# The Ethical Obligations of a Lawyer in a Political Campaign

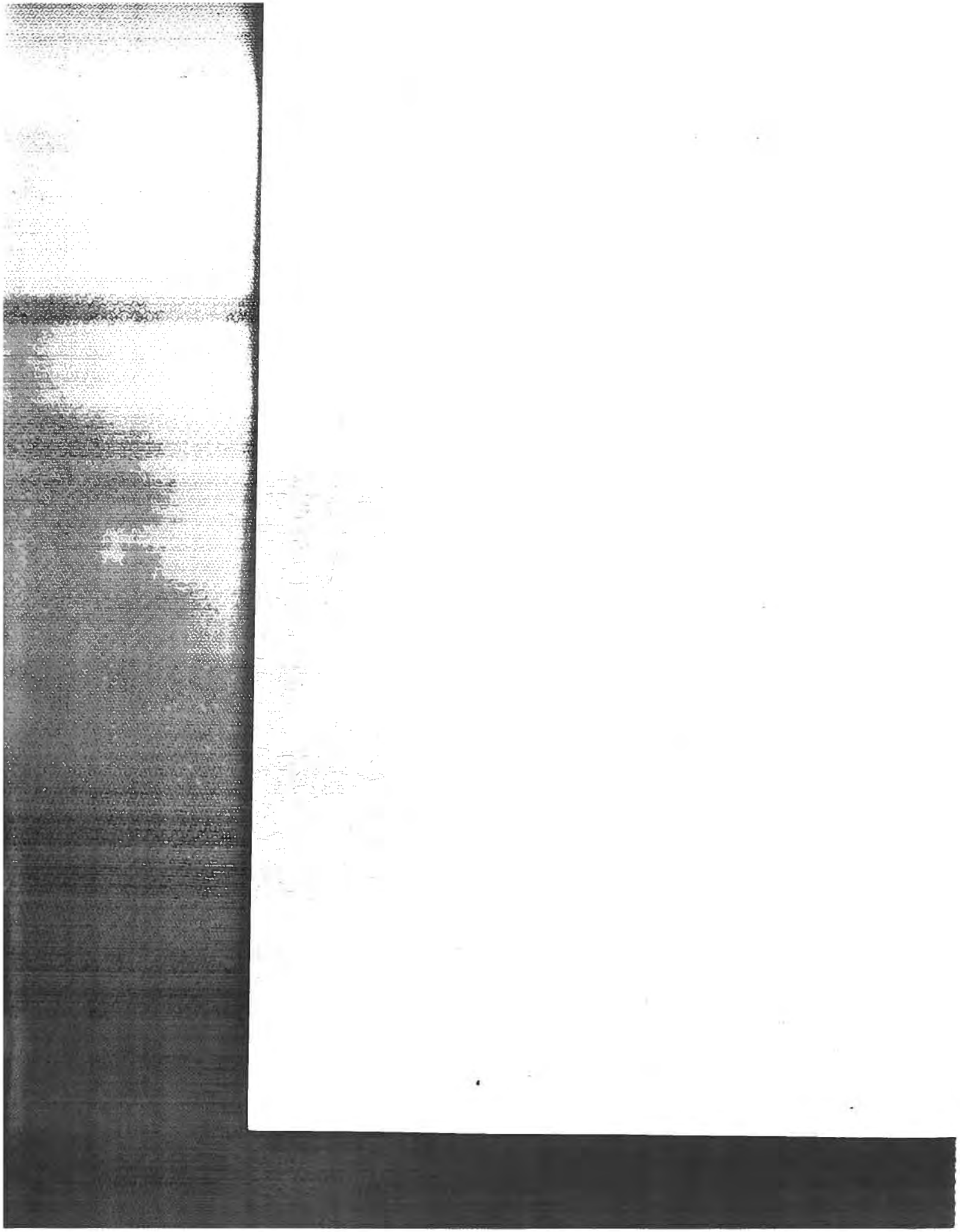
ROBERT F. HOUSMAN*



---

* Chairman of the Board of Directors, the Moderate Agenda, a bipartisan political organization. Mr. Housman also serves as an Adjunct Professor at American University's Washington College of Law and Syracuse University's Maxwell School of Citizenship and Public Affairs-Washington Program. He has also served as a consultant to a number of campaigns for federal and local office. The views expressed in this Article are solely those of the Author.

The Author wishes to thank Hyun Steven Lee for his research efforts. Frank Lloyd Wright once said, "An idea is salvation by imagination." Barry Pershkow and Scott Segal were generous with their ideas and sound advice during this process, which salvaged the piece in a number of places. I also wish to express my sincere gratitude to the unnamed lawyers who participated in the survey upon which this Article is premised. Any remaining errors are the sole property of the Author.



This Article examines how the rules of professional ethics apply to the political efforts of lawyers. In addition, this Article discusses how the wider application of the rules of ethics

could play a significant role in restoring the faith of the public in the American electoral process. The Article also provides lawyers and law firms with common sense ways of avoiding the ethics problems that can arise from political involvement.

## I. LAWYERS, POLITICS AND ETHICS: AN INTRODUCTION

At the time of this writing, the battles of the 1996 political season have just been joined. Advertising salvos from both the Republican and Democratic camps are being exchanged,[1] and the list of challengers for a host of offices seems to grow by the day.[2] The rank and file of the two parties' organizations are already being filled, in great measure, by scores of politically active lawyers eager to do their candidates' bidding. Despite the fact that these lawyers have taken an oath of ethics, few among them are likely to give much thought to how their ethical obligations apply to their campaign activities.

This failure on the part of lawyers to weave ethics into politics could prove to be one of the many significant causes of the acute and negative way in which the public views lawyers and the law, as well as politics and politicians. Amid the public, the law is viewed as nonsensical rules that asphyxiate morality, defeat common sense, and undermine the efficiency of American society;[3] lawyers are perceived as the unscrupulous, parasitical elite who fix these unsuitable rules and then use and abuse them for their own profit and gain.[4] Parallelly,

---

1. *See, e.g., Democrats to Morph Vulnerable Republicans Into Newt Gingrich in New Ads*, U.S. NEWSWIRE, Apr. 6, 1995, *available in* LEXIS, CURNWS database.

2. *See, e.g.*, Dan Balz, *Buchanan Promises to Put 'America First;' Commentator Joins Race for GOP Nomination*, WASH. POST, Mar. 21, 1995, at A5.

3. *See, e.g.*, PHILIP K. HOWARD, THE DEATH OF COMMONSENSE: HOW LAW IS SUFFOCATING AMERICA (1995).

4. *See* James H. Andrews, *Do Too Many Lawyers Spoil the Economy?*, CHRISTIAN SCI. MONITOR, Feb. 15, 1994, at 8; Daniel Burke, *Judge's Praise of Lawyers Read As 'Asinine Cliches'*, SUN SENTINEL (Ft. Lauderdale), May 5, 1994, at 22A (letter to the editor) ("The disparaging jokes that have developed about lawyers in recent years are the natural evolution of the public's waking up to the reality that lawyers are basically parasites who survive by exploiting the misfortune of others."); George Will, *Time for a Flat Tax on Income?*, TIMES-PICAYUNE (New Orleans), Sept. 13, 1994, at B7 ("Washington's parasite class of lawyers and lobbyists who rent themselves to the

politics is viewed as a self-interest imposed gridlock that occasionally succeeds in turning lunacy to law; politicians are viewed as debaucherous[5] "beltway bandits"[6] who proclaim ad nauseam the common good, but fill the pockets of their special interest patrons when the cameras stop rolling.[7] When lawyers and politics unite, these ill visions only feed off each other, fortifying public belief that the political institutions of our country are controlled by the well-heeled,[8] tassel-loafer[9]

---

sort of people . . . seeking to gain advantages, or impose disadvantages on others . . . ."). *But see* James Lileks, *Better Not Kill All the Lawyers*, TIMES-PICAYUNE (New Orleans), Aug. 9, 1993, at B7 (discussing social value of lawyers' services).

Some commentators would have us believe that this distaste for lawyers is a new-found tendency brought on by some change in the law or lawyers. *See, e.g.*, HOWARD, *supra* note 3. However, in reality this trend is far more longstanding. In fact, the distaste for lawyers was so great during Colonial times that they were banned from the Massachusetts Bay area. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 94 (2d ed. 1985).

5. *See, e.g.*, Howie Carr, *Ted K Still Has a Job to Do in D.C.—at La Brasserie*, BOSTON HERALD, Oct. 7, 1994, at 6 (playing on allegations that Senators Ted Kennedy and Christopher Dodd engaged in sexual dalliance with a waitress while inside the restaurant La Brasserie); Michael Lewis, *The New Lust Loophole on Chuck Robb and Too-Subtle Sexual Distinctions*, WASH. POST, Mar. 20, 1994, at C1.

6. *See, e.g.*, John Nichols, *Food for Thought*, CAPITAL TIMES, Dec. 26, 1994, at 1D, *available in* LEXIS, CURNWS database ("Newt Gingrich and other Beltway bandits"). "Beltway bandit" is a derogatory term that refers to the highway that encircles the District of Columbia, insinuating that people who operate within the Beltway are insiders out of touch with the rest of the country.

7. Joe Cummings, *Voters: Alienated or Connected?/Congress Not Interested in Us*, HOUS. CHRON., Nov. 12, 1994, at 33; Edward T. Pound & Douglas Pasternak, *The Pork Barrel Barons*, U.S. NEWS & WORLD REP., Feb. 21, 1994, at 32.

8. *See* Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1129-30 (1994). Wertheimer and Manes discuss a May 1992 poll conducted by Gordon S. Black Corp. Finding "that 74% of registered likely voters agreed that 'Congress is largely owned by . . . special interest groups,' . . . and 85% agreed that 'special interest money buys the loyalty of candidates.'" *Id.* at 1129 (quoting Gordon S. Black Corp., *The Politics of American Discount*, at Table 3). They also report on a Washington Post and ABC News poll taken just prior to the 1992 election that found 75% of voters worried "a 'great deal' or a 'good amount' that 'special interest groups have too much influence over elected officials.'" *Id.* at 1129-30 (quoting Dan Balz & Richard Morin, *Voters Voice Hope, Discount - and Sense of Involvement*, WASH. POST, Nov. 3, 1992, at A1).

