Report of the

PROFESSIONAL RESPONSIBILITY RULES COMMITTEE

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Proposed Rule Amendments

January 2002

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INTRODUCTORY STATEMENT

The Professional Responsibility Rules Committee (PRRC) proposes several rule amendments, some of a general "housekeeping" nature and others that are more substantive. This report explains each of the proposed amendments followed by the proposed rules in amended form. Underscored areas in the rules indicate new language, and brackets indicate deletions.

PROPOSED AMENDMENTS

PROPOSED AMENDMENT TO RPC 1.8(e) (PROHIBITING LAWYERS FROM GIVING FINANCIAL ASSISTANCE TO CLIENTS)

RPC 1.8(e) prohibits attorneys from providing financial assistance to clients in connection with pending or contemplated litigation. The rule makes an exception for costs and expenses of litigation where repayment is contingent on the outcome of the matter, and for court costs and expenses of litigation for indigent clients. By Order entered September 13, 2000, the Court dismissed an attorney ethics complaint against Vincent Ciecka that charged him with violating this rule by providing living expenses to a client who was in dire financial, emotional and physical circumstances. In its Order, the Court directed that the PRRC examine the rule in light of a comment contained in the Debevoise Report, report to the Court on whether the comment should apply to RPC 1.8(e), and consider whether the rule should be amended.

The comment at issue in the Debevoise Report suggested that in some circumstances litigation expenses might be construed to include living expenses. For instance, it noted that unless attorneys provide living expenses to some indigent clients, those clients might not be able to proceed with litigation. On the other hand, the report noted that if lawyers are permitted to pay living expenses for individuals pending litigation, attorneys might misuse the financial assistance to obtain clients. The report concluded that these problems should be addressed on a case-by-case basis.

In discussing the potential problems noted by the Debevoise Report, the PRRC expressed an additional concern that a rule permitting attorneys to provide financial aid to clients could result in the clients “shopping around” for the lawyer who is willing to provide the greatest amount of assistance. This situation would create an incentive for attorneys to “out bid” each other.

The ABA Ethics 2000 Commission offered no recommendations on this matter.

To address the problems that providing financial assistance to clients could create, the PRRC proposes adding a new, limited exception to the two existing RPC 1.8(e) exceptions. The new exception, RPC 1.8(e)(3), would authorize financial assistance to indigent clients when the services are

provided without a fee by a legal services organization. The exception does not define the type of assistance that would be permissible.

RPC 1.8(e) Conflict of Interest: Prohibited Transactions

(a) (No change).

(b) (No change).

(c) (No change).

(d) (No change).

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client[.]; and

(3) a non-profit organization authorized under R. 1:21-1(e) may provide financial assistance to indigent clients whom it is representing without fee.

(f) (No change).

(g) (No change).

(h) (No change).

(i) (No change).

(j) (No change).

(k) (No change).

Note: Adopted to be effective ; paragraph (e) amended ,2002, to be effective , 2002.

PROPOSED AMENDMENT TO RULE 1:20-3
(DISTRICT ETHICS COMMITTEES; INVESTIGATIONS)

Rule 1:20-3 establishes the District Ethics Committees and describes their duties. The Office of Attorney Ethics submitted this proposed amendment to clarify paragraph (g) of the rule. The slight change in paragraph (g) simply recognizes the distinction between cases that are handled by the Office of Attorney Ethics and the District Ethics Committees. In the former case the attorney assigned to investigate is appointed by the Director, while in the latter case the assignment is made by the Chair of the Committee.

1:20-3. District Ethics Committee; Investigations

(a) . . . no change.

(b) . . . no change.

(c) . . . no change.

(d) . . . no change.

(e) . . . no change.

(f) . . . no change.

(g) Investigation.

(1) Generally. Except in those districts where the Director assigns investigators, [T]the chair of the Ethics Committee shall assign an attorney member to each docketed case to conduct such investigation as may be necessary in order to determine whether misconduct has occurred.

(2) . . . no change.

(3) . . . no change.

(4) . . . no change.

(5) . . . no change.

(6) . . . no change.

(h) . . . no change.

(i) . . . no change.

(j) . . . no change.

Note: Former Rule redesignated as Rule 1:20-4 January 31, 1984 to be effective February 15, 1984. Source Former Rule 1:20-2 adopted February 23, 1978, to be effective April 1, 1978; paragraphs (a) (h) (l) and (m) amended January 17, 1979, which were superseded on March 2, 1979, to be effective April 1, 1979; and paragraphs (n) and (o) restored on March 22, 1979, to be effective April 1, 1979; subparagraph (1)(3) deleted and

new paragraph (p) adopted June 19, 1981, to be effective immediately; paragraphs (c), (h), (j) and (l)(1)(i) amended July 16, 1981, to be effective September 14, 1981; Rule redesignated as Rule 1:20-3; paragraphs (a) through (e) amended; paragraphs (f) (g) and part of (k) deleted; paragraphs (h), (i), (j), (k), (l), (m), (n), (o) and (p) amended and redesignated (f), (h), (i), (j), (k), (l), (m), (n) and (o) and new paragraphs (g) and (p)adopted January 31, 1984, to be effective February 15, 1984; paragraphs (f), (g), (h), (i), (l), (n), (o) and (p) amended November 5, 1986, to be effective January 1, 1987; paragraphs (e) and (m) amended June 26, 1987 to be effective July 1, 1987; paragraphs (i), (j) and (o) amended November 7, 1988 to be effective January 2, 1989; paragraphs (f) and (i) amended, and paragraph (n)(3) caption and text amended June 29, 1990 to be effective September 4, 1990; paragraph (f) amended July 13, 1994 to be effective September 1, 1994; paragraphs (g) and (n)(2) captions and text amended August 8, 1994 to be effective immediately; paragraphs (a), (b), (c) and (d) amended, paragraphs (e) through (p) deleted and new paragraphs (e) through (j) adopted January 31, 1995 to be effective March 1, 1995; paragraphs (f), (g)(5), and (h) amended July 5, 2000 to be effective September 5, 2000[.]; paragraph (g) amended _____, 2002 to be effective _____, 2002.

PROPOSED AMENDMENT TO RULE 1:20-4 (FORMAL PLEADINGS; ETHICS COMPLAINTS)

Rule 1:20-4 concerns the contents and filing of ethics complaints and answers to those complaints. The Office of Attorney Ethics offered this amendment to paragraph (e) to correct an error in the rule reference concerning seeking interlocutory relief. The correction changes the reference from R. 1:20-16(c)(1) to R. 1:20-16(f)(1).

1:20-4. Formal Pleadings

(a) . . . no change

(b) . . . no change

(c) . . . no change

(d) . . . no change

(e) Answer. Within twenty-one days after service of the complaint, the respondent shall file and serve the original and two copies of a written, verified answer, designated as such in the caption, with the secretary and shall file one copy with the vice chair or special ethics master and two copies with the Office of Attorney Ethics. For good cause shown, the vice chair or the special ethics master, if one has been appointed, may, on written application made within twenty-one days after service of the complaint, extend the time to answer. The Office of Attorney Ethics shall be notified of any extension granted in cases prosecuted by that office. The secretary shall forward one copy of all answers to the Office of Attorney Ethics. The respondent's answer shall set forth (1) a full, candid, and complete disclosure of all facts reasonably within the scope of the formal complaint; (2) all affirmative defenses, including any claim of mental or physical disability and mitigating circumstances; (4) a request for a hearing either on the charges or in mitigation, and (5) any constitutional challenges to the proceedings. All constitutional questions shall be held for consideration by the Supreme Court as part of its review of any final decision of the Board. Interlocutory relief may be sought only in accordance with R. 1:20-16 [(c)] (f)(1). Failure to request a hearing shall be deemed a waiver thereof. An answer that has not been verified within 10 days after the respondent is given notice of the defect shall be deemed a failure to answer as defined within these Rules.

(f) . . . no change

(g) . . . no change

Note: Text and former R. 1:20-4 redesignated R. 1:20-15. New text to R. 1:20-4, adopted January 31, 1995 to be effective March 1, 1995; paragraph (e) amended July 5, 2000 to be effective
September 5, 2000[.]; paragraph (e) amended , 2002

to be effective , 2002.

