A FRESH APPROACH TO PRESERVING INDEPENDENT JUDGMENT—CANON 6* OF THE PROPOSED CODE OF PROFESSIONAL RESPONSIBILITY

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In the past few years, the Canons of Professional Ethics (hereinafter referred to as the Canons) have been the subject of widespread criticism.[1] Cognizant of their deficiencies and of the need for a reappraisal, the House of Delegates of the American Bar Association created the Special Committee on Evaluation of Ethical Standards to examine the Canons and to recommend changes. This committee, concluding that "the need for change in the statements of professional responsibility of lawyers could not be met by merely amending the present Canons,"[2] recently released its preliminary draft of a proposed Code of Professional Responsibility (hereinafter referred to as the Code).[3] If adopted by the House of Delegates, the Code will replace the present Canons.

Representative of the sweeping changes that have been made by the Code are the provisions of proposed Canon 6. These provisions, which embody a new approach to the problems of protecting the independent

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* Shortly before this article was published the ABA Special Committee on Evaluation of Ethical Standards formulated its final draft. The most obvious change relevant to this article is a change in numbering: Canon 6 will be Canon 5 in the final draft. While other changes have been made, and indicated in the footnotes, they do not substantially affect this article. Although page references in the footnotes are to the preliminary draft, the brackets contain references to where the cited material appears in the final draft. Abbreviations are as follows: Ethical Consideration (EC); Disciplinary Rule (DR).

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1 *See generally* ABA SPECIAL COMM. ON EVALUATION OF ETHICAL STANDARDS, CODE OF PROFESSIONAL RESPONSIBILITY at v, vi (Preliminary Draft, 1969) [hereinafter cited as the CODE]; O. PHILLIPS & P. MCCOY, CONDUCT OF JUDGES AND LAWYERS 205-06 (1952); Sutton, *Revision of the Canons of Ethics of the American Bar Association,* 21 RECORD OF N.Y.C.B.A. 472 (1966); Wright, *Study of the Canons of Professional Ethics,* 11 CATH. LAW. 323 (1965); Wright, *An Evaluation of the Canons of Professional Ethics,* 21 RECORD OF N.Y.C.B.A. 581 (1966); *A Re-evaluation of the Canons of Professional Ethics: A Symposium,* 33 TENN. L. REV. PREFACE 129 (1966).

2 PREFACE, CODE at vi.

3 The preliminary draft, dated January 15, 1969, has been mailed by the ABA to approximately 20,000 persons, including ABA officers, state bar officials, judges of courts of record, professors of legal ethics, representatives of mass media, and law reviews for their comment and criticism. After a review of the responses, the special committee will formulate its final draft. The final draft of the Code will be submitted for adoption to the House of Delegates of the ABA in August, 1969.

judgment of lawyers, constitute the subject of this article. The proposed Canon provides: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of Clients."[4] This general concept, together with the interrelated ethical considerations and disciplinary rules which are derived therefrom (see discussion *infra*), defines the scope of the lawyer's obligation to exercise his professional judgment solely for his client's benefit, free from compromising interests.

This article does not attempt to treat the entire spectrum of problems related to preserving independent judgment;[5] rather, it is intended to be a comprehensive discussion of (1) the Code's approach to protecting the independence of a lawyer's judgment juxtaposed to that under the existing Canons, and (2) the effect of the Code's approach on those interests which may interfere with a lawyer's exercise of independent judgment. Prior to a discussion of specific problem areas, it will be helpful to examine generally the function and structure of the proposed Code.

THE PROPOSED CODE OF PROFESSIONAL RESPONSIBILITY

The proposed Code represents a complete reorganization and restatement of the principles of professional conduct. The committee has sought both to retain the valuable principles of the present Canons and to avoid their inadequacies. Although some clear-cut, substantive changes have been made,[6] the more apparent departures are those in format, direction and emphasis.[7]

The format of the proposed Code deviates from that of the Canons in two significant aspects. First, in contrast to the rather disorganized

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[4] CODE at 60. (In the final draft the proposed Canon will read: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of *A Client.*")

[5] Topics excluded from consideration include: employment where a lawyer's judgment may be adversely affected but the client consents to the representation; employment related to a matter previously dealt with as a judge or public official; disqualification of the other lawyers in a firm when one lawyer of the firm is disqualified because of differing interests; conduct which would subject a lawyer who holds public office to the influence of interests opposed to his public duty; and acceptance of employment which appears to be improper because of differing interests.

[6] Changes include (1) requiring that a lawyer act with competence (CODE, Canon 4, 50-51) [in final draft, Canon 6]; and (2) omission of the total prohibition of present ABA Canon 35 against employment to render legal services to the members of an organization. [Also see final draft, DR 2-102(F) permitting a lawyer to "use, in connection with his name, . . . an earned degree or title derived therefrom indicating his training in the law."].

[7] *Compare, e.g.*, ABA CANONS OF PROFESSIONAL ETHICS No. 31 [hereinafter each canon is cited as ABA CANON] (which emphasizes a lawyer's right to decline employment") *with* CODE, Canon 2, Ethical Considerations ¶26, at 17 (which states that "a lawyer shall not lightly decline proffered employment"). Also *compare* ABA CANON 19 (which states that "[e]xcept when essential to the ends of justice, a lawyer should avoid testifying in court on behalf of his client") *with* CODE, Canon 6, Ethical Considerations ¶9, at 62 (which provides that "doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate").

arrangement of the existing 47 Canons,[8] the organizational framework of the Code is based upon only nine canons, each of which is a concise axiomatic statement of a general principle of professional conduct. Second, the general concepts embodied in each canon are followed by related ethical considerations and disciplinary rules.[9] The ethical considerations represent the reasons which underlie the established standards of professional conduct. They are "aspirational in character" and are intended to provide the lawyer with a body of principles to which he can look for guidance in particular circumstances.[10] On the other hand, the disciplinary rules "are mandatory in character and state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[11]

The Code's division between ethical considerations and disciplinary rules has two primary purposes: to set forth objectives toward which members of the profession should strive, together with certain minimum standards which they must observe; and to resolve the conceptual as well as practical difficulties which have arisen from applying the present Canons, which were intended primarily to be exhortatory in nature, as a basis for disciplinary action.[12] Thus, while the ethical considerations reflect the ideals by which a lawyer is to be guided in seeking to maintain the highest standards of conduct, they are not intended to provide a level of conduct below which a lawyer would be subject to discipline. Rather, the disciplinary rules provide the standards by which to judge a lawyer's conduct, thereby providing a basis for disciplinary action. The Code does not, however, attempt to prescribe the procedures to be used in disciplinary actions or the penalties to be imposed for certain violations; rather it seeks "to enumerate conduct for which a lawyer should be disciplined."[13] It would appear that the Code's distinction between ethical

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[8] Even a casual reading of the Canons reveals the disorganization. For example, Canons which pertain to acceptance of employment include Canons 4, 13, 30, 31, 35, 42 and 44; Canons which pertain to trial conduct include Canons 3, 5, 15, 17, 18, 19, 20, 21, 22, 23, 24, and 39. In addition, 15 Canons follow ABA CANON 32, "The Lawyer's Duty in Its Last Analysis."

[9] The division made between ethical considerations and disciplinary rules corresponds to the division between standards and rules made by the Wisconsin Code of Judicial Ethics.

> The Code is divided into standards and rules, the standards being statements of what the general desirable level of conduct should be, the rules being particular canons, the violation of which shall subject an individual judge to sanctions. *In re* Promulgation of a Code of Judicial Ethics, 36 Wis. 2d 252, 255, 153 N.W.2d 873, 874 (1967).

See also CODE, Preamble, at 1; Sutton, *supra* note 1; Sutton, *Re-Evaluation of the Canons of Professional Ethics: A Reviser's Viewpoint*, 33 TENN. L. REV. 132 (1966).

[10] CODE, Preamble, at 1.

[11] *Id.*

[12] For a general discussion pertaining to these two purposes see Sutton, *supra* note 9, at 134-37; Sutton, *supra* note 1; Wright, *Study of the Canons of Professional Ethics*, 11 CATH. LAW. 323, 325 (1965).

[13] CODE, Preamble, n.12, at 4. "Recommendations as to the procedures to be used in disciplinary actions and the gravity of disciplinary measures appropriate

considerations and disciplinary rules is necessary and desirable in that it delineates for the lawyer conduct which is a basis for discipline while providing courts and grievance committees with specific criteria by which to judge such transgressions in compliance with concepts of procedural due process.

PROVISIONS OF PROPOSED CANON 6—GENERALLY

"A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional judgment of a lawyer of competence and integrity."[14] Laymen typically lack the expertise to represent themselves effectively within our complex legal system. Moreover, laymen usually are in no position to evaluate a lawyer's ability or the quality of his services. Thus, when the average layman is confronted with a legal problem of any import, he must, perforce, turn to a lawyer—whom he often doesn't know—and rely upon him for proper representation of his legal rights. It is therefore imperative that the organized bar and each member of the profession constantly strive to ensure that the public is served by lawyers who are competent, loyal to their clients, zealous on their behalf, and whose professional judgment[15] is exercised free from improper influences.

Canon 6 of the proposed Code sets forth the lawyer's obligation to exercise independent professional judgment on behalf of his clients. Fulfillment of this obligation generally requires that, within the scope of permissible activity,[16] each lawyer determine his actions by the single criterion of what would best serve his client's interests. Inconsistent interests should be disregarded, thereby avoiding their potential adverse influence.