9. *See* Neil Lewis, *The Politicization of Tasseled Loafers*, N.Y. TIMES, Nov. 3, 1993, at C3.

crowd, and not by "we the people."[10]

The relative accuracy or inaccuracy of these beliefs aside, members of the legal profession are themselves partly to blame for these perceptions. By all appearances the American political process is growing more vicious and divisive—driven by scandal not policy.[11] Contemporaneously, lawyers are playing an

---

10. *See, e.g.*, Cummings, *supra* note 7; Ken Herman, *Political Consultants: "Parasites" or Pros? Mouthpieces for the Candidates Rarely Take Break*, HOUS. POST, Oct. 2, 1994, at A33; Will, *supra* note 4. William Greider, for example, provides the following:

> The Democrats might more accurately be described now as "the party of Washington lawyers"—lawyers who serve as the connective tissue within the party's upper reaches. They are the party establishment, to the extent anyone is, that has replaced the old networks of state and local political bosses. But these lawyers have no constituencies of their own and indeed, must answer to no one, other than their clients.
>
> Many major law firms have formed their own political action committees, so that the various strands—party strategy, issues, money—conveniently come together in one location. These lawyers speak, naturally enough, with a mixture of motives—for the good of the party, presumably, but also for the benefit of the clients who are paying them.

WILLIAM GREIDER, WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY 253 (1992). However, Greider's lament as to the role of lawyers in the Democratic party is increasingly applicable to the Republican ranks. Since the 1994 election shifted control of the Congress to the Republican party, the Grand Old Party's coffers have seen dramatic growth. *See* Richard L. Berke, *One Change Is Not in the Contract*, N.Y. TIMES, Apr. 9, 1995, § 4, at 3. Many of these contributions have been from lawyers and law firms. *Id.*

11. *See, e.g.*, KATHLEEN HALL JAMIESON, DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY (1992); Peter F. May, Note, *State Regulation of Political Broadcast Advertising: Stemming the Tide of Deceptive Negative Attacks*, 72 B.U. L. REV. 179 (1992); *see also* FRANK I. LUNTZ, CANDIDATES, CONSULTANTS, AND CAMPAIGNS (1988); John Milne, *Candidates' Ad Spots Traveling the Low Road*, BOSTON GLOBE, Sept. 2, 1990, (New Hampshire Weekly), at 1 ("If there is a single trend apparent today in political advertising it is the increasing proportion of negative campaign advertisements."); MICHEAL PFAU & HENRY C. KENSKI, ATTACK POLITICS: STRATEGY AND DEFENSES (1990).

The use of negative campaigns is far from new. JAMIESON, *supra*, at 43-63 (discussing history of attack campaigning). For example, Yale president Timothy Dwight proclaimed that if Thomas Jefferson were elected president of the United States "the Bible will be burned, the French 'Marseillaise' will be sung in Christian churches, and 'We may see our wives and daughters the victims of legal prostitution; soberly dishonored; speciously polluted.'" *Id.* at 43. The September 1864 edition of *Harper's* collected the following list of slurs that had been slung at President Lincoln by his opponents: "'Filthy Story-Teller, Despot, Liar, Thief, Braggart, Buffoon, Usurper, Monster, Igno-

ever-increasing role in the political process.[12] Although it may be impossible to claim, let alone prove, a causal link between these trends, it behooves the legal profession to begin policing the efforts of its members in the American political process.[13]

Fortunately, the rules of professional ethics,[14] which are

---

ramus Abe, Old Scoundrel, Perjurer, Robber, Swindler, Tyrant, Fiend, Butcher, Land-Pirate' and 'A Long, Lean, Lank, Lantern-Jawed, High Cheek-Boned, Spavined, Rail-Splitting Stallion.'" *Id.*

However, the use of negative or attack campaign tactics has increased of late. *Id.* at App. I charts 4-2, 4-3, 270. For example, in the 1952 general presidential race the candidates used 20 30-second to 5-minute oppositional ads. *Id.* at App. I chart 4.3. By 1980, the number of negative ads had increased to 80. *Id.* Similarly, prior to the 1988 presidential race, political action committee (PAC) money provided very little support for negative campaigning. However, in 1988, roughly $4 million in PAC monies went into oppositional advertising. *Id.* at App. I chart 4-2.

These negative campaigns have a wide range of deleterious effects on the American electorate and electoral process. *See Clean Campaign Act of 1989: Hearings on S. 999 Before the Subcomm. On Communications of the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. 38 (1989) (statement of Curtis B. Gans, Comm. for the Study of the American Electorate); JAMIESON, *supra*, at 64-101; May, *supra*, at 181-91; Victor Kamber, *Political Discourse Descends Into Trivia*, ADVERTISING AGE, Feb. 25, 1991, at 20 (negative advertising undercuts discussion of substantive issues).

12. *See, e.g.*, GREIDER, *supra* note 10, at 252-54. For a general description of the growing role of lawyers in campaigns and politics, see also *infra* notes 17-35 and accompanying text.

13. *Cf.* Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 344 (1994):

> [P]rofessional regulation of lawyers has a variety of purposes, including the provision of guidance to lawyers and the maintenance of a public image that fosters client trust and thereby improves service to clients. To the extent professional regulation fails to further its objectives, it arguably is time to re-evaluate the codes.

*Id. Accord* Peter W. Morgan, *The Appearance of Propriety: Ethics Reform and Blifil Paradoxes*, 44 STAN. L. REV. 593, 616 (1992) ("Of course, the bar should be concerned about its image. The legal system cannot operate effectively without public confidence in attorneys."). In this same vein, to the extent that the way we apply the codes fails to further these goals, we ought to revisit their application.

14. In discussing the rules of ethics, this Article refers to the American Bar Association's (ABA) Model Rules and the earlier ABA Model Code. *See* MODEL RULES OF PROFESSIONAL CONDUCT (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969). However, as each jurisdiction's rules are likely to differ, in analyzing any particular campaign ethics issue, lawyers are advised to consult the rules of ethics for all the applicable jurisdictions. *See generally* Duncan T. O'Brien, *Multistate Practice and Conflicting Ethical Obligations*, 16 SETON HALL L. REV. 678 (1986) (discuss-

intended to govern how members of the legal profession live their lives, have long applied to the activities of lawyers in political campaigns and thus, provide a ready foundation for this needed effort.[15] Unfortunately, despite the longstanding application of these rules to political campaign activities, the legal profession has yet to fully recognize the obligations imposed by the application of the rules of ethics to its political activities. Moreover, the sporadic application of these rules of ethics to campaign activities leaves lawyers with little else but normative pressure to encourage them to act in the most ethical manner. These failures allow the proverbial few bad apples to continue to spoil the vital efforts of the majority of ethical and well-meaning, politically active lawyers. Something must be done to rectify this situation. A wider application of the rules of ethics to the actions of lawyers in campaigns could be an important first step in cleaning up and restoring the public's faith in the American political process.

Moreover, apart from merely squandering an important opportunity to correct some of the problems that plague our political process, the failure of lawyers to collectively recognize these obligations increases the potential for individual lawyers to unwittingly cross over the boundaries of these obligations. In other words, lawyers who are politically active may be exposing themselves, and the firms that employ them, to various liabilities and disciplinary sanctions—even if they are acting in a manner that is generally accepted by lay political professionals.

In an effort to assist lawyers both in using the rules of professional ethics to restore public faith in our electoral process and in avoiding ethical problems in their own political endeavors, this Article discusses how the rules of professional ethics apply to the activities of lawyers in political campaigns.[16] Part I of this Article discusses the growing signifi-

---

ing resolution of conflicts among different jurisdictions' ethics rules).

15. *See infra* part IV (discussing historical application of the rules of ethics to campaign activities).

16. Several caveats as to the scope and focus of this Article are necessary at this point. First, this Article focuses on lawyers who work on the campaigns of others.

cance of lawyers in political campaigns. Part II relates the results of a survey of lawyers and law firms concerning the application of the rules of ethics to political efforts. Part III discusses existing case law that applies the rules of professional ethics to the activities of lawyers in political campaigns. Part IV analyzes how specific rules of ethics would apply to the more common and troubling situations faced by lawyers in campaigns. Part V discusses the liabilities that lawyers who act in violation of the rules of ethics during political campaigns may impose upon themselves and their firms. Part VI evaluates the positive contribution that a wider application of the rules of professional conduct to the campaign activities of lawyers could have on both the legal profession and the American political process. Part VII provides some guidance for lawyers and their firms in avoiding ethical dilemmas during their campaign activities.

## II. THE ROLE OF LAWYERS IN POLITICS AND POLITICAL CAMPAIGNS

Throughout the course of American history, many of our finest political leaders, including founding fathers and presidents alike, have hailed from the legal profession. Thus, it should come as no surprise that lawyers continue to play a number of critical roles in current political ranks.

Both President Bill Clinton and First Lady Hillary Rodham Clinton are members of the bar.[17] Similarly, 157 of the 435

---

However, candidates who are lawyers face the same ethical obligations as do their charges. This Article does not, however, deal at great length with the special issues raised by lawyer involvement in judicial campaigns and the host of other ethical issues raised by such campaigns. For exposès on these issues, see, for example, James Alfini & Terrence J. Brooks, *Ethical Constraints on Judicial Election Campaigns: A Review and Critique of Canon 7*, 77 KY. L.J. 671 (1989); Kurt E. Scheuerman, *Rethinking Judicial Elections*, 72 OR. L. REV. 459 (1993). Nor does this Article deal with the ethical issues faced by lawyers who are also legislators. These issues have been well discussed in George Carpinello, *Should Practicing Lawyers be Legislators?*, 41 HASTINGS L.J. 87 (1989) and in Thomas More Kellenberg, *When Lawyers Become Legislators: An Essay and a Proposal*, 76 MARQ. L. REV. 343 (1993).

17. *See* MICHAEL BARONE & GRANT UJIFUSA, THE ALMANAC OF AMERICAN POLITICS 1994 (1993).

members of the House of Representatives are lawyers, and 54 of the 100 United States Senators are lawyers.[18] Similar numbers can be found within the fifty Statehouses.[19] Moreover, one third of the three branches of the federal and state governments—the judicial branch—is made up almost exclusively of lawyers turned judges. Considering that the primary purpose of most elected officials is to make or otherwise shape our laws, this concentration of lawyers within political ranks is to be expected.

Nor, therefore, should it be surprising that lawyers are playing an ever-increasing role in the political processes through which we elect our presidents and statesmen. For example, law firms are now among the leading political contributors. A 1988 study by the Legal Times found that 157 law firms had established political action committees (PACs).[20] During the 1991-1992 election year cycle, at least sixteen law firms contributed more than $100,000 in political contributions.[21]

---

18. *See id.*

19. *See* Carpinello, *supra* note 16, at 89 (citing BETH BAZAR, NATIONAL CONFERENCE OF STATE LEGISLATORS, STATE LEGISLATORS' OCCUPATIONS: A DECADE OF CHANGE 2-3 (1987)). "A 1986 survey found that 16% of all state legislators identified their occupations as attorneys." *Id.* This 1986 percentage was actually down from a 1966 survey, which found that 26% of all state legislators were lawyers. *Id.*

20. *See* GREIDER, *supra* note 10, at 259.