PROPOSED AMENDMENT TO RULE 1:20-6 (HEARINGS OF THE DISTRICT ETHICS COMMITTEES)

Rule 1:20-6 sets forth the process of the District Ethics Committees' hearings on ethics complaints. The Office of Attorney Ethics requests an amendment to paragraph (a)(1) and (2) to remove any ambiguity regarding the mandatory requirement that a public member must be on every hearing panel, except in cases of minor misconduct. This requirement was established by the Court's Administrative Determination of July 14, 1994 (slip opinion at p.18). This paragraph has also been amended to permit, rather than require, the designation of an alternate public member. This is consistent with current district ethics committee practices. Also requested is an amendment to paragraph (c)(2)(E)(i) to reflect the actual and correct practice in the disciplinary system that district ethics committee secretaries, rather than panel chairs, transmit dismissal letters in all cases.

1:20-6. Hearings

(a) Hearing Panels.

(1) Hearing Panel Designations; Oversight. The chair shall annually determine the composition of hearing panels which shall be administered and advised by the vice chair. Each hearing panel shall consist of only three members, one of whom shall be a public member. The chair shall designate an attorney member as the chair of each panel. An additional attorney member and an additional public member [shall] may be designated as [an] alternates to remain available but not to sit and hear the matter unless one of the attorney members or the public member is unable to do so. An attorney member involved in the investigation of a matter shall not serve as a hearing panel member on that matter.

The vice chair shall designate a hearing panel to hear the matter when [after the time prescribed for the filing of] an answer has been filed and shall notify the presenter or ethics counsel and respondent of the designation.

(2) Quorum. Except in matters of minor misconduct as set forth in subsection (d)(3), [T]three members, one of whom must be a public member, shall constitute a quorum. The hearing panel shall act only with the concurrence of two. When by reason of absence, disability or disqualification the number of members of the hearing panel able to act is fewer than a quorum, the following procedures will apply:

(A) if the hearing has not commenced, the alternate or another attorney panel member shall be substituted for the absent attorney or the alternate or another public member shall be substituted for the absent public member;

(B) if the hearing has commenced but all evidence has not been received, the vice chair may designate an additional panel member to permit the orderly conclusion of the proceedings, provided that the additional panel member shall have the opportunity to review the entire record including the transcript of the proceedings to date;

(C) if all the evidence has been received, the matter

may be determined by the remaining two hearing panel members, provided their decision is unanimous. In the event of disagreement, the vice chair shall designate an alternate panel member who, on review of the entire record including the transcript of the proceedings, shall be eligible to vote thereon.

(3) Powers and Duties . . . no change.

(A) . . . no change

(B) . . . no change

(C) . . . no change

(4) Powers and Duties of Hearing Panel Chair . . . no change

(A) . . . no change

(B) . . . no change

(C) . . . no change

(D) . . . no change

(b) Special Ethics Masters . . . no change

(1) . . . no change

(2) . . . no change

(3) . . . no change

(4) . . . no change

(c) Hearings Involving Misconduct; When Required . . . no change

(1) . . . no change

(2) Notice and Conduct of Hearings . . . no change

(A) . . . no change

(B) . . . no change

(C) . . . no change

(D) . . . no change

(E) Findings and Report. The trier of fact shall submit to the Board written findings of fact and conclusions of law on each issue presented, together with the record of the hearing, and shall take one of the following actions:

(i) Dismissal. If the trier of fact finds that there has been no misconduct, the secretary [panel chair] or special ethics master shall send to the presenter or ethics counsel, the respondent, the grievant, if any, the Director, and the vice chair [and secretary], a letter of dismissal in a form approved by the Director, together with a copy of the hearing panel's report. The original report and record shall be filed with the Director. No transcript shall be ordered by the hearing panel without the prior approval of the Director or the Board. Appeals may be taken in accordance with R. 1:20-15(e)(2).

(ii) Admonition Recommendation . . . no change

(iii) Reprimand, Suspension or Disbarment Recommendations
. . . no change

(F) Public Hearings . . . no change

(d) Hearings Involving Minor Misconduct . . . no change

Note: Adopted January 31, 1995 to be effective March 1, 1995 paragraph (c) amended July 25, 1995, to be effective immediately; paragraph (b)(2) amended July 5, 2000 to be effective September 5, 2000[.]; paragraphs (a) and (c) amended , 2002 to be effective , 2002.

PROPOSED AMENDMENT TO RULE 1:20A-2(c)
(JURISDICTION OF FEE ARBITRATION COMMITTEE)

The Disciplinary Review Board asked the PRRC to determine whether the fee arbitration process, Rules 1:20A-1 to -6, applies to fees and costs charged to clients who are represented by the Office of the Public Defender (OPD). The DRB requested also that the PRRC consider amending or clarifying the fee arbitration rules in one of the two following ways.

1) Rule 1:20A-2 currently exempts from the jurisdiction of fee arbitration committees any fee that is "allowed or allowable as of right by a court or agency pursuant to any applicable rule or statute." The DRB had determined that this rule does not exempt OPD cases. If this determination was incorrect and OPD cases are exempt from fee arbitration, the DRB asked that the PRRC recommend a revision to Rule 1:20A-2 to clarify the exemption.

2) On the other hand, if the DRB's determination was correct and OPD cases are subject to fee arbitration, the DRB sought revisions to the fee arbitration rules regarding notice to clients of the right to fee arbitration and an amendment exempting OPD clients and the Office of Public Defender from the required filing fees.

In investigating this matter, the PRRC learned that the Public Defender Act, N.J.S.A. 2A:158A-1 to -25 ("OPD Act"), provides a process for review of the reasonableness of OPD fees and costs that considers also whether the client can afford to pay the amounts due. This statutory process provides, therefore, more protection to indigent clients than the fee arbitration process, which considers only the reasonableness of fees. For this reason, the PRRC believes that fee arbitration is not appropriate for OPD cases. The background for the PRRC's conclusion is as follows.

The OPD Act expressly requires the Office of Public Defender ("OPD") to bill its clients for fees and costs. Subsection 19 of the OPD Act mandates that the OPD "do all things necessary and proper to collect" these amounts. A prominent tool provided to the OPD for collection of fees is a lien, which must be filed by the OPD if the fees and costs exceed $150. N.J.S.A. 2A:158A-17.

At the initial meeting between the Public Defender and

the client, brochures and other information relating to representation are provided, and the client is asked to sign a "Reimbursement Agreement." That agreement advises the client that he or she is required to "reimburse this Office for the cost of the legal services you receive." It explains that a bill will be sent to the client, and a lien will be filed. If also advises that "even if you cannot pay, you will still receive legal services to the same extent as if you were able to pay."

Clients are charged $30 per hour for attorney time, whether the time is "in court" or not. Investigators charge $15 per hour. The OPD also charges for experts and transcripts. Records of these charges are keep by attorneys and investigators on time sheets. Each attorney's bill is reviewed internally at three levels. First, the Deputy Public Defender in charge of that particular regional office reviews bills for excessiveness. Second, the bills are sent to Trenton and reviewed for accuracy and compliance with the guidelines. Finally, the four Assistant Public Defenders review and sign the bills, after which pool attorneys are paid. The final bill is generated at the end of the case and sent to the client. A lien is filed approximately six months after the case is closed to give clients a chance to pay. Pursuant to the OPD Act, the lien is valid for ten years after its filing.

The OPD Act (as interpreted by court opinion) provides for review of the reasonableness of the fees and costs by the court in a summary proceeding when the public defender seeks to execute the lien. Notably, in this proceeding, the defendant may also seek review of his ability to pay. N.J.S.A. 2A:158A-19; Stroinski v. O.P.D., 134 N.J. Super. 21 (App. Div. 1975).

The Reimbursement Agreement form that the client is asked to sign at the beginning of representation was revised July 1, 2001, to notify the client of the right to contest in the Superior Court the amount of the lien and the ability to pay. The form explains in detail how to obtain review.

In comparison, fee arbitration committees are not authorized to consider a client's ability to pay and may determine only whether the fees are reasonable. Because the OPD's rates are so low, it seems unlikely their fees and costs would be found unreasonable. Instead, the concern is whether enforcing the lien for those fees and costs is unfair because of the client's inability to pay. As such, the PRRC

recommends that OPD fees and costs be reviewed only by the process provided by the OPD Act.

The proposed amendment adds OPD fees and costs to the two existing exemptions to the jurisdiction of fee arbitration committees.

1:20A–2. Jurisdiction.

(a) Generally. (no change)

(b) Discretionary Jurisdiction . . . (no change)
(1) (no change);
(2) (no change);
(3) (no change);
(4) (no change).

(c) Absence of Jurisdiction. A Fee Committee shall not have jurisdiction to decide:

(1) a fee which is allowed or allowable as of right by a court or agency pursuant to any applicable rule or statute.