The provisions of proposed Canon 6 are designed to protect both clients and lawyers. They protect a client from a lawyer who might otherwise undertake or continue employment which would present differing interests tending to adversely affect the interests of the client. They protect lawyers by preventing them from undertaking the difficult, if not impossible, task of representing, with the requisite loyalty, clients whose interests are opposed to those of the lawyer, another client, or a third person.

> The rule that an attorney may not by his contract of employment place himself in a position where his own interests or the in-

for violations of the Code are within the jurisdiction of the American Bar Association Special Committee on Evaluation of Disciplinary Enforcement." *Id.*

[14] CODE, Canon 1, Ethical Considerations ¶1, at 5.

[15] "The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem . . . ." CODE, Canon 3, Ethical Considerations ¶5, at 45.

[16] It should be noted that proposed Canon 7 discusses certain limits on the zeal with which a lawyer may act on behalf of his client. *See* CODE, Canon 7, Ethical Considerations and Disciplinary Rules, at 77-93.

> terests of another, whom he represents, conflict with the interests of his client, is founded upon principles of public policy. It is designed to serve various purposes, among them, to prevent the dishonest practitioner from fraudulent conduct, to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties or between his own interests and those of his client, to remove from the attorney any temptation which may tend to cause him to deviate from his duty of enforcing to the full extent the right of his client, to further the orderly administration of justice, and to foster respect for the profession and the courts.[17]

As with most legal postulates, the principle that a lawyer should exercise independent professional judgment is as difficult to apply as it is simple to state. Specific rules are difficult to formulate for there are a variety of factors, each varying in intensity and degree, which may affect the propriety of representation in a particular situation.

The ideal of a lawyer being free of the influence of even the slightest adverse interest is generally unattainable. For example, a lawyer's interests in accepting employment and in the amount and collection of his fee often may not correspond to the interests of his client. Similarly, as a practical matter, the sole practitioner in a small town may find it difficult to avoid representing clients whose interests differ, especially when the divergence is minute. Ideally, a lawyer should refrain from employment where even the *possibility* of conflict exists; yet the possibility that differing interests will develop during the course of employment theoretically is always present.

If differing interests are present, the degree of divergence may range from gross to subtle; if the interests are merely potentially adverse, the possibility of divergence may range from remote to inevitable. Moreover, although the greater the divergence the greater likelihood that the lawyer will be less protective of his client's interests, a divergence may not in fact affect the lawyer's judgment. For instance, he may be able to disregard the potential influence of differing interests if the divergence is minor and he is of strong character. Furthermore, in exceptional situations the client's interests may be better served by the lawyer's representation than by his refusal, even though such employment subjects him to the influence of differing interests.

These factors weigh against the establishment of an inflexible rule forbidding a lawyer from undertaking or continuing representation whenever his judgment may be adversely affected. Perhaps the only realistic way to determine whether or not representation is proper in a given situation is by use of a balancing process: weighing the potential harm to the client against those factors which favor allowing the lawyer to serve in a particular instance. Determining the potential harm requires

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[17] *In re* Westmoreland, 270 F. Supp. 408, 410 (M.D. Ga. 1967).

consideration of such factors as the degree to which the interests differ, the probability that the lawyer will be influenced by the differing interests, and the extent to which his client's interests would be harmed if the lawyer's judgment were affected. Factors favoring the propriety of representation would include any unique value to the client's interest in retaining the lawyer in question, such as his familiarity with the details of a complex legal transaction, or the desire of several parties that the lawyer in question serve as mediator or arbiter of these interests. Where the potential harm to the client's interests is considerable and there are few, if any, considerations favoring acceptance, clearly the lawyer should avoid the employment. On the other hand, where there is minimal potential harm but weighty considerations favoring employment, the lawyer should be justified in accepting or continuing employment. Yet, there may be situations where application of a balancing test merely reveals that factors pro and con employment are equally weighty. In such situations doubts should be resolved against the propriety of representation.[18]

Given the complexities which may be involved in determining the propriety of a representation in a particular instance, it is clear that the guidance provided by the existing Canons is inadequate. Although existing Canon 6 specifically proscribes employment involving conflicting interests, it fails to set forth any criteria upon which a lawyer may base his actions.[19] Other canons are related tangentially,[20] but they are not presented in a manner which would facilitate a lawyer's understanding of the area. Indeed, none of the Canons even refer to the focal problem of protecting

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[18] Even when a lawyer deems his employment proper, he should disclose to his client any information regarding his relations to the parties or the subject matter of the controversy or his other interests which might influence the client in selecting counsel. *See* ABA CANON 6; Allstate Ins. Co. v. Keller, 17 Ill. App. 2d 44, 149 N.E.2d 482 (1958); *cf.* Byrnes v. Phoenix Assurance Co., 178 F. Supp. 488 (E.D. Wis. 1959).

[19] 6. Adverse Influence and Conflicting Interests.

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed. ABA CANON 6.

[20] Present ABA Canons which apply to related matters include Canons 15 (How Far a Lawyer May Go in Supporting a Client's Cause), 7 (Professional Colleagues and Conflicts of Opinion), 10 (Acquiring Interest in Litigation), 11 (Dealing with Trust Property), 12 (Fixing the Amount of the Fee), 13 (Contingent Fees), 14 (Suing a Client for a Fee), 19 (Appearance of Lawyer as Witness for His Client), 35 (Intermediaries), 38 (Compensation, Commissions and Rebates), 42 (Expenses of Litigation), and 44 (Withdrawal From Employment as Attorney or Counsel).

the independence of the lawyer's judgment. It is not surprising, therefore, that ethics committees have been required to devote a disproportionate amount of attention to problems of adverse and conflicting interests; for example, of the first 315 formal opinions issued by the A.B.A. Committee on Professional Ethics, "sixty-four, or one-fifth approximately, deal with conflicts of interest under Canon 6."[21]

Unlike the present Canons, the proposed Code focuses upon the basic problem, that of preserving and safeguarding the independence of the lawyer's professional judgment. Its approach is clear: "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties."[22] In addition, the provisions of the Code are more descriptive than those of the present Canons as to the nature of the problem and provide a lawyer with more guidance in determining the propriety of a particular representation. The ethical considerations discuss the extent to which a lawyer should protect his judgment, and divide the interests which most frequently oppose those of a client into three categories: interests of the lawyer himself; interests of other clients; and interests or desires of a third party who furnishes the lawyer's services to the client. The first category includes business deals between lawyer and client, gifts from client to lawyer, loans and advances by a lawyer to or on behalf of his client, conduct of a lawyer who is a potential witness, and similar problems. The second category involves the problems faced by a lawyer in representing a client whose interests potentially or actually differ from those of a former or current client. The third category deals with the risk of interference with a lawyer's independent judgment which is created by the power that a third party may have over a lawyer when it recommends him to others or pays for the legal services he renders to others. The disciplinary rules require lawyers to avoid certain enumerated employment situations in which other interests will, or there is reasonable probability that they will, adversely affect his judgment on behalf of his client.

PROVISIONS OF PROPOSED CANON 6—INTERESTS OF THE LAWYER

It is apparent that a lawyer's ability to exercise his professional judgment with sole regard for the interests of his client is endangered where his own interests differ from those of his client. Indeed, a lawyer, being only human, may find it quite difficult to avoid the influence of his own interests, and courts and disciplinary bodies have been demonstrably skeptical of his ability to do so.[23] This skepticism is mirrored by opinions

[21] Armstrong, *A Re-Evaluation of the Canons of Professional Ethics: A Practitioner's and Bar Association Viewpoint*, 33 TENN. L. REV. 154, 156 (1966).
[22] CODE, Canon 6, Ethical Considerations ¶1, at 60.
[23] The relation of attorney and client is one of the highest trust and confidence, and demands the utmost good faith on the part of the attorney.

which presume lawyer-client transactions to be fraudulent,[24] and which place upon the lawyer the burden of showing that he did not take advantage of his client[25] and that the transaction was just and equitable.[26]

The formulation of standards and restraints in this area is complicated by the fact that inevitably there will be some divergence between the interests of a lawyer and his clients, and by the fact that under certain circumstances a divergence will not have an adverse effect on the client's interest or the client may prefer representation even though potential or actual adverse influences exist. Thus, although it would be improper for a lawyer to represent a client "when the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, personal, or property interests,"[27] there may be situations where there exists a lesser degree of probability that his judgment will be affected and where representation might be proper. Such situations can be judged only on a case by case basis, by balancing the potential harm to the client against factors which favor the representation.

The proposed Code provisions pertaining to the interests of a lawyer should prove helpful in several respects. First, the provisions are operative at the moment the lawyer is tempted to subject his judgment to the influence of differing interests, whether that occurs when he is initially offered employment or when an opportunity arises during employment. As stated in the ethical considerations of Canon 6:

> A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the proposed client. After accepting employment, a lawyer carefully should refrain from acquiring any property right or assuming any position that would tend to make his judgment less protective of the interests of his client.[28]

A second advantage of these provisions is inherent in the division between ethical considerations and disciplinary rules. The ethical con-

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This relation is not only highly confidential, but presents so many opportunities for the reaping of special benefits at the expense of the client by an attorney so disposed, that courts will closely scutinize any transaction in which the attorney has assumed a position antagonistic to his client. Fielding v. Brebbia, 399 F.2d 1003, 1005 (D.C. Cir. 1968).

[24] "The well-established rule that the relation of attorney-client is one of uberrima fides rests upon the highest considerations of public policy, and agreements between them in the course of the relation are prima facie presumed to be fraudulent, the burden to show them otherwise being cast, as a matter of law, upon the attorney." Bell v. Ramirez, 299 S.W. 655, 658 (Tex. Civ. App. 1927); *accord,* Blasche v. Himelick, 210 N.E.2d 378 (Ind. Ct. App. 1965).