21. *See How PACs Raised and Spent Money in 1991-1992 Election Cycle, Political Finance & Lobby Reporter*, Apr. 30, 1993, *available in* LEXIS, CURNWS database. These law firms and the amounts they contributed are as follows:

| Firm | Amount Spent |
|---|---|
| Akin, Gump, Straus, Hauer & Feld | $379,852 |
| Baker & Botts | $142,542 |
| Fulbright & Jaworski | $110,320 |
| Hogan & Hartson | $112,712 |
| Jones, Day, Reavis & Pogue | $132,980 |
| King & Spaulding | $337,637 |
| Kilpatrick & Lockhart | $190,665 |
| Kutak, Rock & Campbell | $128,229 |
| O'Melveny & Myers | $105,861 |
| Powell, Goldstein, Frazer & Murphy | $136,135 |
| Preston, Gates, Ellis & Rouvelas | $139,474 |
| Shaw, Pittman Potts & Trowbridge | $125,194 |
| Skadden, Arps, Slade, Meagher & Flom | $150,358 |
| Swidler & Berlin | $133,990 |

The 1992 presidential election campaign graphically displays the disproportionate and diverse roles that lawyers play in American politics. The innermost circle of the Clinton campaign included esquires Hillary Rodham Clinton, Warren Christopher, James Carville, Paul Begala, Samuel Berger, Ron Brown, Mickey Kantor, Vernon Jordan, Bernard Nussbaum, Vince Foster, Bruce Lindsey,[22] and Harold Ickes.[23] Even beyond this inner circle, lawyers played a wide range of significant roles in the campaign, including everything from prepping the then Governor for debates[24] to developing trade and foreign policy positions.[25]

Not to be outdone, the Bush campaign also included more than its share of lawyers. For example, James Baker, a lawyer who has served as Secretary of State, is a longtime Republican insider and operative who headed up the 1992 Bush reelection effort.[26] Perhaps the most interesting of the Bush campaign cadre of lawyers was Gilbert Davis, who was simultaneously a Bush/Quayle volunteer and the lawyer for Paula Jones, the woman who commenced a lawsuit against candidate Clinton for sexual harassment.[27]

While presidential campaigns are to politics what the Super Bowl is to professional football—the big game—lawyers also play major roles in countless national, statewide, and local campaigns that are waged each year. Among the most notable

---

Vinson & Elkins $214,362
*Id.*

22. *The A-Team; Who's Who in Bill and Hillary's Inner Circle*, WASHINGTONIAN, Apr. 1993, *available in* LEXIS, CURNWS database.

23. Todd Purdum, *Clinton Follows Own Advice*, DALLAS MORNING NEWS, Dec. 30, 1994, at A4.

24. *See* Rowland Evans & Robert Novak, *An Aborted Coup Against Michel*, SAN DIEGO UNION TRIB., Oct. 12, 1992, at B8 (discussing role of Tom Donillon).

25. *See* Keith Bradsher, *Split Goal on Trade*, N.Y. TIMES, Feb. 27, 1993, at 6 (discussing Barry Carter's role in trade policy formulation); Don Oberdorfer, *Who's Who in Clinton's Foreign Policy Contingent*, WASH. POST, Sept. 29, 1992, at A7 (discussing John Holum's role in foreign policy position setting).

26. Kathy Kiely, *Veteran Baker May Consider Run for the Presidency*, HOUS. POST, Apr. 3, 1994, at A1.

27. *See* Martin Kasindor, *Foes of Bill in a Frenzy*, NEWSDAY, May 29, 1994, at A18.

is Kenneth Starr, the former Solicitor General who is now a partner in a major law firm and is also the prosecutor in the Whitewater affair.[28] Mr. Starr is a longtime Republican activist who also co-chaired the 1994 campaign of Kyle McSlarrow for the Virginia House of Representatives.[29] Such efforts are not limited to the most visible elements of the bar. For example, Jerome Gray, who headed up "Afro-American Outreach" for the 1994 Jeb Bush gubernatorial campaign in Florida, is also a lawyer.[30]

In short, as full-time political professionals, part-time political activists, and party supporters of all types, lawyers now dominate the political machinery of both the Democratic and Republican parties.[31] This conclusion is hardly sinister. Politics is fundamentally the process by which law is generated. Lawyers, by training and disposition, are advocates.

This situation seems unlikely to change. As legal reform and law-based policies increasingly dominate the political debate, lawyers will be called upon by campaigns to assist in the development of party platforms and the positions of individual candidates. The increasing complexity of campaign finance laws[32] will require candidates to look to lawyers both to get and keep them out of potential pitfalls. The character issues that have come to dominate campaigns will continue to cause difficulties for those candidates born of the 1960s and anon.[33] Lawyers will be called upon to craft legalistic answers to the prying questions of the popular press and similarly formulate and defend answers supplied to the Federal Bureau of Investigation's background checks concerning past irregularities.

---

28. *See* John King, *Demos Criticize Starr*, SALT LAKE TRIB., Aug. 9, 1994, at A5.

29. *Id.*

30. *Group Counters Bush on Death Penalty*, ST. PETERSBURG TIMES, Oct. 19, 1994, at 2B.

31. *See, e.g.*, GREIDER, *supra* note 10, at 252-269 (discussing role of lawyers in Democratic Party).

32. *See, e.g.*, Elaine Song, *The Legal Players Behind the Politicians*, CONN. LAW TRIB., Aug. 29, 1994, at 8.

33. *See, e.g.*, Jim Boren & Robert Rodriquez, *Hello? Is There a Candidate Beneath All That Mud?*, FRESNO BEE, Nov. 2, 1994, at A1; Carl M. Cannon, *What Did You Do in the War?*, BALTIMORE MORNING SUN, Apr. 9, 1995, at A1.

Given the increasing financial demands of campaigns[34] and the networks that lawyers form among affluent friends, associates, colleagues, and clients, lawyers will play ever-growing roles as campaign fundraisers.[35]

## III. The Failure to Fully Recognize the Application of the Rules of Professional Ethics to Campaign Efforts

Despite the role that lawyers play in political campaigns, little attention has been focused on how the rules of professional conduct or legal ethics apply to these efforts. In fact, as the results of the following survey reflect, lawyers—even politically active lawyers—generally fail to incorporate the rules of ethics into their political work.

In order to determine the degree to which lawyers follow the rules of ethics during political activities, an informal survey of fifty-three lawyers who self-reported that they had been politically active at some point during the term of their bar membership was conducted during 1995. A copy of the questions that made up this survey is provided in Appendix I to this Article.

The lawyers surveyed reported working on campaigns at the local, state, and federal levels. The lawyers surveyed reported that their campaign efforts ranged from fundraising to policy development. All of the political efforts reported fell within the time period beginning in 1984 and ending in September 1995, the close of this study.

---

34. *See* Wertheimer & Manes, *supra* note 8, at 1132. The exponential increases in the funding requirements for successful campaigns are startling. *Id.* In 1976, winners of Senate seats spent on average $610,026 during the election cycle. *Id.* (citing Federal Election Comm'n, FEC Disclosure Series No.6: 1976 Senatorial Campaigns Receipts and Expenditures 6 (1977)). By 1992, winners spent $3.8 million "or an average of $12,000 in contributions each week for every week of a six-year Senate term." *Id.* (citing 1992 Senate Campaign Fin., Press Release (Common Cause, Washington, D.C., Spring 1993) at Chart 1).

35. *See supra* note 21 (discussing law firm PACs). For example, the Moderate Agenda, the political organization of which this Author is Chairman of the Board, is the creation of three lawyers—Scott Segal, Steve Orava, and the Author—who wanted to help make politics less political and more responsive to the wishes of most Americans.

Of the fifty-three lawyers surveyed, only six reported that a conflict of interest check was conducted prior to their engagement in campaign activities.[36] Most importantly, of the forty-seven lawyers who provided that they were simultaneously employed in a law firm, company, or association while also working on a campaign, only two reported that some form of conflict check was performed prior to joining the campaign. The mere lack of a conflict check does not necessarily indicate that an actual conflict of interest occurred. However, the lack of a conflict check for political activity shows that lawyers, along with their firms and associations, treat their work for campaigns differently than they treat work related to their "practice," and, as a consequence of this difference in treatment, the potential for ethical problems arises.

Moreover, the dearth of a conflict check is made troubling by the fact that forty-four of the politically active lawyers surveyed reported that the positions of the campaign on which they worked were "sometimes" or "often at odds with the positions of [their] other clients." Here again, just because a lawyer was part of a campaign that advocated some position on some issue that was in opposition to the position of another client of the lawyer does not, by itself, necessarily reflect a breach of ethical conduct. Nevertheless, a significant number of lawyers were engaged in political work for campaigns that had positions that conflicted with the positions of some of their other clients. In the majority of these cases, the fact that not even a basic conflicts check was done further increases the grounds for concern.

The breakdown of the systems designed to prevent ethical problems when they are applied to political activities is also reflected by the number of survey participants that reported not being assigned a supervising lawyer for their political work. Despite the fact that the majority of politically active respondents were at the associate level, only two reported having had a supervising lawyer or partner assigned to oversee their work.

---

36. Interestingly, those reporting that conflicts checks were done came almost exclusively from the most senior ranks of the campaign staff.

Lastly, the survey is troubling in that forty-one of the lawyers reported working for a political campaign that had, at least "sometimes," made mischaracterizations or untruths to attack the opponent. It is vital to note that the survey does not provide a means for determining the responsibilities of the survey lawyers for these acts. However, the relatively high percentage of self-reported excessive fact stretching and fallacy, coupled with the large number of lawyers engaged in campaigns, is further grounds for concern.

While the survey in no way purports to being scientific, taken as a whole, it reflects two significant problems. First, lawyers tend to treat their campaign activities differently from their other work. In fact, many of the lawyers surveyed tried to back up their answers with explanations, usually verbal, that campaign efforts were not "legal" in nature; therefore, they were not subject to the rules of ethics.[37] The presence of a double standard here is troubling because the political work is not being held to the higher ethical standard applicable to lawyers. Rather, as the survey reflects, political work is seen as a no-holds-barred arena where lawyers are free to wage combat unfettered by ethical limits.

Second, the survey reflects the fact that the legal profession has yet to figure out how to marry the demands and realities of political work with the rules of ethics. Absent some meaningful profession-wide attempt to unite these two areas and give guidance, at the individual and firm level, few lawyers will make any conscious attempt to fit their political work within the system of ethics. This is not to say that the conduct of these lawyers is unethical. However, because few lawyers actively ask "What do the rules of ethics tell me to do in this situation?", the likelihood of individual lawyers crossing ethical boundaries increases substantially.