(2) claims for monetary damages resulting from legal malpractice, although a fee committee may consider the quality of services rendered in assessing the reasonableness of the fee pursuant to RPC 1.5.

(A) Submission of a matter to fee arbitration shall not bar the client from filing an action in a court of competent jurisdiction for legal malpractice.

(B) No submission, testimony, decision or settlement made in connection with a fee arbitration proceeding shall be admissible evidence in a legal malpractice action.

(3) a fee for legal services rendered by the Office of the Public Defender, pursuant to N.J.S.A. 2A:158A-1, et seq.

(d) (no change).

Note: Adopted February 23, 1978 to be effective April 1, 1978, amended January 31, 1984 to be effective February 15, 1984; amended June 29, 1990 to be effective September 4, 1990; text deleted, new paragraphs (a)(b)(c) and (d) adopted January 31, 1995 to be effective March 1, 1995[.]; paragraph (c) amended , 2002, to be effective , 2002.

PROPOSED AMENDMENT TO RULE 1:20B-2
(APPOINTMENT OF MEMBERS TO THE DISCIPLINARY REVIEW BOARD)

Rule 1:20B-2 concerns the appointment of members to the Disciplinary Review Board. The amendment proposes a change in the terms of the appointed members. The current rule provides for initial staggered terms of one, two, three and four years, and for reappointment for four-year terms. The rule also prohibits any member from serving more than two full four-year terms.

The proposed amendment deletes reference to the initial terms of appointment, since those terms have expired. The amendment provides instead for an initial appointment of three years and for subsequent reappointments for that same term, up to a maximum of three successive terms. This change is in line with membership terms of other Supreme Court Committees, such as the Board of Bar Examiners (R. 1:23-1), the Committee on Attorney Advertising (R. 1:19A-1), and the Committee on the Unauthorized Practice of Law (R. 1:22-1). In that sense, this amendment may be considered of a “housekeeping” nature.

1:20B-2. Appointment

The Supreme Court shall appoint the members of the Oversight Committee; five shall be lawyers or sitting or retired judges, one shall be an annual designee of the New Jersey State Bar Association, and five shall be members of the public.

Other than the designee of the New Jersey State Bar Association, [the initial members shall be appointed to staggered terms of 1 year, 2 years, 3 years and 4 years. At the expiration of such terms all subsequent reappointments shall be for a term of 4 years. No member who has served two full 4 year terms shall be eligible for reappointment.] each member shall be appointed for a term of three years, and may be reappointed to three successive full terms. A vacancy occurring during a term shall be filled for the unexpired portion thereof.

Note: Adopted January 31, 1995 to be effective March 1, 1995[.]; amended , 2002 to be effective , 2002.

AMENDMENT TO RULE 1:21-3(c)
(PERMISSION FOR OUT-OF-STATE ATTORNEYS TO PRACTICE IN THIS STATE)

Rule 1:21-3(c) permits attorneys admitted to the bar in other states who are employed by or associated with a legal services program to practice and appear in court in association with legal services cases. This practice is limited by certain conditions listed in the rule, which include a time limit on permission to practice of 2.5 years.

The rule was originally designed to accommodate lawyers who moved to New Jersey and sought to work full-time as staff for Legal Services or other not-for-profit legal public interest entities. The 2.5 year time limit was intended to provide attorneys sufficient time to gain formal admission to the bar. When attorneys work full time as corporate in-house counsel, however, the original intent of the time limit does not apply, and the practical effect of the rule is to diminish these attorneys' pro bono participation.

The proposed amendment codifies the Court's Order entered October 19, 2000, which relaxed the time limitation of the rule to permit New Jersey-based corporate attorneys who are in good standing in another jurisdiction to perform pro bono services without requiring those attorneys to seek admission to the New Jersey bar.

1:21–3. Appearance by Law Graduates and Students; Special Permission for Out-of-State Attorneys

(a) (No change).

(b) (No change).

(c) Permission for Out-of-State Attorneys to Practice in This State. A graduate of an approved law school who is a member of the bar of another state or of the District of Columbia and is employed by, [or] associated with, or serving as a volunteer pro bono attorney with a legal services program approved by the Director, Legal Services of New Jersey, shall be permitted to practice, under the supervision of a member of the bar of the State, before all courts of this State in all causes in which the attorney is associated or serving pro bono with such legal services program, subject to the following conditions:

(1) Permission for an out-of-state attorney to practice under this rule shall become effective upon filing with the Clerk of the Supreme Court evidence of graduation from an approved law school, a certificate of any court of last resort certifying that the out-of-state attorney is a member in good standing of the bar of another state or of the District of Columbia, and a statement signed by the Director, Legal Services of New Jersey, that the out-of-state attorney is currently employed by or associated with an approved legal service program;

(2) Permission to practice under this rule shall cease whenever the out-of-state attorney ceases to be employed by, [or] associated with or serving as a volunteer pro bono attorney with an approved legal service program in this State;

(3) Notice of said cessation shall be filed with the Clerk of the Supreme Court by the Director, Legal Services of New Jersey, within 5 days after cessation of the out-of-state attorney's employment or association;

(4) Permission to practice in this State under this rule shall remain in effect no longer than 2.5 years[;], except that there is no time limit on volunteer pro bono service with an approved legal service program.

(5) (No change).

(6) (No change).

Note: Source—R.R. 1:12–8A(a)(b)(c). Caption amended and paragraph (d) adopted July 1, 1970 effective immediately; paragraph (c) amended July 7, 1971 to be effective September 13, 1971; paragraph (a) amended April 2, 1973 to be effective immediately; paragraph (c) amended July 17, 1975 to be effective September 8, 1975; caption and paragraph (a) amended July 29, 1977 to be effective September 6, 1977; paragraph (c) amended July 16, 1979 to be effective September 10, 1979; paragraph (c) amended October 9, 1979 to be effective immediately but amendment stayed October 31, 1979; paragraph (c) amended July 21, 1980 to be effective September 8, 1980; paragraph (d) amended July 16, 1981 to be effective September 14, 1981; former paragraph (b) deleted and former paragraphs (c) and (d) redesignated November 1, 1985 to be effective January 2, 1986; paragraphs (a), (b) and (c) amended July 13, 1994 to be effective September 1, 1994[.]; paragraph (c) amended , 2002 to be effective , 2002.

PROPOSED AMENDMENTS TO RULE 1:21-6
(RECORDKEEPING; SHARING OF FEES; EXAMINATION OF RECORDS)

In New Jersey Ins. Co. v. Caputo, 163 N.J. 153 (2000), the Court asked the PRRC to consider whether Rule 1:21-6 (recordkeeping and attorney bank accounts) should be amended to address the facts of that case. In Caputo, an attorney used almost $300,000 in trust funds derived from real estate closings to finance gambling activities at casinos. The bank was sued by the title insurance company. Circumstances suggested that the bank's manager suspected that Caputo was misusing the funds. Those suspicions were never reported to the ethics authorities, however, because the rule did not require the bank to report "suspicions."

In investigating whether a rule amendment to strengthen bank reporting requirements was reasonable, the PRRC solicited comments from bankers, their counsel, and the Department of Banking and Insurance. After receiving their comments, a meeting was held among PRRC members, representatives of the Office of Attorney Ethics, including David Johnson, and representatives of the banking industry. These individuals met on January 10, 2001, to obtain additional background on how banks monitor trust accounts, and to consider whether it is feasible to implement additional reporting requirements. At that meeting, the bankers explained that any requirement that they monitor attorney business and fiduciary accounts, as opposed to trust accounts, would result in enormous new costs to the banks. No system exists to distinguish those accounts from every other business account in their systems. The bankers agreed, however, that it is feasible to eliminate ATM access and overdraft checking on trust accounts because those accounts are currently monitored. Moreover, the bankers advised that the facts in Caputo, in which the bankers were aware of Caputo's gambling predilection, were extraordinary and unlikely to recur. Because no technological means exist to identify suspicious activity and there is approximately an 80% turnover in teller positions each year, banks are not likely to detect merely suspicious activity. Moreover, requiring banks to report based on subjective impressions could result in lawsuits by attorneys against their banks, according to the representative from Department of Banking and Insurance.

For all these reasons, the PRRC determined that it would limit its recommendation to the Court to prohibiting ATM withdrawals and overdraft protection on attorney trust accounts.