[25] *E.g.,* Jacobs v. Middaugh, 369 S.W.2d 695, 698 (Tex. Civ. App. 1963); Magee v. State Bar, 58 Cal. 2d 423, 374 P.2d 807, 24 Cal. Rptr. 839 (1962).

[26] *E.g.,* McFail v. Braden, 19 Ill. 2d 108, 166 N.E.2d 46 (1960).

[27] CODE, Canon 6, Disciplinary Rule 6-101(A), at 66 [in final draft DR 5-101 (A)].

[28] CODE, Canon 6, Ethical Considerations ¶2, at 60 [in final draft EC 5-2].

siderations are intended to aid lawyers in understanding this problem area; they include a discussion of contexts in which the interests of lawyer and client may differ, an explanation of the danger to the client from a lawyer's inability or failure to disregard his own interests, and an admonition to avoid representation which subjects his judgment to the influence of differing interests. The disciplinary rules go a step further. They require that a lawyer refrain from employment when his judgment will be adversely affected or where the chance is too great (*i.e.*, there is a reasonable probability) that his judgment will be adversely affected.

Third, as mentioned above, the provisions deal specifically with several matters concerning which the interests of lawyer and client may differ. These include: business interests; employment when the lawyer has value to the client as a witness; gifts or bequests from client to lawyer; establishment and collection of the legal fee; loans or advances by a lawyer to or on behalf of a client; and other interests.

Business interests. There is frequently an actual divergence between the business interests of a lawyer and those of his prospective or present client.[29] Since the lawyer's employment generally provides no unique benefit to the client but instead may be to his detriment, such employment should be avoided unless the client's interests are fully protected.

The ethical considerations of proposed Canon 6 stress that a lawyer should avoid employment when his own business interests would interfere with the exercise of independent judgment on behalf of his prospective client and that he should avoid business interests that may adversely affect his representation of a present client.

> The self-interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect property of his client may interfere with the exercise of free judgment on behalf of his client. If such interference would occur with respect to a prospective client, a lawyer should decline employment proffered by him. After accepting employment, a lawyer should not acquire property rights which would affect his professional judgment in the representation of his client. Even if the property interests of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure. A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.[30]

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[29] *See* ABA COMM. ON PROFESSIONAL ETHICS, OPINION, No. 132 (1935) [hereinafter each opinion is cited as ABA OPINION]; J. CARLIN, LAWYERS ETHICS, A SURVEY OF THE NEW YORK CITY BAR 71-78 (1966).

[30] CODE, Canon 6, Ethical Considerations ¶3, at 60 [in final draft EC 5-3].

The disciplinary rules require that a lawyer avoid employment where his judgment will be adversely affected, or reasonably may be adversely affected, except with the consent of the client.

> Except with the consent of his client after full disclosure, a lawyer shall not accept employment when the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.[31]
>
> A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.[32]

Employment when the lawyer has value to the client as a witness. Consideration of the client's interests would usually cause a lawyer to reject or withdraw from employment in a case where he is a potential witness.[33] The disciplinary rules of proposed Canon 6 expressly prohibit representation in two situations:

> A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he . . . ought to be called as a witness on a contested issued . . . .[34]
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> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he . . . ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial . . . .[35]

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[31] CODE, Canon 6, Disciplinary Rule 6-101(A), at 66 [in final draft DR 101(A)].

[32] CODE, Canon 6, Disciplinary Rule 6-103(A), at 67 [in final draft DR 5-104 (A)].

[33] If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness . . . . An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively. CODE, Canon 6, Ethical Considerations ¶ 8, at 61-62 [in final draft EC 5-9]. For a comprehensive, detailed discussion see Sutton, *The Testifying Advocate*, 41 TEXAS L. REV. 477 (1963).

[34] CODE, Canon 6, Disciplinary Rule 6-101(B), at 66. [In the final draft this provision is DR 5-101(B) and has been modified to read:

> A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he . . . ought to be called as a witness, except that he may undertake the employment and he . . . may testify: (1) If the testimony will relate solely to an uncontested matter. (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony. (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client. (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.].

[35] CODE, Canon 6, Disciplinary Rule 6-105(A), at 68 [in final draft DR 5-102 (A)]. This Code provision includes the language "ought to be called as a witness *on behalf of his client*" (emphasis added) so that the rule will not apply to situations covered by Disciplinary Rule 6-105(B), at 68 [in final draft DR 5-102]. Rule 6-105(B) permits a lawyer to continue representation even though he will be called

Moreover, in contrast to existing Canon 19,[36] the ethical considerations state that "doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as advocate."[37]

Both the ethical considerations and the disciplinary rules recognize that there are exceptional situations when a lawyer may properly serve as both advocate and witness. A lawyer may accept employment if his testimony relates to an uncontested issue[38] or if "it is unlikely that he will be called because his testimony would be merely cumulative."[39] Likewise, a lawyer is not required to withdraw from employment if "his testimony relates solely to a formal matter on an uncontested issue"[40] or if "his testimony on behalf of his client relates solely to the nature and value of legal services he has rendered his client."[41] The ethical considerations affirm the propriety of accepting or continuing employment "where it will be manifestly unfair to the client"[42] to do otherwise; factors to be considered include "the personal or financial sacrifice of the client that may result from . . . [the lawyer's] refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement."[43] The disciplinary rules allow employment when refusal or withdrawal "would work a substantial hardship on the client because of the distinctive value of the lawyer . . . as counsel . . . ."[44]

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as a witness for the opposing party, unless his testimony would prejudice his client. Otherwise the opposition could rid itself of a capable lawyer simply by calling him as a witness.

[36] "Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client." ABA CANON 19. This language seems to authorize, if not encourage, a lawyer to deprive his client of a witness rather than to deprive himself of employment.

[37] CODE, Canon 6, Ethical Considerations ¶9, at 62 [in final draft EC 5-10].

[38] CODE, Canon 6, Ethical Considerations ¶9, at 62 [in final draft EC 5-10]. CODE, Canon 6, Disciplinary Rule 6-101(B), at 66-67 [for language in final draft see note 34 *supra*]. Present ABA CANON 19 permits a lawyer to testify as to "formal matters." However that language is inadequate; it does not indicate the relevant considerations. A lawyer should not be both advocate and witness where the issue of his credibility is important, and that issue is important when the lawyer testifies to a "formal" matter which is contested.

[39] CODE, Canon 6, Ethical Considerations ¶9, at 62 [in final draft EC 5-10].

[40] CODE, Canon 6, Disciplinary Rule 6-105(A)(1), at 68. [In the final draft this provision is DR 5-102(A) and has been modified to read as follows:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he . . . ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and . . . shall not continue representation in the trial, except that he may continue the representation and he . . . may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

For the language of DR 5-101(B)(1) through (4) see note 34 *supra*.].

[41] CODE, Canon 6, Disciplinary Rule 6-105(A)(2), at 68 [for provisions of final draft see notes 34 and 40 *supra*]. This exception is closely akin to the exception provided for formal matters on an uncontested issue. It is intended for use where some formal offer of proof is required regarding the nature and value of the lawyer's services because the court does not take judicial notice of such.

[42] CODE, Canon 6, Ethical Considerations ¶9, at 62 [in final draft EC 5-10].

[43] *Id.*

[44] CODE, Canon 6, Disciplinary Rules 6-101(B), -105(C), at 67-68 [in final draft DR 6-101(B)(4), -102(A)].

Client's property in lawyer's custody. The mishandling of clients' funds by lawyers is a serious abuse of the lawyer-client relationship.[45] Mishandling may take various forms, including commingling by a lawyer of his client's money with that of his own,[46] neglecting or refusing after demand to pay over money due a client,[47] using funds of a client without the client's consent,[48] or a combination of one or more of such forms.[49] Since the client is almost inevitably disadvantaged by instances of mishandling and since there are no countervailing considerations, lawyers should be unequivocally prohibited from intentionally mishandling clients' funds and should be required to take affirmative steps to guard against careless mishandling. The proposed Code not only carries forward the applicable restraints provided in A.B.A. Canon 11,[50] but also sets forth even more stringent requirements in order to safeguard the interests of the clients.[51]

Gratuities from client to lawyer. A more subtle divergence between the interests of lawyer and client may exist with regard to gratuitous actions of the client which benefit the lawyer.[52] There is no reason to deny a lawyer

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[45] The financial losses suffered by clients as a result of the misappropriation or mishandling of clients' funds by lawyers has prompted bar associations to seek to provide some compensation through the establishment of clients' security funds. As early as February, 1959, the ABA House of Delegates adopted a resolution declaring that the establishment of clients' security funds by state and local bar associations was within the public interest and merited the strong support of the legal profession. 84 A.B.A. REP. 513 (1959).

A 1961 Committee of the New Jersey State Bar Association appointed to study the subject of clients' security funds reported that the average annual amount misappropriated by New Jersey lawyers indicted for such between 1950 and 1961 was $30,000 to $35,000 and that many of the losses to clients had been under tragic circumstances. 84 N.J.L.J. 253 (1961). After noting that such funds were in operation in nine states and had been approved in five other states, the committee recommended that New Jersey initiate a fund. *Id.*

As of June 15, 1967, 26 state bar organizations had clients' security funds, and 7 states were preparing to initiate such a fund. In addition, several county and local bar organizations have such funds. 92 A.B.A. REP. 588 (1967).

[46] *E.g.*, Black v. State Bar, 57 Cal. 2d 219, 368 P.2d 118, 18 Cal. Rptr. 518 (1962).