---

37. *But see supra* notes 14-16 and accompanying text (discussing the application of rules of ethics to actions outside of what many would consider "legal" work).

## IV. Case Law Application of the Rules of Professional Conduct to Campaign Activities

While the private bar has not become fully aware of how campaign activities are regulated by the rules of ethics, the courts and disciplinary boards,[38] when called upon, have been clear on the application of these rules to campaign activities.[39] This section surveys the existing case law concerning the application of the rules of ethics to the campaign activities of lawyers.

### *A. Actions of Lawyers Who Are Candidates in Campaigns*

#### 1. Statements

Among the ethical violations most often cited in political campaigns is the use of false statements or advertising by a lawyer when he or she is the candidate.[40] For example, in *State v. Russell*,[41] the Kansas Supreme Court disciplined a lawyer for political advertisements that included false claims about the actions of his opponent during a campaign for a seat

---

38. *See* Gregory G. Sarno, *Election Campaign Activities as Grounds for Disciplining Attorney*, 26 A.L.R.4th 170 (1994).

39. *See generally* Sarno, *supra* note 38, at 212-28.

40. *See In re* Riley, 691 P.2d 695 (Ariz. 1986) (lawyer's derogatory and unfair statements concerning opponent for judicial office violated rules of ethics); *In re* Johnson, 729 P.2d 1175 (Kan. 1986) (lawyer publicly censured for false statements made in a campaign letter during reelection bid for county attorney); *In re* Disciplinary Proceeding Against Kaiser, 759 P.2d 392 (Wash. 1988) (incumbent judge's statements concerning party affiliations of opponent and influence peddling by members of the drunk driving defense bar violated rules of ethics); *In re* Donohoe, 580 P.2d 1093 (Wash. 1978) (lawyer who made false accusations against opponent for judicial office in two races violated rules of ethics).

In another case the issue of the veracity of the statements in question played less of a role than the manner in which the statements were made. *See* State Bd. of Law Examiners v. Spriggs, 155 P.2d 285 (Wyo.), *cert. denied*, 325 U.S. 886 (1945). In *Spriggs*, the lawyer was a candidate for the Wyoming Supreme Court who made statements challenging "'the horrible unbelievable breakdown of Justice in the Supreme Court of Wyoming'" including charges of bias, prejudice and incompetence. *Id.* at 289. These statements, mild perhaps by today's standards, were made in a manner deemed unethical. *Id.*

41. 610 P.2d 1122 (Kan.), *cert. denied*, 449 U.S. 983 (1980).

on the Board of Public Utilities of Kansas City.[42] Similarly, in *State ex rel. Nebraska State Bar Ass'n v. Michaelis*,[43] the Nebraska Supreme Court disciplined a candidate for the content of a political advertisement made during his campaign for county attorney.[44] The advertisement alleged various acts of misconduct and violations of the law by the incumbent county attorney and several other lawyers; these claims concerned allegations which the candidate knew or, with the exercise of due care, should have known were false.[45]

Campaign writings, cartoons, and caricatures were also found to constitute a violation of the rules of ethics by the South Dakota Supreme Court in *In re Gorsuch*.[46] In an interesting twist, the conduct found unethical in the *In re Gorsuch* case consisted of direct allegations and indirect insinuations concerning the impropriety and conflicts of interest raised by the substantial campaign funding which the opponent had received from members of the local bar.[47]

---

42. *Id.* at 1122-25; *see also* Sarno, *supra* note 38, at 212-28. In *Russell* the challenged conduct consisted mainly of political rhetoric; however, certain of the campaign statements went to charges that members of the utility board had engaged in unlawful conduct, of which the district attorney had knowledge and failed to act. *Russell*, 610 P.2d at 1127-28. Russell also argued that these actions were undertaken in his personal and not professional capacity. *Id.* at 1127. The court rebuffed this argument noting that the rules of ethics apply to a lawyer's conduct in both his personal and professional lives. *Id.* (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 336 (1974)).

43. 316 N.W.2d 46 (Neb.), *cert. denied* , 459 U.S. 804 (1982).

44. *Id.* at 46; *see also* Sarno, *supra* note 38, at 212-28.

45. *Michaelis*, 316 N.W.2d at 51; Sarno, *supra* note 38, at 212-28. In his defense, counsel argued, inter alia, that the statements were made as a private citizen and not as a lawyer. *Michaelis*, 316 N.W.2d at 52-54. The court responded that a lawyer could be disciplined for private conduct. *Id.* at 53. In addition, the court also provided that a lawyer with knowledge that another lawyer or lawyers had committed the various allegations alleged in the ad had a duty to disclose such knowledge to the bar. *Id.* at 54. The court asked if Michaelis had any such knowledge, and he responded that he did not. *Id.* The court then emphasized that the lack of any specific facts upon which to base his allegation showed that the act of Michaelis was not a good faith effort to improve the law, but rather a violation of the ethics rules. *Id.* at 55.

46. 75 N.W.2d 644 (S.D. 1956); *see also* Sarno, *supra* note 38, at 179.

47. *Gorsuch*, 75 N.W.2d at 646-47; Sarno, *supra* note 38, at 188. One politically active lawyer, Scott Segal, has raised the provocative point that, given the political nature of disciplinary boards, incidences where a disciplinary board seeks out for disci-

This case law demonstrates that when a candidate, who is a lawyer, steps beyond the boundaries of mere vituperative political speech and into the realm of false or defamatory rhetoric, the lawyer may be subject to sanction under the rules of ethics.

### 2. Campaign Finance[48]

A lawyer's misuse of campaign finances in his or her campaign or the failure to report, or report properly, such finances has also been the grounds for a number of ethical proceedings.[49] In several cases, candidates for judicial offices have been found guilty of unethical conduct for campaign finance activities. For example, *In re Hotchkiss*[50] concerned a Michigan circuit court judge who called a lawyer to inform him that his failure to donate money to the judge's campaign would not impact against him in any case before the judge.[51] The court held that the telephone call was a personal solicitation in viola-

---

pline campaigning lawyer-candidates are unsettling.

48. Judicial candidates have also been disciplined for a range of other activities that are particular to the judicial offices they seek. *See generally* Sarno, *supra* note 38. For example, among other things, candidates for judicial office have been found to have violated the rules of ethics for interceding on the behalf of prospective or existing supporters. *See, e.g.*, *Ex Parte* Grace, 13 So. 2d 178 (Ala.), *appeal dismissed*, 320 U.S. 708 (1943) (offering to share the office contended for); Florida Bar v. McCain, 361 So. 2d 700 (Fla. 1978) (disbarring judge for interceding on behalf of supporters with appellate judges hearing labor bribery case involving a supporter); State *ex rel.* Commission on Judicial Qualifications v. Rome, 623 P.2d 1307 (Kan.), *cert. denied*, 454 U.S. 830 (1981) (allowing their views on judicial appointments to color their decisions in matters before them). As these cases have limited applicability to the role that lawyers play in other political campaigns outside of the judicial selection process, they are not discussed at length here. *But see* State v. Russell, 610 P.2d 1122, 1126 (Kan.) *cert. denied*, 449 U.S. 983 (1980) (standards of judicial conduct in campaigns used to inform the application of the standards for lawyer conduct in campaign activities). For more information on these cases, see Sarno, *supra* note 39; James J. Alfini & Terrence J. Brooks, *Ethical Constraints on Judicial Election Campaigns: A Review and Critique of Canon* 7, 77 KY. L.J. 671 (1989); J. Scott Gary, Comment, *Ethical Conduct in a Judicial Campaign: Is Campaigning an Ethical Activity*, 57 WASH. L. REV. 119 (1981).

49. *See generally* Sarno, *supra* note 38, at 190.

50. 327 N.W.2d 312 (Mich. 1982).

51. *Id.*

tion of the rules of judicial conduct.[52]

Similarly, in *In re Bartholet*,[53] the court found a probate judge guilty of unethical conduct for linking the appointment of estate appraisers in probate cases to donations to the judge's campaign for reelection.[54] In *In re Bartholet*, the probate judge appointed estate appraisers who lacked proper experience over various other counsel who had requested the estates, with the understanding that a portion of the appointed appraisers' fees would be returned to the judge for his campaign funding.[55]

Two other cases involving judicial campaigns, in which the courts refused to sanction the lawyers involved, also display the application of the rules of ethics to campaign finance violations. In *State ex rel. Oklahoma Bar Ass'n v. Jones*,[56] the court dismissed a summary disciplinary action against a lawyer for a moral turpitude conviction.[57] Jones had been fined by a federal district court under the Federal Election Campaign Act of 1971[58] for receiving and not reporting a contribution of $1000 during his campaign for the United States House of Representatives.[59] Based on the fact that only a fine was imposed, the disbarment court classified the original reporting violation as a misdemeanor requiring no willful intent.[60] The disbarment court then found that a "moral turpitude" offense, which would have been grounds for a summary disbarment, implied some element of intent and knowledge.[61] Finding no such intent or knowledge in the original reporting offense to which the defendant had plead guilty, the court dismissed the summary disbarment.[62]

---

52. *Id.*
53. 198 N.W.2d 152 (Minn. 1972).
54. *Id.* at 153-55.
55. *Id.*; *see also* Sarno, *supra* note 38, at 192.
56. 566 P.2d 130 (Okla. 1977).
57. *Id.* at 131.
58. *Id.*
59. *Id.*
60. *Id.* at 132-33.
61. *Id.*
62. *Id.*

Similarly, in *In re Dalessandro*,[63] the Pennsylvania Supreme Court rejected a finding by the disciplinary board that a judge unethically solicited and received a $35,000 campaign contribution.[64] The *In re Dalessandro* disciplinary board found as follows:

> [A]t the end of the election campaign, the judge prepared, swore to, and filed a false and misleading account, and prepared and caused to be sworn to and to be filed by his campaign treasurer a similarly false and misleading account; the board also reported that the campaign reports contained incomplete information, and that the judge "persuaded" the campaign treasurer to sign and swear to the false report.[65]

The court rejected these findings, holding that it could not see how the public had been misled or given false information as to the origins of the monies in question.[66]

While rules of judicial conduct provide specific provisions that govern the use and solicitation of funds by judges and candidates for judicial offices, this line of cases seems to demonstrate that the general rules of lawyer ethics apply to the campaign finance activities of lawyers.[67]

### 3. Other Actions

Furthermore, in *In re Rivas*,[68] a lawyer was convicted of five felonies under the California elections code.[69] The lawyer's underlying convictions were based upon the fact that

---

63. 397 A.2d 743 (Pa. 1979).