Meanwhile, the Office of Attorney Ethics submitted to the PRRC suggested “housekeeping” rule changes to Rule 1:21-6 that included amendments prohibiting ATM withdrawals and overdraft protection on trust accounts, among other recommendations. The OAE’s explanation of its proposed amendment to the rule follows.

Paragraph (a)

1. Technical Rule Changes

The title of this paragraph has been amended to make clear that it refers to "Trust and Business" accounts. The word "Bank" has been eliminated as unnecessary and inconsistent with the term “financial institution" contained in the text of the first paragraph.

Paragraph (a) has been amended also to replace reference to the former Ethics Financial Committee with the current Disciplinary Oversight Committee.

Additionally, in order to make the rule more uniform, the phrase "trustee account" has been replaced by "trust account."

Finally, in order to conform with past practices, the primary "business account" as well as primary trust account are reported on the Annual Attorney Registration Statement.

Paragraph (b)

1. New Title

Former paragraph (a) was too long. In order to avoid confusion, a new paragraph (b) has been added with the title "Account Location; Financial Institution's Reporting Requirements." The new paragraph was formerly part of paragraph (a).

2. Separate Interest-Bearing Accounts Authorized; All Interest Belongs to Client.

The rule makes clear the past practice that an attorney may open a separate interest-bearing attorney trust account in accordance with these rules when the attorney has agreed with the client that a deposit will earn interest. In accordance with disciplinary case law, all interest earned on such accounts shall be the sole property of the client and may not be retained

by the attorney. In re Goldstein, 116 N.J. 1 (1989).

3. Digital Images of Records

In a Notice To The Bar dated October 12, 2000, the Supreme Court relaxed Rule 1:21-6 to permit financial institutions to produce to the attorney digital images of trust and business account checks and records, in lieu of the originals thereof, under certain conditions. The rule codifies that decision. It should be read in conjunction with the correlative amendment to paragraph (b)(1)(G).

Paragraph (c)

1. Formatting

This paragraph has been subdivided into three major sub-sections entitled (1), (2) and (3) in order to better organize the material.

2. Electronic Transfers

Subsection (1)(A) of the paragraph is amended to prohibit electronic transfers out of an attorney trust account except under the circumstances described in the proposed rule. Electronic transfers include, but are not limited to, wire transfers and computer transfers. At the time when each electronic transfer is needed, the transfer is effectuated when the attorney personally signs and files with the institution written instructions. The institution then will confirm the instructions in writing and return to the attorney a document stating the date, amount and the account(s) involved in the transfer. The transfer of trust funds, like the writing of trust checks, is a personal non-delegable duty of the attorney.

This amendment is required in order to maintain attorney accountability and an audit trail that does not presently exist where electronic funds transfers are concerned. Specifically, it is not possible to trace the attorney responsible for authorizing and/or making the transfer. The issue of authority is extremely important in assuring attorney accountability for the handling of trust funds. The disciplinary system has seen a number of situations where non-lawyers have stolen monies from law firms through the use of electronic transfers accomplished without the firm's knowledge. The proposed rule would require the attorney's knowledge of all such transfers. Again, authorizing transfers of client trust funds (whether by check or electronic means) is a non-delegable duty which the attorney

must personally fulfill.

3. Identification of Source of Funds

Subsection (1)(G) has been amended in order to enhance accountability. To this end, each check, withdrawal and deposit slip must include a distinct area to identify, whenever it is related to a particular client, the client’s last name or file number of the matter on whose account the funds are being used. Attorneys must complete this field at all times. This proposed rule change is simply good accounting practice.

Attorneys must also maintain checkbooks with running balances. This requirement, while incorporated in the rule's requirement to adhere to "generally accepted accounting practice" under subsection (d), needs to be spelled out here for added emphasis.

4. Digital Images

Subsection 1(G) has also been amended in accordance with the Supreme Court's Notice To The Bar dated October 12, 2000, to permit attorneys to keep digital images of records properly produced by financial institutions. This subsection makes clear that except for digital images provided by the financial institution, attorneys must maintain the originals of all records. See discussion under commentary paragraph (b)3.

5. Reconciliations

Subsection (1)(H) has been amended to increase accountability. Monthly, rather than quarterly, reconciliations of attorney trust accounts should be required. This will insure that errors, both by financial institutions and lawyers, are detected and corrected within a reasonable period of time.

6. ATM Withdrawals Prohibited

A new subsection (2) has been added. Because they lack critical detail and descriptiveness necessary to assure attorney accountability for the handling of funds, ATM withdrawals are prohibited from trust accounts. ATM deposits are proper.

7. Trust Overdraft Protection Prohibited

A new subsection (3) has been added. It is inappropriate for an attorney to have any agreement for trust overdraft protection on the attorney trust account. The proposed

rule prohibits the practice. This practice, if allowed, defeats the reporting requirements placed on banks to notify the Office of Attorney Ethics whenever a check is presented against insufficient funds. Attorneys should balance their accounts and maintain appropriate records so that they do not overdraft their accounts.

Paragraph (d)

1. Computer Files

Computer software is increasingly available to assist attorneys and law firms in meeting their accounting obligations. In addition to being able to produce printed copies of their accounting records, the rule proposes to add computer files in industry-standard formats as an additional method of demonstrating compliance.

Paragraph (h)

1. Duty to Cooperate

Attorneys have a longstanding duty to cooperate with the Office of Attorney Ethics. R. 1:20-3(g)(3). They also have a longstanding duty to produce financial records and case files and, subject to any validly supported constitutional arguments, to cooperate in any investigation and respond completely to questions about any transactions in which they were involved. The amendments to paragraphs (h) and (j) clarify these obligations.

2. Consent to Use of Computer Software

Increasingly attorneys are using computerized software accounting packages as an aid to maintaining records. In order to answer licensing issues, the rule makes clear that when disciplinary authorities take possession of these files, which are evidence in the disciplinary case or random audit, both the law firm or attorney and any software producer or licensor consents to the limited use of the software for investigative and disciplinary purposes.

Paragraph (i)

1. Duty to Cooperate

This change parallels the proposed change to paragraph (h). It also cites RPC 8.1(b) as a violation of the rule where there has been a failure to respond to lawful requests of disciplinary authorities in producing required financial records.

1:21-6. Record keeping; Examination of Records

(a) Required Trust and Business [Bank] Accounts. Every attorney who practices in this state shall maintain in a financial institution in New Jersey, in the attorney's own name, or in the name of a partnership of attorneys, or in the name of the professional corporation of which the attorney is a member, or in the name of the attorney or partnership of attorneys by whom employed:

(1) a trust[ee] account or accounts, separate from any business and personal accounts and from any fiduciary accounts that the attorney may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which trust[ee] account or accounts funds entrusted to the attorney's care shall be deposited; and

(2) a business account into which all funds received for professional services shall be deposited.

One or more of the trust[ee] accounts shall be the IOLTA account or accounts required by Rule 1:28A.

Other than fiduciary accounts maintained by an attorney as executor, guardian, trustee, or receiver, or in any other similar fiduciary capacity, all attorney trust[ee] accounts, whether general or specific, as well as all deposit slips and checks drawn thereon, shall be prominently designated as an "Attorney Trust Account." Nothing herein shall prohibit any additional descriptive designation for a specific trust account. All business accounts, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as an "Attorney Business Account," an "Attorney Professional Account," or an "Attorney Office Account." The IOLTA account or accounts shall each be designated "IOLTA Attorney Trust Account."

The names of institutions in which such primary attorney trust and business accounts are maintained and identification numbers of each account shall be recorded on the annual registration form filed with the annual payment, pursuant to Rule 1:20-1(b) and Rule 1:28-2, to the [Ethics Financial] Disciplinary Oversight Committee and the New Jersey Lawyers' Fund for Client Protection. Such information shall be available for use in accordance with paragraph [(g)](h) of this rule. For all IOLTA accounts, the account numbers, the name the account is under, and the

depository institution shall be indicated on the registration statement. The signed annual registration statement required by Rule 1:20-1(c) shall constitute authorization to depository institutions to convert an existing non-interest bearing account for nominal or short-term funds to an IOLTA account.