[47] *E.g.*, *In re* McAnarney, 197 Kan. 643, 418 P.2d 137 (1966).

[48] *E.g.*, Yapp v. State Bar, 62 Cal. 2d 809, 402 P.2d 361, 44 Cal. Rptr. 593 (1965).

[49] *E.g.*, Clark v. State Bar, 39 Cal. 2d 161, 246 P.2d 1 (1952); Memphis & Shelby County Bar Ass'n v. Sanderson, 52 Tenn. App. 684, 378 S.W.2d 173 (1963); *In re* Ross, 66 Wash. 2d 233, 401 P.2d 975 (1965).

[50] ABA CANON 11 provides that "[m]oney of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him."

[51] CODE, Canon 6, Disciplinary Rule 6-104, at 67-68 [DR 6-104 (A) & (B) have been omitted from the final draft; DR 6-104 (C) & (D) are included, with minor changes, in the final draft as DR 9-102 (A) & (B)].

[52] Courts are often suspicious of gifts or bequests from a client to his lawyer. *See* Laspy v. Anderson, 361 S.W.2d 680 (Mo. 1962); Annot., 19 A.L.R.3d 575 (1968); Annot., 13 A.L.R.3d 381 (1967); Annot., 24 A.L.R.2d 1288 (1952). Courts have generally recommended that the lawyer urge the client to seek counselling from an informed, uninterested person as to the advisability of such action. Magee v. State Bar, 58 Cal. 2d 423, 374 P.2d 807, 24 Cal. Rptr. 839 (1962); Toomey v. Moore, 213 Ore. 422, 325 P.2d 805 (1958); Annot., 123 A.L.R. 1505 (1939).

the right to accept a gift or bequest freely given him by a client, such as in gratitude for his services or because of their personal relationship. Yet it clearly would be improper for the lawyer to overreach the client in any way or fail to advise the client fully or act in the client's best interests.[53] As stated in the ethical considerations of proposed Canon 6:

> Likewise, a lawyer should not attempt to persuade a client to make an inter vivos or testamentary gift to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or over-reached the client. A lawyer should not suggest the making of a gift that benefits him. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. In some instances, it may even be desirable for a lawyer to insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.[54]

Establishment and collection of the legal fee. It is impossible, within our legal system, to avoid a divergence between the interests of lawyers and clients as to the amount and form of legal fees. Clients naturally have a financial interest in the amount of the fee; in addition, the fee largely determines a client's ability to obtain legal services. Yet lawyers depend primarily upon the income from fees for their livelihood, and "adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession."[55] Harmonization of the divergent interests of lawyers and clients requires that both their interests be considered. It may be said generally that the lawyer should receive and the client can properly be expected to pay a reasonable fee.[56]

Where the gift or bequest is to be made through an instrument, it is advisable that the instrument be prepared by another lawyer. State *ex rel.* Nebraska State Bar Ass'n v. Richards, 165 Neb. 80, 84 N.W.2d 136 (1957); *In re* Davis' Will, 14 N.J. 166, 101 A.2d 521 (1953); ABA OPINION 266 (1945); Annot., 19 A.L.R.3d 575, 581 (1968); Annot., 63 A.L.R. 948 (1929). In limited instances the lawyer may subject himself to the possibility of disciplinary action for drawing such an instrument himself. State v. Horan, 21 Wis. 2d 66, 123 N.W.2d 488 (1963); Annot., 98 A.L.R.2d 1234 (1964).

[53] *E.g.*, Magee v. State Bar, 58 Cal. 2d 423, 374 P.2d 807, 24 Cal. Rptr. 839 (1962).

[54] CODE, Canon 6, Ethical Considerations ¶4, at 61 [in final draft EC 5-5].

[55] CODE, Canon 2, Ethical Considerations ¶17, at 15.

[56] Both the present Canons and the proposed Code contain standards for determining what constitutes a reasonable fee. *See* ABA CANON 12; CODE, Canon 2, Ethical Considerations ¶18, at 15-16; CODE, Canon 2, Disciplinary Rule 2-106, at 25. The Code prohibits a lawyer from charging a clearly excessive fee. CODE, Canon 2, Disciplinary Rule 2-106(A), at 25.

In spite of the general obligation of clients to pay reasonable fees, the Code also provides that "persons unable to pay all or a portion of a reasonable fee should have access to legal services, and lawyers should support and participate in ethical activities designed to achieve that objective." CODE, Canon 2, Ethical Considerations ¶17, at 15. *See also* CODE, Canon 2, Ethical Considerations ¶¶24, 25, at 17.

A recent development in payment of fees is the legal fee finance plan. ABA

"One of the most controversial features of the American legal system is the contingent fee."[57] Objections to the use of contingent fees have been made on several grounds,[58] including the arguments "that their use encourages lawyers to take advantage of their superior knowledge and experience to overreach their clients in setting the amount of the lawyer's percentage in the fee contract, providing themselves with a disproportionate fee for the amount of services expected to be or actually rendered,"[59] and that "the lawyer acquires an interest in the lawsuit that might come between him and his client, not only concerning the amount of the fee but also over the control of the suit on such questions as whether to accept an offer of settlement."[60] Yet in some instances a contingent fee arrangement may be in the client's best interest, such as when he otherwise would be unable to pay for or obtain legal services.[61] Thus, the Code permits contingent fee contracts in civil cases,[62] but cautions that a lawyer "should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client."[63]

The interests of lawyer and client may be adverse when a lawyer uses a lien to secure payment of his fee or expenses. However, use of a lien merely protects the lawyer against the careless or dishonest client and poses no threat to the client who conscientiously strives to fulfill the employment contract. Thus, a balancing of policy factors here strongly favors allowing the lawyer to hold such an adverse interest. Hence, the Code approves the use of liens by lawyers.[64]

OPINION 320 (1968) suggests that the lawyer's endorsement be without recourse against himself, thereby avoiding any conflict of interest between himself and his client if the client failed to pay the note.

57 Stason, *Foreword* to F. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES (1964) [hereinafter cited as MACKINNON].

58 For a complete coverage of arguments for and against use of contingent fees, as well as other information relating to the contingent fee see MACKINNON, *supra* note 57.

59 *Id.* at 159.

60 *Id.* at 5. "The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the case of his client or otherwise to become financially interested in the outcome of the litigation." CODE, Canon 6, Ethical Considerations ¶6, at 61 [in final draft EC 5-7].

61 "[A] reasonable contingent fee is often permissible because it may be the only means by which a layman can obtain the services of a lawyer of his choice." CODE, Canon 6, Ethical Considerations ¶6, at 61; *accord,* Gruskay v. Simenauskas, 107 Conn. 380, 140 A. 724 (1928); Radin, *Contingent Fees in California,* 28 CAL. L. REV. 587, 589 (1940).

62 CODE, Canon 6, Disciplinary Rule 6-102(A), at 67 [in final draft DR 5-103 (A)(2)]. Contingent fees in criminal cases are prohibited. CODE, Canon 2, Ethical Considerations ¶20, at 16; CODE, Canon 2, Disciplinary Rule 2-106(C), at 25.

"Most countries do not permit the use of contingent fee contracts." Stretlow, *Loans to Clients for Living Expenses,* 55 CAL. L. REV. 1419, 1419 n.2 (1967).

63 CODE, Canon 6, Ethical Considerations ¶6, at 61 [in final draft EC 5-7].

64 "[I]t is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens . . . ." CODE, Canon 6, Ethical Considerations ¶6, at 61 [in final draft EC 5-7]. "A lawyer . . . may . . . [a]cquire a lien granted by law to secure his fee or expenses." CODE, Canon 6, Disciplinary Rule 6-102(A)(1), at 67 [in final draft DR 5-103(A)(1)].

Loans or advances by the lawyer to or on behalf of the client. When a lawyer makes a loan to his client or advances funds on behalf of his client, he assumes the position of a creditor and acquires interests which differ from those of his client. This divergence of interests may adversely affect the lawyer's judgment, particularly when it appears that he may be unable to recoup the loans or advances. On the other hand, some clients must necessarily obtain loans or advances in order to pursue their causes of action[65] and to sustain themselves during the pendency of litigation.[66] The existence of strong policy considerations both favoring and opposing loans or advances has resulted in inconsistent attitudes in the past.[67] The proposed Code provides that:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client for expenses relating to such litigation or for medical or living expenses during the period of such representation, except that he may advance or guarantee the payment of court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence.[68]

Other interests. Several other situations in which a lawyer's judgment could be adversely affected by the divergence of his interests from those of a client are dealt with in the proposed Code. These include situations where a lawyer desires to be the only counsel in a matter (and thus to receive the entire fee),[69] where a lawyer desires to be appointed executor,

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[65] *See* CODE, Canon 6, Ethical Considerations ¶7, at 61 [in final draft EC 5-8].

[66] *See* Stretlow, *supra* note 62, at 1419; *cf.* People *ex rel.* Chicago Bar Ass'n v. McCallum, 341 Ill. 578, 173 N.E. 827 (1930). *But see* Mahoning County Bar Ass'n v. Ruffalo, 176 Ohio St. 263, 199 N.E.2d 396 (1964).

[67] Present ABA CANON 42 allows a lawyer to advance litigation expenses, subject to reimbursement; "it condones a widespread practice by endorsing the prior judicial rule." Stretlow, *supra* note 62, at 1423. However, ABA CANON 42 does not mention loans for living expenses, and "[t]he legal profession is divided . . . over the ethics of lending money to clients for living expenses." Stretlow, *supra* note 62, at 1419.