64. *Id.* at 746.

65. Sarno, *supra* note 38, at 192-93.

66. *In re Dalessandro*, 397 A.2d at 754. In Florida Bar v. McCain, 330 So. 2d 712 (Fla. 1976), without further explanation, the court acquitted counsel for unethically soliciting campaign funds for his judicial reelection campaign. *See also* Sarno, *supra* note 38.

67. This conclusion is supported by the similar conclusion reached in the campaign finance cases concerning the campaigns of persons other than the lawyer disciplined. *See infra* notes 99-119 and accompanying text.

68. 781 P.2d 946 (Cal. 1989).

69. *Id.* at 947-48, 951.

he had provided false information to the Registrar of Voters in an attempt to qualify for a judicial race.[70] Based on these convictions, the court disbarred him for illegal conduct involving moral turpitude.[71]

### *B. Actions by Lawyers to Advance the Candidacy of Another*

In addition to sanctioning lawyers who in furtherance of their own candidacy take unethical courses of action, lawyers have also been sanctioned for a wide array of actions intended to assist the political campaign of a person other than themselves.[72]

#### 1. Statements

In *Thatcher v. United States*,[73] a personal injury lawyer who had lost several cases before a particular judge, launched a particularly malevolent campaign against that judge at election time.[74] The lawyer's conduct included printing and distributing circulars conveying false information regarding the judge[75] and hiring a trumpeter to rally crowds of factory workers around a legless plaintiff whose case had been dismissed by the judge.[76] Ultimately, the Sixth Circuit ruled that the attorney's actions were a breach of the rules of ethics.[77]

A counsel's efforts to unseat a judge were also at issue in a different case of similar name, *In re Thatcher*.[78] In the *In re Thatcher* case, a lawyer who supported a Democratic judicial candidate published and distributed a pamphlet disparaging the Republican opponent.[79] The Ohio Supreme Court found that

---

70. *Id.* at 948.
71. *Id.* at 951.
72. *See* Sarno, *supra* note 38 at 199-204.
73. 212 F. 801 (6th Cir. 1914), *appeal dismissed*, 241 U.S. 644 (1916).
74. *See* Sarno, *supra* note 38, at 207.
75. *Thatcher*, 212 F. at 807-10.
76. *Id.* at 807-08.
77. *Id.* at 812.
78. 89 N.E. 39 (Ohio 1909), *motion overruled by* 93 N.E. 895 (Ohio 1910).
79. *Id.* at 40.

the contents of the pamphlet were a violation of the lawyer's ethical obligations.[80]

Similarly, in *In re Humphrey*,[81] a lawyer who published and distributed a pamphlet criticizing the conduct of a judge before whom he had lost a case was disciplined by the California Supreme Court.[82] Among other charges made in the pamphlet, the lawyer implied that the judge's ruling in the particular case lacked the "intelligence of a common monkey."[83] The lawyer also called upon voters to vote for the judge's opponent in the next election.[84] In disciplining the lawyer, the court characterized the charges made in the pamphlet as libellous and willfully false; therefore, when made by a lawyer, the comments fell outside the realm of privileged political speech.[85]

The *In re Humphrey* court came very close to treading on the realm of political speech protected by the First Amendment. In fact, many lawyers, this Author included, may feel that the *In re Humphrey* court stepped over that line; however, the holding in this case may be explained by its facts. First, the decision stems from another era, and second, it concerns a disgruntled bar member's libel of a sitting judge, who is accorded greater deference due to his station. If a modern day court were to face a similar fact scenario, but one involving a non-judge rather than a judge, the result would likely differ from the one reached in *In re Humphrey*.

In *Segretti v. State Bar*,[86] counsel was disciplined for various actions taken while employed by President Nixon's 1972 campaign for reelection.[87] Counsel sent a number of letters under false letterheads of various Democratic campaigns making false allegations concerning the Democratic candidates for office with the intent of throwing the Democratic party into

---

80. *Id.* at 40-41.
81. 163 P. 60 (Cal. 1917).
82. *Id.* at 62.
83. *Id.* at 61.
84. *Id.*
85. *Id.* at 62.
86. 544 P.2d 929 (Cal. 1976).
87. *Id.* at 930-31; *see also* Sarno, *supra* note 38, at 214-15.

chaos.[88]

Similarly, false statements made under the name of another person also served as the basis for disciplinary actions in *People v. Casias*.[89] In *Casias*, a lawyer authored a letter making false charges against a primary candidate running for the office of district attorney and listed the post office box of another as the return address on the letter.[90] When the press began to focus on the letter, the individual whose post office box had been falsely listed suffered from embarrassment and humiliation.[91] During a police investigation to locate the letter's true author, the defendant denied having written the letter, destroyed the typewritten original, and, when ordered by the authorities to produce an exemplar of his writing, attempted to provide a false handwriting sample.[92]

Two other cases addressed statements made by judges in election efforts. In *In re Bennett*,[93] the Michigan Supreme Court found a judge guilty of unethical conduct for various efforts intended to discredit a candidate running in a primary campaign for legislative office.[94] Among other things, the judge, without a basis in fact, told a social studies class that the candidate had been the subject of criminal charges for drug use and had not graduated from law school.[95] In addition, the judge repeated the same unsubstantiated charges to a re-

---

88. Counsel sent, without authorization, a letter, under the letterhead of the Muskie campaign, wrongfully accusing Senators Humphrey and Jackson of sexual improprieties. *Segretti*, 544 P.2d at 931. Counsel also sent without authorization, under the letterhead of Senator Humphrey, a press release charging that another candidate, Representative Chisholm, had psychiatric problems. *Id.* In addition to serving as grounds for disciplinary action, the Humphrey-Jackson letter also caused counsel to be convicted of a violation of a federal statute, which made it illegal to make certain election statements without disclosing the real identities of the person or entity responsible for the statements. *Id.*; *see also* 18 U.S.C. § 612 (1974). Counsel also published and distributed bumperstickers that made erroneous proclamations. *Segretti*, 544 P.2d at 932.

89. 646 P.2d 391 (Colo. 1982).

90. *Id.* at 391.

91. *Id.*

92. *Id.* at 392.

93. 267 N.W.2d 914 (Mich. 1978).

94. *Id.* at 915-16.

95. *Id.* at 920.

porter.[96] Similarly, in *Linsenmeyer v. Straits*,[97] the Pennsylvania Supreme Court found that a trial judge's public endorsement of the incumbent lawyer was a violation of the Canons of Judicial Ethics.[98]

This line of cases should give lawyers who speak out during political campaigns against a candidate cause for concern. Where a lawyer's campaign statements made in support of another person's candidacy contain malicious or false allegations, or statements intended to disparage or discredit a candidate, the lawyer risks ethical sanctions.

### 2. Campaign Finance

A number of ethical proceedings have resulted in a lawyer being disciplined for ethical violations relating to unethical campaign finance activities.[99] Most notably, in *In re Wild*,[100]

---

96. *Id.*

97. 166 A.2d 18 (Pa. 1960).

98. *Id.* at 24. This case was, oddly enough, based on an auto accident. The case proved to be more interesting because one of the trial lawyers in the auto case was the campaign manager for the incumbent's opponent. *Id.* at 23.

99. *See* Sarno, *supra* note 38, at 191-94; *In re* Troy, 306 N.E.2d 203 (Mass. 1973). In a number of other cases, the courts have looked at, but refused to sanction lawyers for acts on behalf of the campaigns of others involving campaign finances. *See* Colorado Bar Ass'n v. Class, 201 P. 883 (Colo. 1921); *see also* Sarno, *supra* note 38, at 201-02.

In addition to the cases discussed in the text, two other rather unique cases raise the issue of bribes in campaign finance efforts. In the *In re Larkin* case, the court found unethical a district judge's attempt to make an unlawful campaign contribution to a gubernatorial candidate. *In re* Larkin, 333 N.E.2d 199 (Mass. 1975); *see also* Sarno, *supra* note 38, at 219. The judge delivered to the Governor's security detail, for presentment to the Governor, an envelope containing $1,000 in cash with a note attributing the gift to the judge's mother-in-law. *In re Larkin*, 333 N.E.2d at 200. After the cash was returned as per the Governor's instructions, the judge tried, once again, to make the donation. *Id.* While the court refused to find that the judge had deliberately violated the Code of Judicial Conduct, it did discipline him for the serious ethical issues raised by his conduct. *Id.* at 202.

In the second case, *In re Crum*, an assistant to the Attorney General was disciplined for accepting a bribe from a cashier, who later became an embezzlement defendant. *See In re* Crum, 215 N.W. 682 (N.D. 1927); Sarno, *supra* note 38, at 216-17. The cashier first attempted to bribe the assistant, but when the bribe offer was rejected the cashier gave the assistant money for an unspecified political campaign fund. *In re Crum*, 215 N.W. at 683. The court held that even as a political campaign contribution

the Circuit Court of Appeals for the District of Columbia disciplined a corporate vice president, who was also a lawyer, for illegally[101] and secretly, transferring certain monies from a Bahamian subsidiary of the corporation to President Nixon's reelection committee.[102] Counsel also directed an administration agent "to list the contributions as made by 'employees of [the corporation].'"[103] Counsel attempted to defend his actions by arguing that the way in which the contributions were listed did not constitute a misrepresentation between himself and the recipient of the funds.[104] The court, however, held that the counsel's efforts to prevent public disclosure of the corporation's political contributions constituted a misrepresentation against the corporation's shareholders and the general public.[105] Based upon this finding, the court held that the counsel's conduct violated the rule of ethics prohibiting dishonesty, fraud, deceit, and misrepresentation.[106]

In another case, *In re Gross*,[107] a lawyer served as the state chairman of the New Jersey Republican Party during the 1980 gubernatorial campaign.[108] In conjunction with this office, the lawyer participated in a scheme that allowed corporate donors who made sizeable political contributions to be invoiced in the amount of the donation for public relations work.[109] These invoices enabled corporate donors to claim the political contribution as a tax deductible business expense.[110] In an effort to conceal the scheme, the lawyer in question also ad-

---

the money was intended to influence the investigation, and, therefore, the money was a bribe. *Id.* at 688.

100. 361 A.2d 182 (D.C. 1976).

101. *Id.* Counsel's actions here also constituted a misdemeanor violation of the federal campaign finance law. *Id.* at 182.

102. *Id.* at 183.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 184.

107. 424 A.2d 421 (N.J. Sup. Ct. 1980).

108. *Id.* at 422.