(b) Account Location; Financial Institution's Reporting Requirements. An attorney trust account shall be maintained only in New Jersey financial institutions approved by the Supreme Court, which shall annually publish a list of such approved institutions. A financial institution shall be approved if it shall file with the Supreme Court an agreement, in a form provided by the Court, to report to the Office of Attorney Ethics in the event any properly payable attorney trust account instrument is presented against insufficient funds, irrespective of whether the instrument is honored; any such agreement shall apply to all branches of the financial institution and shall not be canceled except on thirty days notice in writing to the Office of Attorney Ethics. The agreement shall further provide that all reports made by the financial institution shall be in the following format: (1) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (2) in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the attorney or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any; if an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

In addition, each financial institution approved by the Supreme Court must co-operate with the IOLTA Program, and must offer an IOLTA account to any attorney who wishes to open one. Nothing herein shall prevent an attorney from establishing a separate interest-bearing account for an individual client in accordance with these rules, providing that all interest earned shall be the sole property of the client and may not be retained by the attorney.

In addition to the reports specified above, approved financial institutions shall agree to cooperate fully with the Office of Attorney Ethics and to produce any attorney trust

account or attorney business account records on receipt of a subpoena therefore. Digital images of these records may be kept and produced by financial institutions provided: (a) imaged copies of checks shall, when printed, be limited to no more than two checks per page (front and back) and (b) all digital records shall be maintained for a period of seven years. Nothing herein shall preclude a financial institution from charging an attorney or law firm for the reasonable cost of producing the reports and records required by this Rule. Every attorney or law firm in this state shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

(c) [(b)] Required Bookkeeping Records.

(1) Attorneys, partnerships of attorneys and professional corporations who practice in this State shall maintain in a current status and retain for a period of 7 years after the event that [which] they record:

(A) [(1)] appropriate receipts and disbursements journals containing a record of all deposits in and withdrawals from the accounts specified in paragraph (a) of this rule and of any other bank account which concerns or affects their practice of law, specifically identifying the date, source and description of each item deposited as well as the date, payee and purpose of each disbursement. All trust account receipts shall be deposited intact and the duplicate deposit slip shall [should] be sufficiently detailed to identify each item. All trust account withdrawals shall be made only by attorney authorized [intrastate or interstate bank] financial institution transfers as stated below or by check payable to a named payee and not to cash. Each electronic transfer out of an attorney trust account must be made on signed written instructions from the attorney to the financial institution. The financial institution must confirm each authorized transfer by returning a document to the attorney showing the date of the transfer, the payee and the amount. Only an attorney admitted to practice law in this state shall be an authorized signatory on an attorney trust account and only an attorney shall be permitted to authorize electronic transfers as above provided; and

(B) [(2)] an appropriate ledger book, having at least one single page for each separate trust client, for all trust[ee] accounts, showing the source of all

funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts of charges or withdrawals from such accounts, and the names of all persons to whom such funds were disbursed. A regular trial balance of the individual client trust ledgers shall be maintained. The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of moneys received in trust for the client, and deducting the total of all moneys disbursed; and

(C) [(3)] copies of all retainer and compensation agreements with clients; and

(D) [(4)] copies of all statements to clients showing the disbursement of funds to them or on their behalf; and

(E) [(5)] copies of all bills rendered to clients; and

(F) [(6)] copies of all records showing payments to attorneys, investigators or other persons, not in their regular employ, for services rendered or performed; and

(G) [(7)] originals of all checkbooks with running balances and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips, except that, where the financial institution provides proper digital images or copies thereof to the attorney, then these digital images or copies shall be maintained; all checks, withdrawals and deposit slips, when related to a particular client, shall include, and attorneys shall complete, a distinct area identifying the client's last name or file number of the matter; and

(H) [(8)] copies of all records, showing that at least [quarterly] monthly a reconciliation has been made of the cash balance derived from the cash receipts and cash disbursement journal totals, the checkbook balance, the bank statement balance and the client trust ledger sheet balances; and

(I) [(9)] copies of those portions of each client's

case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto.

(2) ATM or cash withdrawals from all attorney trust accounts are prohibited.

(3) No attorney trust account shall have any agreement for overdraft protection.

(d) [(c)] Type and Availability of Bookkeeping Records. The financial books and other records required by paragraphs (a) and [(b)] (c) of this rule shall be maintained in accordance with generally accepted accounting practice. Bookkeeping records may be maintained by computer provided they otherwise comply with this rule and provided further that printed copies and computer files in industry-standard formats can be made on demand in accordance with this section or section (h) [(g)]. They shall be located at the principal New Jersey office of each attorney, partnership or professional corporation and shall be available for inspection, checks for compliance with this Rule and copying at that location by a duly authorized representative of the Office of Attorney Ethics. When made available pursuant to this rule, all such books and records shall remain confidential except for the purposes thereof or by direction of the Supreme Court, and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege.

(e) [(d)] Dissolutions. Upon the dissolution of any partnership of attorneys or of any professional corporation, the former partners or shareholders shall make appropriate arrangements for the maintenance by one of them or by a successor firm of the records specified in paragraph [(b)] (c) of this rule.

(f) [(e)] Attorneys Practicing With Foreign Attorneys or Firms. All of the requirements of this rule shall be applicable to every attorney rendering legal services in this State regardless whether affiliated with or otherwise related in any way to an attorney, partnership, legal corporation, limited liability company, or limited liability partnership formed or registered in another state.

(g) [(f)] Attorneys Associated With Out of State Attorneys. An attorney who practices in this State shall maintain and preserve for 7 years a record of all fees received and expenses incurred in connection with any matter in which the attorney was associated with an attorney of another state.

(h) [(g)] Availability of Records. Any of the records required to be kept by this rule shall be produced in response to a subpoena duces tecum issued in connection with an ethics investigation or hearing pursuant to R. 1:20-1 to 1:20-11, or shall be produced at the direction of the Disciplinary Review Board or the Supreme Court. They shall be available upon request for review and audit by the Office of Attorney Ethics. Every attorney shall be required to cooperate and to respond completely to questions by the Office of Attorney Ethics regarding all transactions concerning records required to be kept under this rule. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege. When produced or examined during the course of a disciplinary or random audit, both the attorney or law firm and the producers and licensors of computerized software shall be conclusively deemed to have consented to the use of said software by disciplinary authorities as evidence during the course of the disciplinary proceeding.

(i) [(h)] Disciplinary Action. An attorney who fails to comply with the requirements of this rule in respect of the maintenance, availability and preservation of accounts and records or who fails to produce or respond completely to questions regarding such records as required shall be deemed to be in violation of R.P.C. 1.15(d) and R.P.C. 8.1(b).

(j) [(i)] Unidentifiable and Unclaimed Trust Fund Accumulations and Trust Funds Held for Missing Owners. When, for a period in excess of 2 years, an attorney's trust account contains trust funds which are either unidentifiable, unclaimed, or which are held for missing owners, such funds shall be so designated. A reasonable search shall then be made by the attorney to determine the beneficial owner of any unidentifiable or unclaimed accumulation, or the whereabouts of any missing owner. If the beneficial owner of an unidentified or unclaimed accumulation is determined, or if the missing beneficial owner is located, the funds shall be delivered to the beneficial owner when due. Trust funds which remain unidentifiable or unclaimed, and funds which are held for missing owners, after being designated as such, may, after the passage of 1 year during which time a diligent search and inquiry fails to identify the beneficial owner or the whereabouts of a missing owner, be paid to the Clerk of the Superior Court for deposit with the Superior Court Trust Fund. The Clerk shall hold the same in trust for the beneficial owners or for ultimate disposition as provided by order of the Supreme Court. All applications for payment to

the Superior Court Clerk under this section shall be supported by a detailed affidavit setting forth specifically the facts and all reasonable efforts of search, inquiry and notice. The Clerk of the Superior Court may decline to accept funds where the petition does not evidence diligent search and inquiry or otherwise fails to conform with this section.

Note: Source--R.R. 1:12-8A(a)(b)(c). Caption amended and paragraph (d) adopted July 1, 1970 effective immediately; paragraph (c) amended July 7, 1971 to be effective September 13, 1971; paragraph (a) amended April 2, 1973 to be effective immediately; paragraph (c) amended July 17, 1975 to be effective September 8, 1975; caption and paragraph (a) amended July 29, 1977 to be effective September 6, 1977. Paragraphs (a) and (b) amended, new paragraph (c) adopted and former paragraphs (c), (d), (e), (f) and (g) redesignated and amended February 23, 1978 to be effective April 1, 1978; paragraphs (b), (c) and (h) amended November 22, 1978 to be effective January 1, 1979; paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (b) amended July 16, 1981 to be effective September 14, 1981; paragraphs (a), (b), (c), (g) and (h) amended January 31, 1984 to be effective February 15, 1984 except that the amendments to paragraph (a)(2) regarding designations to be placed on trust and business accounts shall not be effective until July 1, 1984; effective date of amendment to paragraph (a)(2) deferred on June 15, 1984 from July 1, 1984 to September 1, 1984; paragraphs (a)(1) and (2), (e)(1) and (h) amended July 26, 1984 to be effective September 10, 1984; paragraphs (a), (e) and (f) amended November 1, 1984 to be effective March 1, 1985; paragraphs (b) and (c) amended and paragraph (i) adopted November 5, 1986 to be effective January 1, 1987; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraph (a)(2) amended September 15, 1992 to be effective January 1, 1993; former paragraph (e) deleted and new paragraph (e) adopted November 18, 1996 to be effective January 1, 1997[.] ;paragraph (a) amended, new paragraph (b) created, former paragraph's (b) through (i) renumbered (c) through (j) and new paragraph's (c), (d), (e), (h) and (i) amended , 2002 to be effective , 2002.