[68] CODE, Canon 6, Disciplinary Rule 6-102(B), at 67. [In the final draft this provision is DR 5-103(B) and has been modified to read as follows:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his 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, provided the client remains ultimately liable for such expenses.].

See Stretlow, *supra* note 62, for a thorough discussion of loans for living expenses and for advocation of a position opposite that taken by the Code as to living expenses. See also CAL. BUS. & PROF. CODE § 6076, Rule 3a (West Supp. 1968).

[69] A lawyer should not permit his personal interest to influence his advice relative to a suggestion by his client that additional counsel be employed. In like manner, his personal interests should not deter him from suggesting that additional counsel be employed; on the contrary, he should be alert to the desirability of recommending additional counsel when, in his judgment, the proper representation of his client requires it. CODE, Canon 6, Ethical Considerations ¶10, at 62 [in final draft EC 5-11].

One of "Hoffman's Fifty Resolutions," published in 1836, was: "Should I not understand my client's cause, after due means to comprehend it, I will retain it

trustee, or attorney in an instrument prepared for his client,[70] and where a lawyer desires to accept rebates or other compensation regarding employment from one other than his client.[71]

PROVISIONS OF PROPOSED CANON 6—INTERESTS OF OTHER CLIENTS

A client is entitled to the benefit of his lawyer's undivided judgment. This benefit is denied him when that judgment is hobbled or fettered or restrained by commitments to others.[72] It is denied him when the lawyer, because of considerations for other clients, fails to promote the client's cause to the fullest extent. The lawyer's judgment clearly would be adversely affected if he undertook dual representation which made it his duty "in behalf of one client . . . to contend for that which duty to another client requires him to oppose."[73] Yet there are also numerous, less egregious instances in which dual representation should be avoided because of an inherent risk that the lawyer's judgment will be adversely affected by the differing interests of his clients.[74] This is the situation whenever the interests of one client dilute the lawyer's loyalty to another, when advice or action which tends to serve one client also tends to disserve another, or when the interests of one client otherwise become an extraneous, improper influence upon the lawyer's fidelity to the interests of the other.

"Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuance of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client."[75] Generally, therefore, a lawyer should not undertake or continue representation of clients whose interests are in any way diverse if the divergence will adversely affect the exercise of his independent judgment.[76] A lawyer's judgment may be adversely affected by either an actual or a potential divergence,[77] and, consequently, dual represen-

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no longer, but honestly confess it, and advise him to consult others, whose knowledge of the particular case may probably be better than my own." Akers, *Hoffman's Fifty Resolutions*, 14 THE ALA. LAW. 171, 178 (1953).

70 "A lawyer should not consciously influence a client to name him as executor, trustee, or attorney in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety." CODE, Canon 6, Ethical Considerations ¶5, at 61 [in final draft EC 5-6].

71 *See* CODE, Canon 2, Ethical Considerations ¶21, at 16; CODE, Canon 6, Disciplinary Rule 6-108(A), at 69 [in final draft DR 5-107(A)]; ABA OPINIONS 304 (1962), 196 (1939), and 38 (1931); H. DRINKER, LEGAL ETHICS 96-99 (1953); R. WISE, LEGAL ETHICS 119-20 (1966).

72 *See* Glasser v. United States, 315 U.S. 60, 71 (1942).

73 ABA CANON 6.

74 "'[T]he essential question in each case is whether or not the attorney has accepted a retainer which is in any manner in conflict with his obligation to some other client.'" American Employers Ins. Co. v. Goble Aircraft Spec., 205 Misc. 1066, 1075, 131 N.Y.S.2d 393, 402 (Sup. Ct. 1954); *see* Annot., 17 A.L.R.3d 835 (1968).

75 CODE, Canon 6, Ethical Considerations ¶12, at 63 [in final draft EC 5-14].

76 *See generally* Annot., 17 A.L.R.3d 835 (1968).

77 An unresolved problem is the precise meaning of the term "potential" diver-

tation may be improper not only when an actual divergence exists, but also when a potential divergence exists.[78] It would be proper to undertake representation of divergent interests only in those limited instances when, on balance, the clients' interests would be best served by doing so.

A divergence between the interests of parties to litigation would necessarily impair the independence of a lawyer's judgment if he attempted to represent both parties. Thus, it is clear that dual representation of opposing parties in the same litigation would be improper.[79] Moreover, even where the dual representation is of clients on the same side in a proceeding, their interests may differ to such an extent that independent representation of each by the same lawyer would be precluded.

The possibility of a divergence exists in representation of both an insurer and its insured.[80] Problems may arise in several contexts, the most important of which involve: a dispute over the desirability of

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gence. If a lawyer is aware that the interests of clients will differ as to a decision he must make in the future, would dual representation involve an "actual" or a "potential" conflict? If a potential conflict, at what point as the time approaches for the decision to be made does the conflict become an "actual" one? Would "potential" be more accurately used to signify situations in which a lawyer does not know of any present or future divergence, but in which he does know that the general nature of the representation is conducive to the emergence of divergences?

Courts have not been consistent in the use of the term "potential." For example, representation by a lawyer of both an entity (such as a corporation or union) and its officers in a suit by its members or stockholders against the officers for misconduct has been termed both representation involving potential conflict and representation involving actual conflict. *Compare* Tucker v. Shaw, 378 F.2d 304 (2d Cir. 1967), *and* International Bhd. of Teamsters v. Hoffa, 242 F. Supp. 246 (D.D.C. 1965), *with* Murphy v. Washington Am. League Base Ball Club, Inc., 324 F.2d 394 (D. C. Cir. 1963), *and* Milone v. English, 306 F.2d 814 (D.C. Cir. 1962).

[78] *See, e.g.*, Glasser v. United States, 315 U.S. 60, 76 (1942)("Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from . . . insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client . . . ."); International Bhd. of Teamsters v. Hoffa, 242 F. Supp. 246, 256 (D.D.C. 1965)("Potential, no less than actual, conflict disqualifies counsel from serving in a double capacity."); American Employers Ins. Co. v. Goble Aircraft Spec., 205 Misc. 1066, 1075, 131 N.Y.S.2d 393, 401-02 (Sup. Ct. 1954)("If the interests of the carrier and the assured are or are likely to become diverse, he [the attorney] cannot represent both."); H. DRINKER, *supra* note 71, at 104-05, 108.

[79] *See* CODE, Canon 6, Disciplinary Rule 6-106, at 69 [in final draft DR 5-105]; Annot., 17 A.L.R.3d 835, 843-45 (1968). "The injunction against being on both sides of a case goes back to earliest times." H. DRINKER, *supra* note 71, at 103.

For a discussion of representation of both husband and wife in matrimonial proceedings see R. WISE, *supra* note 71, at 141; Annot., 17 A.L.R.3d 835, 844 (1968).

[80] *See generally* H. DRINKER, *supra* note 71, at 114-18. Since the Code treats the problem of differing interests between an insurance company and its insured as a problem of differing interests between two clients, this article follows the same approach. However, some sources have suggested that the lawyer's only client is the insured. *See* American Home Assurance Co. v. Sand, 253 F. Supp. 942 (D. Ariz. 1966); American Employers Ins. Co. v. Goble Aircraft Spec., 205 Misc. 1066, 131 N.Y.2d 393 (Sup. Ct. 1954); NYSBA COMM. ON PROFESSIONAL ETHICS, OPINION No. 73, 40 N.Y.S.B.J. 374 (1968). If so, the problem could be more accurately classified as a problem of differing interests between the interests of a client (the insured) and those of a third party that furnishes legal services (the insurance company) in which case "the attorney is obligated to represent . . . [the assured] regardless of the fact that his fee for legal services is paid by another." *Id.*

settlement when the suit seeks an amount above policy limits,[81] especially when there is a settlement offer which is near the policy limits[82] or when the insured demands that the case be settled and the insurer refuses;[83] or a question as to coverage,[84] such as when the insurer alleges that the insured breached the cooperation clause,[85] when the policy covers only negligent conduct and it is alleged that the insured's misconduct was willful,[86] or when the policy covers the defendant only if he was acting in the course of employment and it is alleged that he was not.[87]

Possible divergence also exists in dual representation of the driver of a car and his passenger. The Supreme Court of New Jersey "is of the view, because of the conflict of interest inherent in the situation, that an attorney should not represent both the driver of a car and his passenger in an action against the driver of another car, unless there is a legal bar to the passenger suing his own driver . . . ."[88] Likewise, dual representation of two passengers against the car driver is likely to be improper if one of the passengers is the owner of the car and therefore would be a defendant in a suit brought by the other passenger.[89] Similarly, it is likely to be improper for a lawyer to represent a child in an action against both the child's parents and a manufacturer for injuries sustained in a car accident and to simultaneously represent the parents in an action against the same manufacturer for injuries they sustained in the accident.[90]

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[81] *See* Harris v. Standard Accident & Ins. Co., 297 F.2d 627 (2d Cir. 1961); Kaudern v. Allstate Ins. Co., 277 F. Supp. 83, 87-88 (D.N.J. 1967). *See generally* Jarrett, *Lawsuits for Wrongful Refusal to Defend or Settle*, 28 INS. COUNSEL J. 58 (1961); Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136 (1954); Comment, *California—In Search of a Solution for Excess Liability Problems*, 8 SANTA CLARA LAW. 97 (1967); Comment, *Insurer's Liability for Judgments Exceding Policy Limits*, 38 TEXAS L. REV. 233 (1959).

[82] The insurance company's obligation to defend in the name of the insured creates a conflict of interest on its part. On one hand, its interest lies in minimizing the amount of its payout; on the other, the insured's interest, which it is also supposedly defending, lies in keeping the plaintiff's award—however high—within the policy limits, so that he will not suffer any personal financial loss. The problem becomes most acute where there is a settlement offer which approximates the policy limits. Kaudern v. Allstate Ins. Co., 277 F. Supp. 83, 87 (D.N.J. 1967).