109. *Id.*

110. *Id.*

vised a corporate officer of one of the donor corporations to provide false and misleading information to federal investigators.[111] The lawyer was suspended for three years and convicted of a number of criminal offenses for his part in the scheme.[112]

Similarly, *State v. Nelson*[113] concerned a lawyer who was disbarred for making several illegal campaign contributions.[114] In deciding upon the "appropriate discipline to be imposed, rather than on the unethical nature of counsel's misbehavior," the Texas Court of Appeals focused its ethics analysis primarily on whether the lawyer's past crimes were acts of moral turpitude.[115] In so doing, the court found that the act of making illicit campaign contributions was a felony of moral turpitude that required the lawyer's disbarment.[116]

Campaign finance improprieties were also at issue in *Kentucky Bar Ass'n v. Huffman*.[117] In *Huffman*, the lawyer and her co-conspirators obtained salary increases that they then transferred to their supervisor to help him pay off past campaign debts so that he could run for governor.[118] Although the lawyer had been given immunity from criminal charges in exchange for her cooperation in convicting her supervisor, the Kentucky Supreme Court found her guilty of illegal conduct involving moral turpitude and suspended her from practicing law for four years.[119]

These cases demonstrate that the courts take a lawyer's ethical obligations seriously, particularly when they involve campaign finance improprieties. Even these isolated cases should be sufficient reason for lawyers who are involved in campaign finance reporting or fundraising to take their ethical

---

111. *Id.*
112. *Id.* at 422-23; *see also* United States v. Gross, 375 F. Supp. 971 (D.N.J. 1974), *aff'd*, 11 F.2d 910 (3d Cir.), *cert. denied*, 423 U.S. 924 (1975).
113. 551 S.W.2d 433 (Tex. Civ. App. 1977).
114. *Id.* at 435-36.
115. *See* Sarno, *supra* note 38, at 204.
116. *Nelson*, 551 S.W.2d at 434-36.
117. No. 94-SC-898-K8, 1995 Ky. LEXIS 18 (Ky. Feb. 16, 1995).
118. *Id.* at *1-2.
119. *Id.* at *1-5.

obligations seriously.

### 3. Other Actions[120]

A range of other activities have also caused disciplinary proceedings to be brought against a lawyer campaigning for another person.[121] For example, the case of *In re Smith*[122] involved a lawyer who was disbarred for a felony of moral turpitude for his participation in a ballot stuffing scheme.[123] The lawyer was convicted of conspiracy to cast and count fictitious primary votes.[124] The *In re Smith* court held that the element of fraud on the public inherent in ballot stuffing was a crime of moral turpitude that required disbarment.[125]

In the *Segretti* case, discussed above, the court's discipline of the lawyer in question was based in part upon counsel's having conducted a range of actions to throw confusion into opposition campaigns.[126] These actions included, but were not limited to the following: releasing notices that the offices of opposing candidates would be giving out free food and drink; publishing and distributing erroneous posters under the name of the opponents' campaigns; posing as members of other campaigns and ordering liquor and other items for campaign workers; and inviting foreign guests to, and hiring a magician to

---

120. In addition to the cases described in this section, a number of judges have been disciplined for having engaged in partisan politics. *See, e.g.*, Colorado Bar Ass'n v. Class, 201 P. 883 (Colo. 1921) (acting as lawyer to a campaign while holding judicial office); *In re* Corning, 538 S.W.2d 46 (Mo. 1976) (payment of $2 in fees to Republican club while holding judicial office); *In re* Hayden, 197 A.2d 353 (N.J. 1964) (engaging in partisan political activities while acting as a magistrate); *In re* Pagliughi, 189 A.2d 218 (N.J. 1963) (attending local political meetings while holding judicial office); Office of Disciplinary Counsel v. Capers, 472 N.E.2d 1073 (Ohio 1984) (endorsement of candidate while holding judicial office). As these cases involve the violation of sections of the judicial canons of ethics that are not applicable to lawyers who are not judges, they are not discussed in detail in this Article.

121. *See* Sarno, *supra* note 38, at 199-212.

122. 206 S.E.2d 920 (W. Va. 1974).

123. *Id.* at 921.

124. *Id.* at 921-22.

125. *Id.* at 922-23.

126. *See* Segretti v. State Bar, 544 P.2d 929, 929-31 (Cal. 1976); *see also supra* notes 86-88 and accompanying text.

perform at, a fundraising dinner.[127]

In another odd conduct case, *State v. Ledvina*,[128] the Wisconsin Supreme Court disciplined a lawyer for ordering the driver of a campaign car in which he was riding to run over a photographer.[129] The *Ledvina* court took particular note that, after the photographer had moved out of the car's path, the lawyer ordered the driver to back the car up in order to run over the man in reverse.[130] The decision in *Ledvina* is noteworthy because the court recognized that the lawyer's actions were not performed in his professional capacity; nonetheless, the court determined that they were unethical and subject to legal ethical standards.[131] In so doing, the court emphasized that a lawyer is subject to the rules of ethics twenty-four hours a day, every day.[132]

Another twist on unethical campaign actions can be found in the case of *In re Mattice*.[133] In *In re Mattice*, a lawyer was disciplined for submitting candidate nomination materials that contained false information.[134] The lawyer in *In re Mattice* signed the names of three individuals to the petitions of a candidate who was seeking the Democratic party nomination for a local office.[135] In his defense, the lawyer argued that he had been authorized by the persons for whom he signed to affix their names to the petitions, and, therefore, no harm or prejudice resulted from his actions.[136] Emphasizing that "the election process is at the very core of the concept of democracy for it is by this means that the citizenry is given a voice in the selection of its public representatives" and that tampering with the fundamental suffrage right could not be

127. *Id.* at 931-32; *see also* Sarno, *supra* note 38, at 205.
128. 237 N.W.2d 683 (Wis. 1976).
129. *Id.* at 685.
130. *Id.*
131. *Id.* at 687.
132. *Id.*
133. 372 A.2d 1104 (N.J. 1977).
134. *Id.*
135. *Id.* at 1104-05.
136. *Id.* at 1105.

condoned, the court rejected his defense.[137]

Ethical dilemmas also previously arose in the area of campaign advertising. Because, in the past, lawyers were precluded from advertising, campaign advertising that included references to the candidate's status as a lawyer was often challenged as a breach of the rules of ethics.[138] With the end of the ban on lawyer advertising, this issue has been largely resolved.

## V. The Application of the Rules of Ethics to Campaign Activities

Although the preceding part of this Article demonstrates that there is nothing novel about the application of the rules of ethics to the campaign actions of lawyers, the case law discussed fails to reflect the wide range of circumstances where the rules of ethics could apply to the actions of a lawyer involved in a political campaign.[139] Thus, in order to provide a better understanding of the full range of the application of the rules of ethics here, this Part provides examples of how these rules could apply to various types of campaign activities.[140]

### *A. Conflicts of Interests*

Under the rules of ethics,[141] subject to certain limits set

---

137. *Id.*

138. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1366 (1976); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 972 (1967); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 818 (1965); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 795 (1965); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 825 (1965); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 656 (1963). The underlying concern with campaign ads identifying the candidate as a lawyer was that lawyers were using these ads to impermissibly solicit business.

139. *See supra* note 138.

140. This Part should not, however, be relied upon as the definitive guide to how each and every rule of ethics could in some way apply to some act of a lawyer during a campaign in a particular jurisdiction. Rather, this section is intended to provide illustrative examples of how the rules of ethics *could* apply to certain campaign activities.

141. For a discussion of the parameters of "rules of ethics" for the purposes of this Article, see *supra* note 14.

out below, lawyers have an obligation to avoid conflicts of interest that would adversely affect either an existing or former client. While these rules are typically thought of in the litigation setting and their interpretations have been tailored generally to address litigation questions, there is nothing in the rules themselves that would preclude their application to campaign activities. Thus, these conflicts rules raise interesting issues with regard to lawyers who work on campaigns.

### 1. Current Clients

Lawyers who serve as part-time volunteers on a campaign may end up providing legal advice and assistance to the principal regarding areas of their expertise. For example, a lawyer specializing in international trade law may likely be called upon to explain and provide legal and policy assistance to the candidate on international trade law. In other words, campaign work often requires a campaigning lawyer to provide legal advice to the campaign on matters for which he or she is currently advising and assisting other current clients. This raises the issue of whether a lawyer's work on a campaign can create a conflict of interest with his representation of other current clients.

If the lawyer is advocating, within the campaign, a position that is in accord with the position he is advocating on behalf of his other existing clients, the likelihood of a conflict is low. The rules on conflicts are triggered by some degree of adversity, and no adversity would exist if the positions are nonantagonistic. However, one can envision a host of scenarios where the lawyer's best legal and policy judgment, when no longer constrained by the interests of a specific client, would lead her to advocate a position for the candidate, another client, that is at odds with the one she is otherwise advancing for her first client.

For example, assume a lawyer's current client is seeking to open up business ventures in Cuba that are presently prohibited by the Cuban Democracy Act.[142] Part of the lawyer's services

142. Cuban Democracy Act of 1992, 22 U.S.C. §§ 6001-6010. For a general discus-

for that client consists of lobbying efforts to eliminate this prohibition. Separately, the lawyer becomes a volunteer for a campaign for federal office (congressional or presidential). As part of his campaign duties, he is assigned to draft a position for the campaign on trade with Cuba. If the lawyer weighs all of the legal, political, and policy implications inherent in opening trade with Cuba and determines that the candidate should advocate the continuation of the trade ban, or perhaps even the strengthening of the ban, does the inconsistency between the campaign's position and the client's position create a conflict of interest?

Under the rules of ethics, even when the matters are separate and distinct, a lawyer may not represent a client whose interests are adverse to those of an existing client.[143] A lawyer can, however, undertake such representation where, after full disclosure, both of the lawyer's clients consent and grant him a waiver.[144] While the scope of this prohibition remains a subject of debate, strict interpretations have precluded any representation of a client, even in an unrelated matter, that would in any way be adverse to the interests of an existing client.[145]

---

sion of the Act, see Trevor R. Jefferies, *The Cuban Democracy Act of 1992: A Rotten Carrot and a Broken Stick?*, 16 HOUS. J. INT'L L. 75 (1993).

143. *See* ABA/BNA, LAWYERS MANUAL ON PROFESSIONAL CONDUCT 51:101 (1995 & Supp. Feb. 22, 1995) [hereinafter ABA/BNA]; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A) (1980) [hereinafter MODEL CODE]; MODEL RULES OF PROFESSIONAL CODUCT Rule 1.7(a), (b) (1980) [hereinafter MODEL RULES]. This prohibition is based on two rationales: A lawyer may not be as vigorous an advocate for one client if that advocacy may antagonize the other client, and the client has the right to expect the unconditional loyalty of the lawyer. ABA/BNA, *supra*, at 51:104; International Business Mach. Corp. v. Levin, 579 F.2d 271, 280 (3d Cir. 1978); Fund of Funds v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977).