PROPOSED AMENDMENTS TO RULE 1:21-9 (CERTIFICATION AND PRACTICE OF FOREIGN LEGAL CONSULTANTS)

Rule 1:21-9 provides for the certification of an attorney from a foreign country who wishes to advise clients in New Jersey on matters relating to the laws of the foreign country in which the attorney is licensed to practice law. In In re Dalena, 157 N.J. 242 (1999), the Court considered disciplinary charges against a New Jersey attorney as a result of his association with a foreign attorney from Italy. The dispute concerned the reasonableness of fees charged to the client and issues relating to association, practice restrictions, advertising, the nature of the duties of a New Jersey attorney associated with a foreign attorney, and whether certification is mandatory. In part, the Court rejected the argument that certification is optional, finding that a foreign attorney must become certified before giving legal advice in New Jersey on the laws of the foreign country. However, the Court found that the remaining issues were not clearly addressed by the rule, and referred the matter to the PRRC for consideration.

As an initial matter, the PRRC surveyed the rules of other states, but found little guidance on this matter. The paucity of information is understandable, because only ten foreign legal consultants are registered in New Jersey at this time. The PRRC determined, however, that the rule should track Rule 1:21-2, the pro hac vice admission rule, which provides that a New Jersey attorney must be associated with the applying attorney and which holds the New Jersey attorney responsible for the applying attorney's conduct. See R. 1:21-2(b)(4). With that premise in mind, the PRRC prepared a draft of an amendment to Rule 1:21-9 that adopted parts of the pro hac vice rule. The PRRC then submitted the draft rule to the New Jersey State Bar Association for comment.

On February 9, 2001, the NJSBA offered its comments and suggestions. The NJSBA agreed that a foreign legal consultant should be treated as an attorney admitted pro hac vice. As such, it recommended that the applying foreign attorney submit, as part of the application process, an affidavit by the New Jersey attorney who would accept full responsibility for the work of the foreign attorney. The NJSBA made numerous other recommendations, many of which have been incorporated into the proposed amendment to Rule 1:21-9 that follows.

The first proposed change to the rule is to paragraph (a). It clarifies that certification of the foreign legal consultant is mandatory, pursuant to the Court's decision in Dalena.

The proposed rule inserts a new subsection (b), which explains the conditions for representation, including restricting the attorney to rendering advice on the laws of the foreign country in which the foreign legal consultant is licensed, and requiring that the foreign attorney associate and consult with a New Jersey attorney who will be responsible for the foreign attorney's conduct.

Former subsection (b), Eligibility, is renumbered subsection (c), but is otherwise unchanged.

Changes to the subsection entitled "Applications," now designated subsection (d), include that applications from foreign attorneys for certification shall be supported with an affidavit. The affidavit will provide the same information as the rule currently requires in an application along with additional information, such as the identity of the New Jersey lawyer with whom the foreign legal consultant will associate. This subsection also expands the information the foreign attorney must provide relating to prior instances of professional misconduct and imposes a continuing obligation to inform the Court of new charges. This subsection adds also a requirement that the applicant file an affidavit by the associating New Jersey attorney attesting to his or her understanding of the obligations of supervision under this rule.

The subsection of the current rule entitled "Hardship Waiver," former subsection (d), has been deleted as creating an unnecessary potential loophole to the more restrictive requirements proposed here.

Two new subsections follow. The first, subsection (e), follows the pro hac vice rule in listing the contents of the order granting admission. Those contents include that the associated New Jersey attorney must assume full responsibility for the foreign attorney's conduct, requirements relating to service of process, and mandatory notification to the Court of changes to the foreign attorney's standing to practice in other courts.

Subsection (f) is new and relates to advertising. It states that the associating New Jersey attorney may advertise and identify on letterhead the foreign attorney's

certification as a foreign legal consultant along with the scope of practice.

The Scope of Practice subsection, renumbered subsection (g), is unchanged. The rule in its current form states that the foreign legal consultant may be compensated for his or her services. The PRRC declined to propose an amendment relating to referral fees or sharing fees because it does not believe the rules relating to such fees apply to foreign legal consultants. Compensation for the domestic attorney should be governed by current Court rules.

The final subsection, Conduct and Discipline, includes a new provision that admissions under the rule are valid for a period of twelve months and may be renewed annually. This provision permits greater control over foreign legal consultants.

1:21–9. Certification and Practice of Foreign Legal Consultants

(a) Certification of Foreign Legal Consultants. No person who [A person who] is admitted to practice in a foreign country as an attorney or counselor at law or the equivalent may render legal services in this State unless and until that person [and who] complies with the provisions in this rule and becomes [may be] certified by the Supreme Court as a foreign legal consultant. [and,] In that capacity, such person may render legal services within this State to the extent permitted by this rule.

(b) Conditions of Representation. A foreign legal consultant may, at the discretion of the Supreme Court, be permitted to represent New Jersey clients for the sole purpose of rendering professional legal advice on the laws, rules, regulations or any other matters involving the foreign country in which the foreign legal consultant is licensed. The foreign legal consultant shall associate and consult with a New Jersey attorney and the associating New Jersey attorney shall assume full responsibility for the conduct of the foreign legal consultant.

[(b)](c) Eligibility. In its discretion the Supreme Court may certify as a foreign legal consultant an applicant who:

(1) for a period of not less than 5 of the 7 years immediately preceding the date of application has been admitted to practice and has been in good standing as an attorney or counselor at law or the equivalent in a foreign country and has engaged either (A) in the practice of law in such country or (B) in a profession or occupation which requires as a prerequisite admission to practice and good standing as an attorney or counselor at law or the equivalent in such country; and

(2) possesses the good moral character customarily required for admission to the practice of law in this State; and

(3) intends to maintain, within this State, a bona fide office for practice as a foreign legal consultant.

[(c)](d) Applications.

(1) [Every applicant for certification as a foreign legal consultant shall file with the Clerk of the Supreme Court

a typewritten application, in duplicate, setting forth:] Application for admission under this rule shall be made to the Clerk of the Supreme Court. The application shall be supported by an affidavit of the applicant, which shall provide: (A) the applicant's name and age; (B) the applicant's last place of residence; (C) the character and duration of the applicant's formal legal education or training; (D) the name of and date of attendance at each university or post graduate level educational institution which the applicant has attended and/or graduated from, and the degree conferred, if any; (E) the names of all courts or other licensing authorities to which the applicant has applied for admission to the practice of law or certification or licensure as a foreign legal consultant; (F) the names of all courts or other licensing authorities under the auspices of which the applicant has taken any bar or equivalent examinations, the dates upon which said examinations were taken and the results thereof; [and] (G) the names of all courts and other licensing authorities by which the applicant has actually been licensed to practice as an attorney or counselor at law or equivalent or certified or licensed as a foreign legal consultant and the dates of each licensure or certification; (H) a statement that the applicant is admitted to practice and is in good standing as an attorney or counselor at law or the equivalent in a foreign country and has maintained that status for a period of not less than five of the seven years immediately prior to the date of the application; (I) a statement that the applicant possesses the good moral character customarily required for admission to the practice of law in New Jersey ; (J) the identity of a New Jersey attorney holding a plenary license to practice law in this State who is in good standing with the Supreme Court with whom the applicant shall associate; and (K) [The application also shall state] a statement advising whether the applicant is currently or has ever been the subject of any investigation or proceeding for professional misconduct and whether the applicant has ever been rejected upon an application for admission to practice before any court or by any other licensing authority. If the applicant has been the subject of any investigation or proceeding for professional misconduct or has been rejected for admission to practice, the applicant shall state the date, jurisdiction, nature of the violation, and penalty imposed and may set forth a brief explanation of the disposition and any extenuating or mitigating circumstances. An applicant admitted under

this rule shall have a continuing obligation to advise the Court of a disposition made of a pending charge or the institution of new disciplinary proceedings. A filing fee, set by order of the Supreme Court, shall accompany each application.