See State Farm Mut. Auto. Ins. Co. v. Smoot, 381 F.2d 331 (5th Cir. 1967); Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

[83] *See* National Farmers Union Property & Cas. Co. v. O'Daniel, 329 F.2d 60 (9th Cir. 1964).

[84] *See* Hammett v. McIntyre, 249 P.2d 885, 114 Cal. App. 2d 148 (1952); *cf.* Steel Erection Co. v. Travelers Indem. Co., 392 S.W.2d 713 (Tex. Civ. App. 1965).

[85] *See* Farmers Cas. Co. v. Green, 390 F.2d 188 (10th Cir. 1968); Allstate Ins. Co. v. Keller, 17 Ill. App. 2d 44, 149 N.E.2d 482 (1958); V. COUNTRYMAN & T. FINMAN, THE LAWYER IN MODERN SOCIETY 108-09 (1966); *cf.* State Farm Mut. Auto. Ins. Co. v. Walker, 382 F.2d 548 (7th Cir. 1967).

[86] *See* NYSBA COMM. ON PROFESSIONAL ETHICS, OPINION No. 73, 40 N.Y.S.B.J. 374 (1968).

[87] *See* J. W. Hill & Sons, Inc. v. Wilson, 399 S.W.2d 152 (Tex. Civ. App. 1966). For discussions of divergence in other contexts see Ivy v. Pacific Ins. Co., 156 Cal. App. 2d 652, 320 P.2d 140 (1958); Pennix v. Winton, 61 Cal. App. 2d 761, 143 P.2d 940 (1943); ABA OPINIONS 231 (1941) and 222 (1941).

[88] 91 N.J.L.J. 68 (1968).

[89] ABA OPINION 99 (1933).

[90] *See* NYSBA COMM. ON PROFESSIONAL ETHICS, OPINION No. 74, 40 N.Y.S.B.J.

A divergence of the interests of codefendants in a criminal case often precludes dual representation.[91] For example, a divergence may arise regarding the presentation of their defense,[92] the possibility and contingency of waiving a jury trial,[93] or whether they should take the stand or be cross-examined.[94] Their interests may also differ when they are both accused as principal of the same murder[95] or when their stories differ as to who planned and participated in the criminal act.[96]

Dual representation of a corporation or a union and its officers may be improper in a suit by stockholders or members alleging improper conduct by the officers.[97]

Likewise, the independent judgment of a lawyer may be adversely affected if he undertakes representation of parties with differing interests in a civil matter.[98] Representation of divergent interests may result if a lawyer undertakes representation of both seller and purchaser,[99] lender and borrower,[100] seller and mortgagee,[101] real estate builder and mort-

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375 (1968). However, the committee characterized the conflict as being a *potential* conflict, saying:

> In this case, the potential conflicts are so serious that it would be impossible for the attorney to discharge his duty to both sides. For example, it may become his duty to press for a recovery against the parents exceeding the limits of their insurance coverage. Other possibilities of conflict creating problems of divided loyalty exist in connection with such matters as discovery proceedings, settlement negotiations, litigation strategy and appeals. *Id.* at 376.

But see Jedwabny v. Philadelphia Transp. Co., 390 Pa. 231, 135 A.2d 252 (1957) (dissenting opinion), *cert. denied*, 355 U.S. 966 (1958).

[91] *E.g.*, White v. United States, 396 F.2d 822 (5th Cir. 1968); Morgan v. United States, 396 F.2d 110 (2d Cir. 1968); Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967); United States *ex rel.* Martinas v. Brierley, 273 F. Supp. 260 (E.D. Pa. 1967).

[92] *E.g.*, Morgan v. United States, 396 F.2d 110 (2d Cir. 1968).

[93] *E.g.*, Kaplan v. United States, 375 F.2d 895 (9th Cir. 1967).

[94] *E.g.*, Morgan v. United States, 396 F.2d 110 (2d Cir. 1968); Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967).

[95] *E.g.*, Holland v. Boles, 225 F. Supp. 863 (N.D.W. Va. 1963).

[96] *E.g.*, White v. United States, 396 F.2d 822 (5th Cir. 1968); United States *ex rel.* Martinas v. Brierley, 273 F. Supp. 260 (E.D. Pa. 1967); United States v. Rundle, 273 F. Supp. 438 (E.D. Pa. 1967).

[97] As to a corporation, *see* Murphy v. Washington Am. League Base Ball Club, Inc., 324 F.2d 394 (D.C. Cir. 1963). *But see* Selama-Dindings Plantations, Ltd., v. Durham, 216 F. Supp. 104 (S.D. Ohio 1963).

As to a union, *see* Tucker v. Shaw, 378 F.2d 304 (2d Cir. 1967); Milone v. English, 306 F.2d 814 (D.C. Cir. 1962); International Bhd. of Teamsters v. Hoffa, 242 F. Supp. 246 (D.D.C. 1965); *cf.* NYCBA COMM. ON PROFESSIONAL ETHICS, OPINION No. 843, 15 RECORD OF N.Y.C.B.A. 139 (1960).

[98] "Although the practice of a solicitor's acting for both sides in a noncontentious matter . . . was formerly considered proper by the courts in England, the modern view is that it is practically impossible for a solicitor to do his duty to each client property." M. ORKIN, LEGAL ETHICS 100 (1957).

[99] *E.g.*, *In re* Kamp, 40 N.J. 588, 194 A.2d 236 (1963); ABA INFORMAL OPINION 472 (1961); Editorial, 83 N.J.L.J. 76 (1960); Annot., 17 A.L.R.3d 835, 848 (1968).

[100] *E.g.*, Editorial, 83 N.J.L.J. 76 (1960); N.Y.S.B.A. COMM. ON PROFESSIONAL ETHICS, OPINION No. 8, 39 N.Y.S.B.J. 155 (1967).

[101] *E.g.*, N.J. ADVISORY COMM. ON PROFESSIONAL ETHICS, OPINION No. 99, 89 N.J.L.J. 693 (1966).

gagee,[102] trustee and trust beneficiary,[103] estate and estate beneficiary,[104] bankrupt and creditor,[105] or of both mother and prospective parents of a child to be adopted.[106] In some instances, it may be improper to represent several parties in business planning or in a business transaction.[107]

The divergence of clients' interests may adversely affect a lawyer's judgment even though he represents the parties in proceedings or transactions which are only generally related or even unrelated.[108] For example, independent judgment may be impaired if a lawyer accepts employment from a client whose interests diverge from those of a retainer client,[109] or if he undertakes employment to sue a party whom he is representing in another action,[110] or to represent a party whom he is suing in another action.[111] Such impairment may occur when an attorney accepts employment from a husband in a workman's compensation claim although he represents the man's wife in a divorce action.[112] Similarly, it may be improper to represent the person accused of a crime and to simultaneously represent the victims of the crime in an unrelated civil suit.[113] A lawyer also should be cautious in undertaking representation of parties in business competition with his clients.[114] More difficult questions are presented as to the effect on judgment of representing a client in an attempt to have the law changed and simultaneously representing persons whose interests would be harmed by the change, and as to the propriety of arguing one statutory interpretation for a client and

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102 *Id.*

103 *E.g.*, Potter v. Moran, 239 Cal. App. 2d 873, 49 Cal. Rptr. 229 (1966); 55 CALIF. L. REV. 948 (1967).

104 *E.g.*, ABA OPINION 160 (1936).

105 *E.g.*, ABA OPINION 40 (1931); R. WISE, *supra* note 71, at 143.

106 *Cf.* Arden v. State Bar, 52 Cal. 2d 310, 341 P.2d 6 (1959).

107 Seminar, *Business Planning and Professional Responsibility*, 8 PRAC. LAW. 18 (1962).

108 *See* Annot., 17 A.L.R.3d 835, 849-50 (1968).

109 *Cf.* Harry Rich Corp. v. Curtiss-Wright Corp., 233 F. Supp. 252 (S.D.N.Y. 1964).

110 *See* Grievance Comm. v. Rottner, 152 Conn. 59, 203 A.2d 82 (1964) (although no actual conflict of interest, defendant's conduct violated preamble of canons).

111 *See* H. DRINKER, *supra* note 71, at 113. *But see* TEXAS OPINION 123, 19 TEXAS B.J. 29 (1956), which decided that such conduct was not a breach of ethics although "all members [of the committee] . . . look with misgivings upon the action of an attorney in trying to represent a client in one case and to sue him in another." *Id.*

112 Memphis & Shelby County Bar Ass'n v. Sanderson, 52 Tenn. App. 684, 378 S.W.2d 173 (1963).

113 United States v. Myers, 253 F. Supp. 55 (E.D. Pa. 1966).

> Moreover, if the case had gone to trial it might have meant an investigation involving the Carpenters and even cross-examination of them on the stand. The entire situation could be very embarrassing for the lawyer who is naturally interested in having the legal business of the Carpenters, especially when they are much more able to compensate him for his services than the defendant. The circumstances here are such that an attorney cannot properly serve two masters. *Id.* at 57.

114 *Cf.* Texarkana College Bowl, Inc. v. Phillips, 408 S.W.2d 537 (Tex. Civ. App. 1966).

aruging for an opposing interpretation on behalf of another, either in the same or in different jurisdictions. These questions have yet to be resolved.