144. *See* ABA/BNA, *supra* note 143, at 51:101; MODEL CODE, *supra* note 143, at DR 5-105(C); MODEL RULES, *supra* note 143, at Rule 1.7(a)(1)-(2), (b)(1)-(2). A lawyer, however, cannot ask for a waiver if he believes that the representation of the two clients will significantly harm one of the two clients. ABA/BNA, *supra* note 143, at 51:101.

145. *See* ABA/BNA, *supra* note 143, at 51:102-105; ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1495 (1982); *International Business Mach. Corp.*, 579 F.2d at 280; Guthrie Aircraft Inc. v. Genesee County, 597 F. Supp. 1097, 1099 (W.D.N.Y. 1984).

This issue of whether such actions give rise to conflicts of interest is, perhaps, best discussed in the context of the amorphous area of "issue" or "positional" conflicts; namely, when does the lawyer's advocacy of a position in one matter for one client become so adverse to the interests of another client in another matter that it precludes contemporaneous representation of the two clients?[146] Although this question regularly confronts lawyers, there is little authority to guide them in resolving potential issue conflicts.[147] The tentative draft of the *Restatement of the Law Governing Lawyers* provides that in the litigation context, a conflict issue arises when the antagonistic positions will "directly create a material and adverse impact" on the second client.[148]

Does this definition illuminate the line any further? Perhaps not. For example, the application of these rules to the Cuba hypothetical leads to uncertainty. While it is difficult to say that the campaign efforts and the client lobbying efforts are the same matter, it is clear that if the antagonistic Cuban campaign position is adopted, the first client's interests will suffer a direct and materially adverse impact. Uncertainties aside, it would seem that the advocacy of a position in a campaign that is directly adverse to a position being advanced, even in other

---

While a few courts have held that the prohibition against conflicting representation applies only in the context of litigation, the language of both the Model Rules and the Model Code provisions would seem to apply far more broadly than just within litigatory settings. *Compare* City Council v. Sakai, 570 P.2d 565, 573 (Haw. 1977) (prohibition limited to litigation) *with* Financial Bankshares v. Matzger, 523 F. Supp. 744, 770 n.79 (D.D.C. 1981), *vacated*, 680 F.2d 768 (D.C. Cir. 1982) (litigation situation is not determinative of application of prohibition).

146. *See* ABA/BNA, *supra* note 143, at 51:107-:108. *See also* John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEXAS L. REV. 457 (1993). Dzienkowski provides:

> A positional conflict of interest occurs when a law firm adopts a legal position for one client seeking a particular legal result that is directly contrary to the position taken on behalf of another present or former client, seeking an opposite legal result, *in a completely unrelated matter*.

*Id.* at 460; *see also* Peter Jarvis, *Two-Sided or Two-Faced?*, AM. LAW, Apr. 1992, at 28 (discussing increasing efforts of clients to challenge issue conflicts).

147. *See* ABA/BNA, *supra* note 143, at 51:107.

148. *See* ABA/BNA, *supra* note 143, at 51:108 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 209 cmt. f (Tentative Draft No. 3, 1990)).

fora, for another client would give rise to sufficient adversity of interests to be in violation of the prohibition on conflicts.[149] Thus, the lawyer should only contemporaneously represent both the candidate and the other client if, after consultation with both, the candidate and the other client both consent.[150]

The strict application of these rules on conflicts to campaign activities may give politically active lawyers grounds for concern. Politically active lawyers may feel that such rules will box them in so that they can only represent one side of a debate, for example, labor or management.[151] Similarly, campaigning lawyers may feel that the strict rules on conflicts are

---

149. *See* MODEL CODE, *supra* note 143, at DR 5-105(A); MODEL RULES, *supra* note 143, at Rule 1.7(a)(1)-(2), (b)(1)-(2). *Accord* Dzienkowski, *supra* note 146, at 466-67 (discussing lobbying conflicts). Dzienkowski provides:

> A lobbying positional conflict is defined as a positional conflict of interest involving at least one lobbying matter. In other words, the lawyer or law firm represents one client before a legislative body on a particular legal issue while representing another client in a litigation or transaction matter. . . . Lobbying may involve two different types of representations. The first may involve only the presentation of facts to the legislature. Although a factual presentation may seem outside the realm of a positional conflict, such presentations usually are implicit efforts to show that the law should remain the same or that the existing law should be changed. To the extent that such factual presentations involve an effort to influence the legislature's decision, they should be treated as positional conflicts of interest. A second type of representation may involve a presentation of a legal conclusion to the legislature about a particular area of the law. This raises issues similar to the ones found in the litigational positional conflict.

Dzienkowski, *supra* note 146, at 466-67. Dzienkowski also notes that as a practical matter "factual presentations are also more likely to involve the use of confidential information." *Id.* at 467 n.39. The parallels between Dzienkowski's lobbying conflicts and the situation of campaign conflicts are substantial. Both involve non-litigation activities where a position taken for one client could directly affect the interests of another. Both involve situations where factual presentations risk disclosure of confidential information. Both involve efforts to influence elected, or potentially elected, officials.

150. *See* MODEL CODE, *supra* note 143, at DR 5-105(C); MODEL RULES, *supra* note 143, at Rule 1.7(a)(1)-(2), (b)(1)-(2); *see also* Standing Committee on Professional Responsibility and Conduct of the State Bar of California, Formal Op. 1989-108 (undated) (noting that a lawyer who faces a potential issues conflict is advised to disclose such potential conflict to his clients).

151. Interview with Scott Segal, Attorney (August 1, 1995).

premised on the characteristics of litigation—characteristics that do not necessarily carry over in the campaign setting.[152]

Due to these difficulties, the Restatement takes a different approach to public policy conflicts that may provide a safe harbor for a lawyer's campaign actions.[153] Under the tentative draft of the Restatement, a lawyer remains unfettered by conflicts with the interests of his client or clients both to speak out publicly on positions adverse to a client's interest and to lobby in support of legislation that would be adverse to his client.[154] Further, at least one court, dealing with the political activities of a government lawyer has implicitly endorsed such an approach. In *Johnston v. Koppes*,[155] the Ninth Circuit held that a government lawyer had the right to attend a legislative hearing and voice her support for a position that ran counter to that of her employer, the California Department of Health Services.[156]

However, campaigning lawyers should refrain from looking to either the Restatement or *Koppes* for complete relief from the burdens of the rules on conflicts. Both the Restatement and *Koppes* deal with the personal beliefs of a lawyer, not whether a lawyer can take employment that counters the views of a client. Although both the endorsement of a candidate and participation in a campaign are highly personal decisions, the acceptance of employment on a campaign, while no less a personal choice, more directly implicates the types of conflicts the rules of ethics preclude.[157] If either the Restatement or *Koppes* is

---

152. *Id.* For example, it can be argued that in a litigation setting, because of the doctrine of stare decisis and the sharp adversity between conflicting parties, the client pays for a heightened degree of loyalty on a particular, well-defined matter. *Id.* In the campaign setting, "public policy positions are often ephemeral—but legal rights [and] obligations are set in stone." *Id.* Because of these differences, it could be argued that the campaign or lobbying client should neither expect, nor does he pay for, such strict loyalty. *Id.*

153. *Cf., e.g.*, Lee E. Hejmanowski, Note, *An Ethical Treatment of Attorneys' Personal Conflicts of Interest*, 66 S. CAL. L. REV. 881, 883 (1993).

154. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 206 cmt. e, illus. 7 (Tentative Draft No. 4, 1991); Hejmanowski, *supra* note 153, at 883.

155. 850 F.2d 594 (9th Cir. 1988).

156. *Id.* at 596-97.

157. The line being drawn here (personal versus professional campaign work) paral-

extended to apply beyond the narrow area of a lawyer's personal beliefs, such an extension would make it difficult to square the direction of the Restatement with the provisions of the Model Rules and Model Code—an issue that should be dealt with as the Restatement is finalized.[158]

Moreover, the extension of *Koppes* to insulate campaign actions from conflicts rules is further suspect because *Koppes* dealt with the special circumstances of a government lawyer. The Model Rules make it clear that government lawyers have greater latitude in questioning their "client's" positions than do lawyers employed elsewhere.[159]

### 2. Former Clients

A similar problem is created where a lawyer leaves her practice to go to work full time on a campaign. Here again, the lawyer is likely to work for the campaign on issues where she has expertise gleaned from prior practice experience. There is the strong potential in this scenario for the lawyer to advocate positions in her campaign work that are antagonistic to those of her former clients. This raises the issue of whether such advocacy creates a conflict of interest.

Under the Model Rules a "lawyer may not, without the

---

lels the line drawn in First Amendment cases between political speech and commercial speech. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

158. At least one commentator has relied on the language of Model Rule 1.2(b), which provides that a lawyer by representing a client does not necessarily endorse the client's positions, as evidence that the Restatement's approach is in accord with the Model Rules. *See* Hejmanowski, *supra* note 153, at 894; MODEL RULES, *supra* note 143, at Rule 1.2(b). This argument misinterprets the purpose of Rule 1.2(b). Rule 1.2(b), which addresses the scope of representation, provides lawyers with an "out" of sorts to represent unpopular clients and positions. It does not provide a safe haven for the violation of Rule 1.7's prohibition on conflicts.

159. *Cf., e.g.*, MODEL RULES, *supra* note 143, at Rule 1.13 cmt. 7 ("Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances.")

consent of the former client, represent another client in the same or a substantially related matter in which the new client's interests are materially adverse to those of the former client."[160] Moreover, absent consent, the Model Rules prohibit a lawyer from knowingly representing a client in situations such as the following: the lawyer's *former firm* represented a client with an antagonistic position in the same or substantially related matter and, by virtue of the firm's representation, the lawyer acquired confidential information material to the matter in question.[161]

The comment to Model Rule 1.9 evinces the tension in the rule between allowing lawyers to work on both sides of an issue in unrelated matters and preventing lawyers from jeopardizing the interests of former clients through actions on behalf of the new client.[162] Given the murkiness of Rule 1.9's prohi-

---

160. ABA/BNA, *supra* note 143, at 51:201; MODEL RULES, *supra* note 143, at Rule 1.9(a). The Model Code has no provision that applies directly to conflicts of interest concerning former clients. ABA/BNA, *supra* note 143, at 51:203. Because of the lack of a former client provision, Model Code jurisdictions have relied on Canon 4 and DR 4-101, which require lawyers to preserve inviolate the confidences of their clients to prevent conflicts with the interests of former clients. *Id.* at 51:206; Greene v. Greene, 418 N.Y.S.2d 379, 382 (1979). Courts within Model Code jurisdictions have also relied upon Canon 9 and developed a test requiring lawyers to avoid representations that would create the appearance of impropriety to protect the interests of former clients. ABA/BNA, *supra* note 143, at 51:206; *In re* Corn Derivatives Antitrust Litig., 748 F.2d 157, 161-62 (3d Cir. 1984); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1385-86 (3d Cir. 1972). However, the use of Canon 9 alone to disqualify lawyers from representing future clients, where the lawyer can prove that the representation will not jeopardize the confidences of the prior client has been criticized. *See* ABA/BNA, *supra* note 143, at 51:206; Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 757 (2d Cir. 1975). Similarly, the Model Rules explicitly reject the "appearance of impropriety" standard. ABA/BNA, *supra* note 143, at 51:207; Waters v. Kemp, 845 F.2d 260, 265-66 (11th Cir. 1988).