(2) The application shall be accompanied by the following documents, together with duly authenticated English translations of each document that is not in English:

(A) Duly executed certificates and/or documents from the authority having final jurisdiction over professional discipline in the foreign country in which the applicant is admitted to practice attesting to:

(i) the authority's jurisdiction in such matters;

(ii) the applicant's admission to practice in such foreign country, the date thereof and the applicant's current good standing as an attorney or counselor at law or the equivalent therein; and

(iii) whether any charge or complaint has ever been filed against the applicant with such authority, and, if so, the nature and substance of the allegations of each such charge or complaint and the disposition thereof.

(B) A letter of recommendation from one of the members of the executive body of such authority or from one of the judges of a court of general original or appellate jurisdiction within such foreign country, setting forth the applicant's professional qualifications, together with a certificate from the clerk of such authority or of such court, as the case may be, attesting to the office held by the person signing the letter and the genuineness of the person's signature.

(C) Letters of recommendation from at least two attorneys or counselors at law or the equivalent admitted to practice and practicing in such foreign country, setting forth the length of time and circumstances under which they have come to know the applicant, and their appraisal of the applicant's

moral character.

(D) Letters of recommendation from at least two attorneys admitted to the practice of law in this State, setting forth the length of time and circumstances under which they have come to know the applicant, and their appraisal of the applicant's moral character.

(E) An affidavit of the New Jersey attorney with whom the foreign legal consultant will associate in which the New Jersey counsel agrees to the association and acknowledges that he or she will be responsible for the conduct of the foreign legal consultant. An associating attorney is one who voluntarily agrees to assume full responsibility for the foreign legal consultant as described in sections (b), (d), (e) and (f) of this rule.

[(E)] (F) Such other relevant documents or information as may be requested by the Supreme Court.

(3) The statements contained in the application and supporting documents shall be investigated by the Supreme Court or its designee. Prior to granting certification as a foreign legal consultant, the Supreme Court shall be satisfied that the applicant is of good moral character. The application shall be granted by the Court, unless there is a finding of good cause for denying the application.

[(d) Hardship Waiver. Upon a showing that strict compliance with the provisions of subsections (c)(2)(A), (B) or (C) of this rule would cause the applicant unnecessary hardship and upon a showing of exceptional professional qualifications to practice as a foreign legal consultant, the Supreme Court may, in its discretion, waive or vary the applicability of such provisions and permit the applicant to make such other showing as may be satisfactory to the Court.**]**

(e) Contents of Order. The order granting admission shall require that:

(1) the foreign legal consultant shall:

(A) abide by this rule;

(B) consent to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against the foreign legal consultant or the New Jersey attorney with whom such person has associated that may arise out of the foreign legal consultant's participation in a matter; and

(C) notify the Supreme Court immediately of any matter affecting the foreign legal consultant's standing at the bar of any other court; and

(2) the associating New Jersey attorney shall assume full responsibility for the conduct of the foreign legal consultant.

(f) Advertising of Foreign Legal Consultant's Practice.

(1) A foreign legal consultant and the associating New Jersey attorney may advertise the admission of the foreign legal consultant and permitted scope of practice consistent with this rule and the laws and regulations of this State;

(2) A foreign legal consultant shall be listed and identified on the letterhead of the associating New Jersey attorney with appropriate designation and limitation of practice as a foreign legal consultant under this rule.

[(e)](g) Scope of Practice. A person licensed as a foreign legal consultant under this rule may render and be compensated for the performance of legal services within the State, but specifically shall not:

(1) appear for another person as attorney in any court or before any other judicial officer or administrative agency in the State, or sign or file in the capacity of a lawyer or legal advisor any pleadings or any other papers in any action or proceeding brought in any such court or before any judicial officer or administrative agency; or

(2) prepare any deed, mortgage, assignment, discharge, lease, agreement or contract of sale or any other instrument for purposes of recordation which may affect title to real estate located in the United States of America, its territories, districts or possessions; or

(3) prepare:

(A) any will or trust instrument effecting the disposition of any property located in the United States of America, its territories, districts or possessions and owned by a resident thereof; or

(B) any instrument relating directly to the primary administration of a decedent's estate in the United States of America, its territories, districts or possessions; or

(4) prepare any instrument in respect of the marital relations, rights or duties of a resident of the United States of America, its territories, districts or possessions or the custody or care of the children of such a resident; or

(5) render professional legal advice on the laws of this State or the United States of America or any other state, territory, district or possession of the United States of America or any foreign country other than a country to the bar of which the foreign legal consultant is admitted as an attorney or counselor at law or the equivalent (whether rendered incident to the preparation of legal instruments or otherwise), except on the basis of advice from a person admitted to the practice of law as an attorney of this State or such other state, territory, district or possession or as an attorney or counselor at law or the equivalent in such other foreign country, who has been consulted by the foreign legal consultant in the particular matter at hand and who has been identified to the client by name; or

(6) in any way represent that such person is licensed as an attorney at law of this State, or as an attorney at law or foreign legal consultant of another state territory or district, or as an attorney or counselor at law or the equivalent of a foreign country, unless so licensed; or

(7) use any title other than "foreign legal consultant"; provided that such person's authorized title and firm name in the foreign country in which such person is admitted to practice as an attorney or counselor at law or the equivalent may be used, provided that the title, firm name, and the name of such foreign country are stated together with the title "foreign legal consultant"

and further provided that such use does not create the impression that the foreign legal consultant holds a plenary license to practice law in this State.

[(f)](h) Conduct and Discipline.

(1) The professional conduct of foreign legal consultants, as limited by section [(e)] (g) of this rule, shall be governed in all respects by the Rules of Professional Conduct of the American Bar Association, as amended and supplemented by the Supreme Court and included as an Appendix to Part I of these rules.

(2) For purposes of Rules 1:14, 1:16, 1:19, 1:20, 1:20A, 1:21–6, 1:21–7, [1:21-8,] 1:22, 1:25, 1:27–3, 1:28 and 1:29, a foreign legal consultant shall be deemed a member of the legal profession and shall be subject to the same requirements and procedures as an attorney and member of the bar holding a plenary license to practice law in the State of New Jersey. However, nothing in this subsection shall be construed as expanding the scope of practice authorized by section [(e)] (g) of this rule. No foreign legal consultant shall be admitted under this rule without annually complying with R. 1:20-1(b) and R. 1:28-2 during the period of admission.

(3) All admissions under this rule shall be valid for a period of 12 months and may be renewed annually.

Note: Adopted November 7, 1988 to be effective January 2, 1989[.] ; paragraph (a) was amended, paragraph (b) was amended and redesignated as paragraph (c) and a new paragraph (b) adopted, paragraph (c) was amended and redesigned as paragraph (d), paragraph (d) was deleted, paragraph (e) was amended and redesignated as paragraph (g) and new paragraphs (e) and (f) were adopted, paragraph (f) was amended and redesignated paragraph (h) , 2002 to be effective , 2002.

PROPOSED AMENDMENTS TO RULE 2:14 (REMOVAL OF JUDGES)

Rule 2:14 provides for the removal of a judge for misconduct, willful neglect of duty, unfitness or incompetence pursuant to N.J.S.A. 2B:2A-1 to –11.

These proposed amendments to Rule 2:14 attempt to resolve questions about the cost of a judge's defense by reconciling the Rule's provisions with certain subsections of Rule 2:15. Rule 2:15, in part, provides for formal hearings on allegations of judicial impropriety by the Advisory Committee on Judicial Conduct.

The first proposed amendment to Rule 2:14 addresses representation of the judge by counsel. Rule 2:15-14(a) states that "[a]t a formal hearing, the judge has the right to be represented by an attorney retained at the expense of the judge." To ensure conformity between judicial conduct proceedings, the PRRC proposes adding a new section to Rule 2:14, Rule 2:14-3(a), which mirrors the right provided by Rule 2:15-14(a).

The second proposed amendment follows the provision in Rule 2:15-14(c), which states that "[a]ll formal hearings shall be recorded by a qualified shorthand reporter, a video recording device, or a sound recording device. The Committee shall provide a copy of any videotapes or transcripts to the judge without charge." The PRRC recommends a new provision, Rule 2:14-3(b), to provide this same right. The PRRC recognizes the incongruity of providing free transcripts to judges while requiring attorneys to pay for transcripts of attorney ethics hearings. The Court, however, made this policy decision in adopting Rule 2:15-14(c).