Representation of one whose interests diverge from those of a former client is generally recognized to be improper.[115] The divergence might inhibit the lawyer's exercise of judgment on behalf of his current client. It also might impair the obligation of loyalty owed by the lawyer to his former client. Thus the lawyer might divulge or utilize the secrets and confidences of his former client for the benefit of his current one.[116] Further, such representation may have the appearance of being improper.[117] Representation may be improper in a variety of other contexts, including: representation of a party who is opposing a former client of the lawyer in the same litigation in which the lawyer represented the former client;[118] representation of a party who is opposing a former client of the lawyer in a suit arising from or based upon the same matter or transaction in which he formerly represented both parties;[119] representation of a person regarding a step in or arising from litigation in which he formerly represented another person;[120] representation of a person in a matter substantially related to prior litigation in which he had represented another person;[121] and, in some situations, representation of a

[115] *See generally* ABA CANONS 6 & 37; Annot., 52 A.L.R.2d 1243 (1957). "The test is not whether the attorney has appeared for the party against whom he now appears, but whether his accepting the new retainer will require him in advancing the interests of his new client, to do anything which will injuriously affect his former client in any matter in which he formerly represented him." N.J. ADVISORY COMM. ON PROFESSIONAL ETHICS, OPINION No. 97, 89 N.J.L.J. 497 (1966).

[116] *See In re* Braun, 46 N.J. 16, 227 A.2d 506 (1967); N.J. ADVISORY COMM. ON PROFESSIONAL ETHICS, OPINIONS No. 97, 89 N.J.L.J. 497 (1966), & No. 2, 86 N.J.L.J. 718 (1963); Annot., 52 A.L.R.2d 1243, 1250 (1957). However, the duty not to represent one having interests adverse to those of a former client "does not depend for its operation upon a subsidiary question as to whether the attorney would or might be using or misusing confidential information derived from his former client." Cord v. Smith, 338 F.2d 516, 524 (9th Cir. 1964).

[117] "If the former client has any reason to feel aggrieved, the necessity of maintaining proper public relations for the bar and of avoiding the appearance of wrong-doing should cause the attorney to refuse to accept employment in a capacity adverse to the interests of a former client." R. WISE, *supra* note 71, at 155.

[118] "We recognize the rule that an attorney, after accepting employment and enjoying the confidence of one client . . . cannot in general, with propriety, accept an employment by the opposite party in the same case." Turner v. Turner, 385 S.W.2d 230, 236 (Tex. 1964) (citations omitted).

"If I have ever had any connection with a cause, I will never permit myself (when that connection is from any reason severed) to be engaged on the side of my former antagonist. Nor shall any change in the formal aspect of the cause induce me to regard it as a ground of exception. It is a poor apology for being found on the opposite side, that the present is but the ghost of the former cause." Resolution 8 of Hoffman's Fifty Resolutions, originally published in 1836, Akers, *Hoffman's Fifty Resolutions*, 14 THE ALA. LAW. 171, 174-75 (1953).

[119] *See* H. DRINKER, *supra* note 71, at 113; N.J. ADVISORY COMM. ON PROFESSIONAL ETHICS, OPINION No. 2, 86 N.J.L.J. 718 (1963).

[120] *See In re* Blatt, 42 N.J. 522, 201 A.2d 715 (1964); ABA INFORMAL OPINION 728 (1963).

[121] *See, e.g.*, Cord v. Smith, 338 F.2d 516 (9th Cir. 1964); Consolidated Theaters, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920 (2d Cir. 1954); United States v. Standard Oil Co., 136 F. Supp. 345 (S.D.N.Y. 1955); T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268 (S.D.N.Y. 1953); Cochran v. Cochran, 333 S.W.2d 635 (Tex. Civ. App. 1960); ABA INFORMAL OPINION 753 (1964).

client whose interests oppose those of a former client, even though the matter is unrelated to the former employment.[122]

There are, of course, circumstances where dual representation is proper.[123] Generally, there would be no impropriety in representing clients whose interests coincide, for there the interests of one would not have an adverse effect on the lawyer's exercise of independent judgment on behalf of the other. Furthermore, there are some conditions under which it may be proper for a lawyer to represent multiple parties, even though their interests are somewhat divergent. This might be true as to probate proceedings, corporate reorganizations, bills of interpleader, receiverships,[124] and the drafting of papers desired by several parties.[125] Representation also might be proper where the parties are anxious to avoid the expense of an added lawyer,[126] or where several persons desire the lawyer to act as an arbitrator or mediator of their interests.[127] In each instance the propriety of representation should be determined according to the interests of the clients, by balancing the potential harm against the factors which favor allowing the representation.

The provisions of proposed Canon 6 sweep across the various contexts in which dual representation may negate a lawyer's ability to exercise independent judgment on behalf of each client. The ethical considerations state, first, that the problem of maintaining independence of judgment "arises whenever a lawyer is asked to represent two or more clients who may have differing interests."[128] The considerations define "differing interests" to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."[129]

The fundamental provisions of the ethical considerations consider two factors to be of primary importance in determining the propriety of dual representation: whether the differing interests are actually or potentially differing and whether or not the representation involves litigation.

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122 *See* N.J. ADVISORY COMM. ON PROFESSIONAL ETHICS, OPINION No. 97, 89 N.J.L.J. 497 (1966); ABA INFORMAL OPINION 516 (1962); *cf.* Uniweld Prods., Inc. v. Union Carbide Corp., 385 F.2d 992 (5th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968).

123 *See* 36 L. INST. J. 84 (1962).

124 *See* American-Canadian Oil and Drilling Corp. v. Aldridge & Stroud, Inc., 237 Ark. 387, 373 S.W.2d 148 (1963).

125 "The position of an attorney who acts for both parties, to the knowledge of each, in the preparation of papers needed to effectuate their purpose, and gives to each the advice necessary for his protection, is recognized by the law as a proper one." Taylor v. Vail, 80 Vt. 152, 161, 66 A. 820, 823 (1907). *See* NEW YORK COUNTY LAWYERS' COMM., Question 155, which pertains to drafting a contract for two parties. *Cf.* ABA OPINION 224 (1941).

126 *See* Seminar, *Business and Professional Responsibility*, 8 PRAC. LAW. 18 (1962).

127 Such might be the case, for example, as to a division of property among heirs, upon dissolution of a partnership, or upon divorce.

128 CODE, Canon 6, Ethical Considerations ¶12, at 63 [in final draft EC 5-14].

129 *Id.*

> If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If he accepted such employment and the interests did become actually differing, the lawyer would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests did become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.[130]

The disciplinary rules apply only to a representation which will or is likely to adversely affect judgment.

> A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment . . . .[131]
>
> A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client . . . .[132]

But even in those situations where representation will or is likely to adversely affect judgment, the rules allow a lawyer to represent multiple clients

> if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.[133]

However, due to the stringent nature of the two requirements which must be met in order for multiple representation to come within the exception, it seems that the exception seldom will be applicable.

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130 CODE, Canon 6, Ethical Considerations ¶13, at 63 [in final draft EC 5-15].
131 CODE, Canon 6, Disciplinary Rules 6-106(A), at 69 [in final draft DR 5-105 (A)].
132 CODE, Canon 6, Disciplinary Rules 6-106(B), at 69 [in final draft DR 5-105 (B)].
133 CODE, Canon 6, Disciplinary Rules 6-106(C), at 69 [in final draft DR 5-105 (C)].

Other pertinent ethical and disciplinary provisions relate to a lawyer acting as an arbitrator or mediator,[134] to representation of an entity,[135] to the making of aggregate settlements,[136] and to representation by a lawyer's partners or associates in instances when representation by the lawyer himself is prohibited.[137] Although representation in the last situation clearly would be improper, it may be proper in the first three. Even when multiple representation is proper, however, the ethical considerations admonish that "it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires,"[138] and that a lawyer "should explain any circumstances that might cause a client to question his undivided loyalty."[139]

PROVISIONS OF PROPOSED CANON 6—DESIRES OF THIRD PERSONS

A lawyer should be inviolably dedicated to the interests of his clients. Thus, in exercising his judgment, he should guard against the influence of not only his own interests and the interests of other clients, but also the interests or desires of third persons.

It is apparent that the interests or desires of third persons are most

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134 CODE, Canon 6, Ethical Considerations ¶16, at 64. [In the final draft, this provision is EC 5-18 and reads as follows:

> A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.].

135 CODE, Canon 6, Ethical Considerations ¶17, at 64. [In the final draft this provision is EC 5-19 and reads as follows:

> A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.].

136 A lawyer who represents two or more clients shall 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 person in the settlement. CODE, Canon 6, Disciplinary Rules 6-107(A), at 69 [in final draft DR 5-106(A)].

137 "If a lawyer is required to decline employment or to withdraw from employment under Disciplinary Rule 6-106, no partner or associate of his firm may accept or continue such employment." CODE, Canon 6, Disciplinary Rule 6-106(D), at 69 [in final draft DR 5-105(D)].

138 CODE, Canon 6, Ethical Considerations ¶14, at 63-64 [in final draft EC 5-16]. "Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the client consents." *Id.*

139 CODE, Canon 6, Ethical Considerations ¶18, at 64-65 [in final draft EC 5-20].

likely to dominate a lawyer's judgment when such persons are able to exert strong pressures upon the lawyer. A lawyer is apt to be susceptible to the influence of any pressure intimately related to his personal interests or goals, whether economic, political, or social in nature.[140] For example, a group which employs a lawyer full-time may have a financial hold on him and thus may be in a position to influence decisions he makes. And even when third persons do not exert direct pressure upon a lawyer, he may be acutely sensitive to, and swayed by, the existence of their interests or desires.

