and factual innocence. All of these changes are desirable and should be adopted. (One might ask whether, in the future, the rules of professional conduct ought to address whether prosecutors should routinely insist on waivers of the attorney-client privilege as a condition of obtaining lenient treatment.)

Paragraphs (g) and (h). These paragraphs are important additions to the existing rules regulating prosecutorial conduct. The purpose of this portion of Proposed Rule 3.8 is to make clear that prosecutors have continuing duties, after obtaining a conviction, to respond to evidence that an innocent person has been convicted. Accordingly, when a prosecutor comes to know of new, material evidence creating a reasonable likelihood that a convicted defendant is factually innocent, Proposed Rule 3.8(g) requires the prosecutor to ensure that an investigation is conducted to determine whether in fact the defendant is innocent. Proposed Rule 3.8(g) further requires the prosecutor to disclose the new evidence to the defendant and to make any appropriate motions directed at setting aside the verdict. The post conviction disclosure duty is specifically applicable regardless of whether the evidence of innocence could have been previously discovered by the defense. Under paragraph (h) the prosecutor must seek to set aside a prior conviction if the prosecutor learns of clear and convincing evidence that the defendant did not commit the offense of which he was convicted. As noted in commentary to Proposed Rule 3.8, paragraphs (g) and (h) -- which track the recommendations in a report on prosecutorial ethics prepared by this Committee last year -- have no counterpart in either the existing Code or in the ABA Model Rules.

8. Rule 3.9 -- Advocate in Non-Adjudicative Proceedings

Proposed Rule 3.9 establishes certain standards of conduct applicable to attorneys who appear on behalf of clients before legislative bodies or administrative agencies in non-adjudicative matters. While the existing Code does not include a disciplinary rule parallel to proposed Rule 3.9, the Code does include an ethical consideration providing that an attorney "should identify the capacity in which he or she appears [when seeking legislative or administrative changes]." Moreover, requiring that an attorney treat a legislative or administrative body in accordance with proposed Rules 4.1 through 4.4 -- standards of professional conduct generally applicable to dealings with third parties -- does not seem controversial. This rule should be approved.

9. Rule 8.1 -- Truthfulness in Bar Admission Matters

Proposed Rule 8.1, prohibiting false statements and omissions in connection with applications for admission to the bar, carries forward the current requirements of DR 1-101(A), DR 1-101(B), DR 1-103(B) and DR 1-102(A)(4), (5). It should be approved.

10. Rule 8.2 -- Judicial Officers

Proposed Rule 8.2(a) provides, in relevant part, that a lawyer shall not

> make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to any judicial office.

This Proposed Rule occasions the following comments.

First, the analogous Model Code provision is DR 8-102. The Disciplinary Rule treats lawyers' statements about judicial officers differently from lawyers statements about candidates for judicial office. It is not clear whether the same standard applies, because the Rule prohibits "false statements of fact" about a candidate, and "false accusations" against a judge. Is a false statement of fact different from a false accusation? The Proposed Rule removes the potential confusion by applying the same rule to both. This is an obvious improvement over the Disciplinary Rule.

Second, the Proposed Rule prohibits lawyers from making statements that (a) they know to be false, or (b) as to the truth or falsity of which they have "reckless disregard." The reckless disregard provision expands the prohibition of the Proposed Rule beyond Disciplinary Rule, 8-102, which prohibits only knowingly false statements or knowingly false accusations. As the COSAC Commentary notes, the reckless disregard proviso tracks the first amendments standards enunciated in *New York Times v. Sullivan*. This appears to have been done in response to the case of *Matter of Holtzman*, 78 N.Y.2d 184, *cert. denied*, 502 U.S. 1009 (1991), which found that a lawyer's speech about a judge that was arguably made in reckless disregard to its truth or falsity violated DR 1-102(A)(7), even though the speech was constitutionally protected under *New York Times v. Sullivan*. It is not clear to us, however, that the disciplinary rules need to adhere to that standard, or that it is appropriate for them to do so. Proposed Rule 8.2(a) deals with false statements concerning judicial officers or candidates for judicial office, and largely carries forward the requirements of existing DR 8-102 and DR 8-103. However, while the Code provisions prohibit "knowing" false statements, the proposed rule prohibits both statements known to be false *and* statements made "with reckless disregard as to its truth or falsity." Moreover, while the Code refers to false statements concerning "qualifications" of a candidate for judicial office and "false accusations" against a sitting judicial officer, the proposed rule refers to statements concerning "qualifications or integrity." These changes are both desirable, and should be adopted.

Proposed Rule 8.2(b), requiring candidates for judicial office to comply with relevant provisions of the Code of Judicial Conduct, is substantially identical to existing DR 8-103, and should be adopted.

11. Rule 8.3 -- Reporting Professional Misconduct

Proposed Rule 8.3, identifying the circumstances in which an attorney with knowledge of professional misconduct by another attorney must report such misconduct, is substantially identical to existing DR 1-103. Notably, Rule 8.3(b) adds an obligation to report a

violation by a judge of "applicable rules of judicial conduct," where the violation "raises a substantial question as to the judge's fitness for office." This requirement is not found in the Code, but is not controversial. This rule should be approved.

12. Rule 8.4 -- Definition of Professional Misconduct

Proposed Rule 8.4 is drawn largely from existing DR 1-102(A). Paragraphs (a), (b), (c), (d), (e)(1) and (g) are drawn directly from DR 1-102(A), with certain clarifications that do not appear to effect any substantive change in the law. Paragraphs (e)(2) and (f) -- prohibiting attorneys from stating an ability to obtain any result through unlawful means, or assisting judicial officers in violations of the Code of Judicial Conduct or other law -- are new, but not controversial. This rule should be approved.

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