N.J.S.A. 2B:2A-1 defines "judge" as "any judge of the Superior Court, the Tax Court or a municipal court." The PRRC declines to distinguish municipal court judges from judges of the Superior Court and Tax Court in respect of the potential right of municipal court judges to seek municipal funds for their defense. The PRRC defers to the municipalities on this issue.

2:14-3. Conduct of Formal Proceedings

(a) At any formal proceeding pursuant to N.J.S.A. 2B:2A-1 to –11, the judge has the right to be represented by an attorney retained at the expense of the judge.

(b) All formal proceedings pursuant to N.J.S.A. 2B:2A-1 to -11 shall be recorded by a qualified shorthand reporter, a video recording device, or a sound recording device. A copy of videotapes or transcripts of the formal proceeding shall be provided to the judge without charge.

Note: Adopted , 2002, to be effective September 1, 2002.

PROPOSED AMENDMENTS TRANSMITTED TO THE COURT OUT OF CYCLE

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Student Loans. In April 2001, the PRRC submitted to the Court its report and alternative proposed rules to implement N.J.S.A. 2A:13-12, suspension of attorney licenses for failing to repay student loans. The Court received comments from the Bar on these proposed rules and, at the Court's request, the PRRC provided to the Court its response to those comments on November 28, 2001. The matter is still pending before the Court.

Attorney-Client Sexual Relations. Also in April 2001, the PRRC submitted to the Court its report and proposed amendment to RPC 1.8, Conflict of Interest, to add a subsection prohibiting attorney-client sexual relations during the pendency of the representation. The Court received comments from the Bar on this proposed rule and, at the Court's request, the PRRC provided to the Court its response to those comments on November 28, 2001. The matter is still pending before the Court.

Opinion 24. On November 28, 2001, the PRRC submitted to the Court its report on the Committee on Attorney Advertising's Opinion 24, which addresses attorney claims of specialization or expertise in particular areas of the law. The PRRC also proposed an amendment to RPC 7.4, Communication of Fields of Practice, that reflected the position of some members of the PRRC on this matter. The matter is still pending before the Court.

PROPOSED RULE AMENDMENTS REQUESTED AND REJECTED OR RESOLVED WITHOUT CHANGES TO THE RULES

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Public Notice of Hearings by the District Ethics Committees. The PRRC received a letter from John T. Paff, President of Citizens for Justice in New Jersey, Inc., in which he expressed frustration caused by his attempts to receive notice of DEC public hearings. Mr. Paff complained that there was no method to notify the public of these hearings and suggested the implementation of an advanced registration for persons requesting notice. Mr. Paff's suggestion was forwarded to the Office of Attorney Ethics, which conducted an inquiry of the Secretaries of the District Committees on this issue. As a result of this inquiry, in July 2000, the OAE implemented a system for advanced registration of persons requesting notice of public hearings before all District Ethics Committees throughout the State. Mr. Paff was advised of these results in a July 5, 2000 letter from the PRRC.

Docketing of Grievances Against Attorneys. Mr. Paff wrote a second letter to the PRRC in which he criticized the docketing system for grievances against attorneys. Specifically, he contended that when secretaries and public members of the DEC review a grievance to determine whether it warrants docketing, they should look only at the face of the grievance, and not seek information from the respondent before deciding whether the grievance is meritorious. He also requested that the process provide a limited right of review from a secretary's declination of a grievance. The letter was referred to the OAE, which revised the DEC Manual to ensure that grievants receive from the Secretary a copy of any information solicited from the respondent or third parties in assessing the merits of the grievance, and to further provide the grievant with the right to respond to that information. Mr. Paff was advised of these results in a letter from the PRRC dated November 1, 2000.

Marketing of Law Firms by Non-Lawyer Employees of the Firms. The Disciplinary Review Board referred to the PRRC a request to consider whether RPC 5.4(a)(sharing legal fees) and RPC 7.2(c) (paying fees for referrals) should be amended to address conduct that the DRB faced in In the Matter of Richard J. Weiner, DRB Docket No. 97-099. In that matter, ethics violations were charged as a result of the firm's employment of a non-lawyer to market the firm's services. The non-lawyer's salary apparently was tied, in part, to his success in developing clients for the firm. The DRB dismissed the

charged violations after finding that the rules provided insufficient guidance.

The PRRC investigated the rules of other jurisdictions. It noted also the failure of the Ethics 2000 Commission to address such conduct. In June 2001, the PRRC declined to recommend any changes to the rules. The PRRC noted that it would be difficult to draft a workable rule to address this conduct, which is on the fringes of lobbying, and that any such rule, if implemented, would be difficult to enforce.

Amendment to the Annual Attorney Registration Statement relating to Corporate and Insurance House Counsel. James F. McNaboe, Esquire, sent an e-mailed message to the Administrative Director of the Courts relating concerns about certain questions contained in the annual registration statement. Specifically, Mr. McNaboe noted that the form asked whether the registrant "engaged in the practice of law in New Jersey at all" during the relevant time and, if so, the form required information about trust and business accounts. Mr. McNaboe is an insurance house counsel and therefore does not maintain the usual trust and business accounts.

Mr. McNaboe's e-mail was referred to the PRRC, which contacted the OAE. David Johnson provided the PRRC with a revised registration statement that expressly advises corporate counsel and insurance house counsel to answer "no" to the question of private practice in New Jersey, thereby avoiding the trust and business account problem. Mr. McNaboe was so advised in a March 14, 2001 letter from the PRRC.

Appointment of Trustees to Handle Deceased Lawyers' Practices. By letter dated December 12, 2000, the PRRC informed Mr. Stephen N. Maskaleris, Esquire, that it would take no action on his recommendation that the Annual Attorney Registration Statement be amended to require attorneys to name a trustee that would handle their law practice upon their demise. The PRRC obtained comments from the OAE and the New Jersey Lawyers' Fund for Client Protection. It determined from its investigation that there is no clear need at this time to implement Mr. Maskaleris' suggestion.

Complaints Regarding Confidentiality Requirements for Undocketed Grievances. The PRRC received letters from two citizens complaining that the confidentiality requirements for undocketed grievances, which they characterized as a "gag rule," are unfair. The letters were sent by Meryl Jacobs and K. S. Pitta.

By way of background, the confidentiality requirement arises from Rule 1:20-11(b) and Rule 1:20-10, and bars grievants from discussing with non-parties the circumstances that formed the basis for the grievance unless and until the grievance is docketed. Once the grievance is docketed, the process becomes public in nature. The PRRC reviewed the purpose of the confidentiality requirement, which is to encourage grievants to complain to ethics authorities about unprofessional attorney conduct by removing the fear of a retaliatory suit by the attorney for harm to the attorney's reputation. In effect, with these rules, the Court extended to statements made by grievants the same absolute immunity that attaches to statements made in lawsuits so long as the confidentiality requirements of Rule 1:20-10 are met. IMO Hearing on Immunity for Ethics Complaints, 96 N.J. 669 (1984). Based on its review, the PRRC advised these citizens that it would not recommend changes to the rules at this time.

The Appearance of Impropriety. The PRRC received a letter from a citizen, Dorothy Mataras, advocating for the retention of the appearance of impropriety rule. Ms. Mataras had read several articles suggesting that the rule might be eliminated. The PRRC took no action other than briefly responding to Ms. Mataras' letter.

Paralegal Regulations. The PRRC was contacted by Maria De Filippis, a paralegal, who was acting on behalf of an ad hoc committee of the New Jersey State Bar Association on the issue of paralegal regulation. Ms. De Filippis inquired whether the PRRC would consider a proposal in which paralegal professionals would be registered on a voluntary basis, assuming that proposal was adopted by the NJSBA. The PRRC agreed to consider the proposal if it is presented. At this time, however, the PRRC sees no reason to go beyond the position taken by the Ethics 2000 Commission, which did not propose any changes to RPC 5.3 regarding the regulation of paralegal professionals. In the future, however, the PRRC may develop recommendations as a result of the work of the NJSBA's ad hoc committee.

CONCLUSION

The proposed amendments are offered in an attempt to address particular issues on which the Court has expressed concerns during the past two years or to address conflicts or omissions in the rules that were discovered through their application to specific situations. The PRRC believes that these amendments will improve the process currently provided by the rules.

For the foregoing reasons, it is respectfully requested that the Court approve the proposed rule amendments.

Respectfully submitted,

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