The insidious nature of the influence that the desires of third persons may have presents a major problem in the preservation of a lawyer's independent judgment. In all likelihood, a lawyer would be aware of any direct conflict between the interests of his client and those of a third person, would realize the potentiality of an adverse effect on his judgment, and could therefore seek to avoid either the representation or the adverse effect; but the more subtle the conflict, the harder it becomes to recognize its existence and to guard against its effect. Thus, when a lawyer is in a position to be influenced by the interests or desires of third persons, he should consciously strive to be aware of any divergence of interests and should exert a conscientious effort to avoid any hindrance of his exercise of independent judgment.

Various forms of representation[141] may subject the exercise of a lawyer's professional judgment[142] to the influence of third persons. These include: when a lawyer who is a full-time employee of a corporation undertakes representation of a fellow employee;[143] when a lawyer who is employed by a business establishment undertakes representation of a customer in a matter directly related to his employer's business;[144] when a lawyer is employed by an entity to render legal services to a person[145] or

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140 *Cf.* Markus, *Group Representation by Attorneys as Misconduct*, 14 CLEV.-MAR. L. REV. 1, 22 (1965); Note, *Group Legal Services*, 79 HARV. L. REV. 416, 417 (1965); Comment, *Membership Associations as Attorney-Client Intermediaries*, 1968 U. ILL. L.F. 65, 67 (1968); 66 MICH. L. REV. 389, 391 (1967).

141 Neither proposed Canon 6 nor this article deals with the question of the over-all propriety of various forms of representation, including that of "group legal services."

142 It should be emphasized that the relevant concern is the independence of the lawyer's professional judgment in handling a particular case. In situations where an entity hires a lawyer to represent other persons, the entity might properly exercise some types of control over the lawyer; it could, for example, direct the lawyer to accept only certain types of cases. However, it should not seek to influence his handling of a particular representation.

143 A corporate lawyer is generally free to represent individual officers, stockholders, and employees of the corporation in regard to their personal affairs. However, he should be careful to avoid private employment when a divergence in interests would result in a deterioration of the quality of legal services rendered to either the corporation or the private client. *See* ABA INFORMAL OPINION 476 (1964).

144 *See* E. CHEATHAM, CASES AND MATERIALS ON THE LEGAL PROFESSION 153 (1955); ABA OPINION 10 (1926); Note, *The Unauthorized Practice of Law by Lay Organizations Providing the Services of Attorneys*, 72 HARV. L. REV. 1334, 1337-39 (1959).

145 It may be that problems of differing interests between an insurer and its

a class of persons;[146] when a lawyer is regularly recommended by an entity to its members;[147] and when a lawyer is hired by one person in an isolated instance to represent another.[148] Some sources also have suggested that union membership might subject a lawyer's judgment to improper influences.[149]

In none of these forms of representation is it imperative or certain that differing interests will exist; yet in each form of representation, there exists at least the theoretical possibility of divergence. For example, a group which furnishes legal services to its members usually will be concerned that they receive competent, independent representation. Often the interests of the group and those of the individual member being represented will coincide.[150] Yet there may be instances when those interests diverge,[151] such as when the interests or goals of the group would be best served by pressing a legal action while the interests of the individual member would be best served by settling the case; in such instances the group might seek to interfere with the attorney-client relationship, to the detriment of the client, in order to pursue its own goals. However, the mere existence of a divergence, especially where it is slight, would not necessarily compromise the lawyer's independent judgment.

The relevant provisions of proposed Canon 6 have two purposes: first, to alert the lawyer to the problems inherent in forms of representation which give third persons some influence over him; and second, to prohibit the lawyer from becoming involved in representation where the interests or desires of third persons will, or are likely to, influence his judgment.

"The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment."[152] The ethical considerations point out that the desires of third persons "will seldom adversely affect a lawyer

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insured are problems of differing interests between a client and a third party. *See* note 80 *supra*; Markus, *supra* note 140, at 2; *cf.* Kaudern v. Allstate Ins. Co., 277 F. Supp. 83, 91 (D.N.J. 1967).

[146] Such forms of representation might include neighborhood law offices; public defender offices; legal service programs of a labor union, trade association, teachers' group, taxpayers' association, or motor club; or even a law firm. *See* Bradway, *Two's Company*, 1966 DUKE L.J. 311, 329 (1966); Copaken, *Group Legal Services for Trade Associations*, 66 MICH. L. REV. 1211 (1968); Note, *The Unauthorized Practice of Law by Lay Organizations Providing the Services of Attorneys*, *supra* note 144, at 1342-46.

[147] *See* Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964).

[148] *See* Whitaker v. Warden, Maryland Penetintiary, 362 F.2d 838 (4th Cir. 1966) (defendant charged with raping his stepdaughter was represented by an attorney retained by his wife and his sister, charges having been brought by his wife who was the child's mother).

[149] *See* ABA OPINION 275 (1947); ABA INFORMAL OPINION 917 (1966); N.Y. COUNTY LAWYER'S ASS'N ETHICS OPINION No. 554, 91 N.J.L.J. 487 (1968).

[150] *See* Zimroth, *Group Legal Services and the Constitution*, 76 YALE L.J. 966, 975 (1967).

[151] *See* Copaken, *supra* note 146, at 1220-21; Zimroth, *supra* note 150, at 975-76; Note, *The Unauthorized Practice of Law by Lay Organizations Providing the Services of Attorneys*, *supra* note 144, at 1344.

[152] CODE, Canon 6, Ethical Considerations ¶19, at 65 [in final draft EC 5-21].

unless that person is in a position to exert strong . . . pressures upon the lawyer,"[153] and that such pressures are less likely where a lawyer "is compensated directly by his client and his professional work is exclusively with his client."[154] The considerations mention several circumstances in which a lawyer's judgment may be affected by a person or group that pays for or furnishes his services to another.

> Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it.[155]

The ethical considerations then conclude that "[s]ince a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom."[156]

The ethical considerations also suggest several precautions a lawyer may utilize in guarding his independent judgment.

> For example, a lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law, if any director, officer, or stockholder of it is a non-lawyer. Although a lawyer may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman. Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written agreement which defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles.[157]

The ethical considerations further suggest that a lawyer who is "subjected

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153 *Id.*
154 CODE, Canon 6, Ethical Considerations ¶20, at 65 [in final draft EC 5-22].
155 CODE, Canon 6, Ethical Considerations ¶21, at 65 [in final draft EC 5-23].
156 *Id.* at 65-66.
157 CODE, Canon 6, Ethical Considerations ¶22, at 66 [in final draft EC 5-24].

to outside pressures should make a full disclosure of them to his client"[158] and that he should withdraw from representation if "he or his client believes that the effectiveness of his representation has been or will be impaired thereby."[159]

The basic disciplinary rule provides that

> [a] lawyer shall not permit a person or group which recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rending such legal services.[160]

Moreover, since one who compensates a lawyer in connection with representation is particularly apt to have some control over the lawyer, Disciplinary Rule 6-108(A) provides that a lawyer shall not accept compensation for, or related to, legal services rendered a client without the consent of that client after full disclosure.[161] A final disciplinary rule prohibits a lawyer from practicing as part of a professional legal corporation if a non-lawyer has a position of authority over the lawyer.[162]

CONCLUSION

That a lawyer should exercise independent professional judgment on behalf of his clients is evident. Nevertheless, it is readily apparent that his personal interests, the interests of his other clients, or the desires of third persons may jeopardize a lawyer's loyalty to his clients. Temptations to deviate from complete devotion abound, and pitfalls surround even the conscientious lawyer.

Canon 6 of the Code of Professional Responsibility proposed by the ABA Special Committee on Evaluation of Ethical Standards is a fresh approach to the problem of preserving independent judgment. Through its organization, it illustrates, for perhaps the first time, the connecting link between the various influences that may adversely affect the exercise of a lawyer's judgment. Its ethical considerations focus attention on the underlying necessity that a lawyer's judgment be exercised free of compromising influences, and provides an expanded explanation of the basic

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158 CODE, Canon 6, Ethical Considerations ¶19, at 65 [in final draft EC 5-21]. See ABA CANON 6.

159 *Id.*

160 CODE, Canon 6, Disciplinary Rule 6-108(B), at 69 [in final draft DR 5-107 (B)]. *See* Zimroth, *supra* note 150, at 982. United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964), and NAACP v. Button, 371 U.S. 415 (1963), suggest that the mere possibility of a lawyer's judgment being adversely affected by his participation in a group's program to provide representation for its beneficiaries and members is not sufficient to justify a complete prohibition against such participation. However, the cases leave open the possibility that representation can be prohibited in instances when it is shown that the lawyer's judgment is being adversely affected. *See* Copaken, *supra* note 146, at 1213; Zimroth, *supra* note 150, at 992.

161 CODE, Canon 6, Disciplinary Rule 6-108(A), at 69 [in final draft DR 5-107 (A)].

162 CODE, Canon 6, Disciplinary Rule 6-108(C), at 70 [in final draft DR 5-107 (C)]; ABA OPINION 303 (1961); Annot., 4 A.L.R.3d 383 (1965).

rationale and its application. At the same time, the disciplinary rules facilitate action against those lawyers who violate minimum standards of conduct.

It is not contended that the provisions of Canon 6 are without fault. It may be that the ethical considerations do not offer adequate guidance in some areas; it may be that the disciplinary rules do not properly draw the line between conduct that is to be required and that which is to be encouraged. Other deficiencies may be found. Yet the format of the Code facilitates amendment; others can cure its defects. If the new approach of proposed Canon 6 gives lawyers a clearer insight into, and understanding of, the concept and means by exercising of independent judgment on behalf of clients, Canon 6 will have performed a valuable service.