161. MODEL RULES, *supra* note 143, at Rule 1.9(b)(1)-(2).

162. *See id.* at Rule 1.9 cmt. In an explicitly give with one hand take with the other fashion, the comment provides:

> When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.

bition, the *ABA/BNA Manual on Lawyer's Conduct* outlines seven questions that a lawyer should ask to determine whether there is a former client conflict: 1) "Was there ever an attorney-client relationship between the lawyer and a party who might seek his disqualification?";[163] 2) "Is the client truly a former client of the lawyer's [or does some continuing relationship exist]?";[164] 3) "Are the interests of the current and former clients adverse?";[165] 4) "Is there a substantial relationship between the two representations?";[166] 5) "Has the former client consented to the current representation, or waived objections to it?";[167] 6) "Is the presumption that the lawyer gained confidential information from the former client rebuttable in [the] jurisdiction?";[168] and 7) "Has the presumption been rebutted?"[169]

The application of Rule 1.9 to a lawyer who leaves a firm to join the staff of a campaign is analogous to the application of the rule to a lawyer who has transferred firms. As the Model Rules themselves acknowledge, this analogy further complicates the conflicts analysis.[170] Here the Model Rules advocate a functional analysis of any potential conflict based upon two elements: whether the new representation will compromise the confidences of the former client, and whether the adversity of positions will adversely affect the interests of the former client.[171]

It is impossible to answer in the abstract whether the infinite realm of campaign activities that implicate the interests of former clients conflicts with Rule 1.9. However, it is clear

---

*Id.*

163. ABA/BNA, *supra* note 143, at 51:208-:212.
164. *Id.* at 51:212.
165. *Id.* at 51:214.
166. *Id.* at 51:214-:218.
167. *Id.* at 51:218-:221.
168. *Id.* at 51:221-:223.
169. *Id.* at 51:223-:224.
170. *See* MODEL RULES, *supra* note 143, at Rule 1.10 cmt. ("When lawyers have been associated within a firm but then end their association, [the question of whether a lawyer should undertake representation] is more complicated.").
171. *Id.*

from these questions that, while most campaign activities will not give rise to former client conflicts, some may.[172] For example, imagine a tax lawyer who has assisted a corporate client in maintaining and using tax loopholes. The lawyer then enters a full-time campaign and uses this knowledge to develop a candidate's position criticizing corporate tax dodgers and closing these loopholes.

Of the seven questions set out in the ABA/BNA Manual, questions three (adversity of positions) and four (substantial relationship between the matters) are the critical issues in this hypothetical. As to question three, the positions of the two clients—the candidate and the former corporate client—would seem to be directly in conflict. The candidate wishes to close the loopholes, and the corporation wishes to continue to maintain the tax treatment provided by them.[173]

Question four is difficult because the substantial relationship test is both the "keystone" to the conflicts inquiry and "one of the two most confused questions that is addressed when purported conflicts involving former clients are at issue."[174] At the heart of the "substantial relationship" test is information and the protection of confidences.[175] In other words, the focus of the inquiry is whether there is sufficient commonality between the matters as "to raise a common-sense inference that what the lawyer learned from his former client will prove useful in his representation of another client whose interests are adverse to those of the former client."[176] For

---

172. *Accord* Dzienkowski, *supra* note 146, at 501 (discussing analogous situation of positional conflicts arising from lobbying activities for successive clients).

173. *See, e.g.*, *In re* Blinder, Robinson & Co., 123 B.R. 900, 909 (Bankr. D. Colo. 1991) ("There is no requirement that the subsequent representation strike a totally adversarial posture. It should be enough that the two positions are not exactly aligned."); *In re* Dayco Corp. Derivative Sec. Litig., 102 F.R.D. 624, 628 (S.D. Ohio 1984) ("Generally, the test of adversity is premised on whether . . . the interests of the former and current client are differing."). *But see In re* Dayco Corp. Derivative Sec. Litig., 102 F.R.D. 624 (S.D. Ohio 1984) (no adversity in representing employee against a company and shareholders in a derivative suit against same company).

174. ABA/BNA, *supra* note 143, at 51:214-:215.

175. *Id.*

176. *Id.*

example, in *Stitz v. Bethlehem Steel Corp.*,[177] a lawyer who had worked as a corporation's in-house labor counsel was prohibited from suing the company on behalf of an employee in a labor dispute because of his familiarity with the company's labor practices.[178] While it is difficult to say definitively that the campaign's tax position and the prior efforts to assist the corporation to use and maintain the tax loopholes are substantially related matters, one can easily see the potential for the misuse of client confidences in such situations. Thus, it is clear that the corporation might view this as a conflict of interest.

Lastly, with regard to former clients, the rules on former client conflicts raise the full brace of concerns addressed by the application of similar rules on current client conflicts. For brevity's sake these concerns are not repeated here; however, the reader is referred to the discussions of these issues above.[179]

### 3. Practical Twists on the Conflicts Analysis

The uncertainties surrounding the application of the rules on conflicts to lawyers involved in campaigns are exacerbated by the nontraditional aspects, from a legal ethics standpoint, of many political lawyer efforts. Confusion over the application of the rules on conflicts, and many of the other rules of ethics discussed below as well, is, perhaps, greatest surrounding four issues: (1) the existence of an attorney-client relationship, (2) the nature of the lawyer's efforts, (3) the identity of the client, and (4) the practicalities of adversity of position.

A threshold issue for any conflicts analysis is whether there exists a client with whom's interests there could be a

---

177. 650 F. Supp. 914 (D. Md. 1987).

178. *Id.* at 915; *see also* Western Continental Operating Co. v. Natural Gas Corp., 261 Cal. Rptr. 100 (Ct. App. 1989) (lawyer who learned about utility's operations as counsel to both the utility and its gas producers could not then sue the utility on behalf of the producers); Crawford W. Long Memorial Hosp. v. Yerby, 373 S.E.2d 749 (Ga. 1988) (hospital's malpractice lawyer could not then sue hospital on behalf of a plaintiff alleging malpractice).

179. *See supra* note 142-78 and accompanying text.

conflict. The analysis of whether an attorney-client relationship exists can, at times, prove difficult in even the normal course of the traditional practice of law.[180] However, these difficulties are magnified when the nontraditional elements of a politically active lawyer's practice are added to the mix.

Courts examine the existence of an attorney-client relationship from the perspective of the client.[181] Under the traditional inquiry, the court focuses on the law of contract: Was there some expressed or implied employment agreement?[182] However, of late, the requirement of privity has eroded, and courts are now willing to entertain more nontraditional means of forming attorney-client relationships.[183] Thus, an attorney-client relationship can now be formed "informally by the implication of the actions of the lawyer and the purported client."[184] Moreover, the degree to which an attorney-client relationship can reach over into the nonlegal activities of a lawyer has also, of late, been expanding.[185]

These rules on the formation of an attorney-client relation-

---

180. *See, e.g.*, Ronald I. Friedman, *The Creation of the Attorney-Client Relationship: An Emerging View*, 22 CAL. W.L. REV. 209, 212 (1986); *see also* Folly Farms I, Inc. v. Bar of Maryland, 387 A.2d 248, 254 (Md. 1978) ("What constitutes an attorney-client relationship is a rather elusive concept.").

181. *See, e.g.*, Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980).

182. *See* Friedman, *supra* note 180, at 213; Board of Comm'rs of Ala. State Bar v. Jones, 281 So. 2d 267 (Ala. 1973). While the focus is on the formation of some form of employment agreement, there is no requirement that a fee must be paid for an attorney-client relationship to exist. *See, e.g.*, Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), *cert denied*, 439 U.S. 955 (1978).

183. *See* Friedman, *supra* note 180, at 215-225; W. Probert & R. Hendricks, *Lawyer Malpractice: Duty Relationships Beyond Contract*, 55 NOTRE DAME LAW. 708, 728 (1980).

184. Friedman, *supra* note 180, at 218 (citing Lau v. Valu-Bilt Homes, 582 P.2d 195 (Haw. 1978); Flanagan v. DeLapp, 533 S.W.2d 592 (Mo. 1976)). *But see* Keller v. LeBlanc, 368 So. 2d 193 (La. Ct. App.), *cert. denied*, 369 So. 2d 457 (La. 1979) (finding more narrow scope of formation).

185. *See, e.g.*, Layton v. State Bar, 789 P.2d 1026 (Cal. 1990) (lawyer who does both legal and nonlegal actions for a client bound in all actions to rules of ethics); *In re* Johnson, 729 P.2d 1175, 1179 (Kan. 1986) (lawyer bound even when doing nonlegal acts, including campaigning); *In re* Yates, 755 P.2d 770 (Wash. 1988) (lawyer is bound to rules of ethics even when performing nonlegal services unless there is a knowing and express waiver by client).

ship are of importance here because many of the lawyers who serve on a campaign do so absent any express employment contract. For example, a lawyer may be contacted,[186] informally at first, by a member of the campaign staff and asked to provide assistance on a particular issue. This raises the issue of whether such a voluntary act renders the campaign, or the candidate, a client. While the lawyer may argue that these acts do not create an attorney-client relationship, given the trends in the law that such efforts do give rise to a relationship, the lawyer would be wise to err on the side of caution.[187]

Moreover, deciding whether an attorney-client relationship exists can be further complicated if the lawyer is performing nonlegal services. Many campaign lawyers do not perform tasks that are clearly legal, and some perform tasks that are clearly outside the realm of the law. For example, many lawyers serve as campaign fundraisers, and their only exposure to legal aspects of the campaign may be in merely complying with the rules on campaign finance, which they may do in a more clerical than professional sense.

The courts have generally failed to establish a bright line test as to when a lawyer's nonlegal acts trigger his ethical duties. In general, while courts are *slower* to find a duty from nonlegal work in liability cases, they have been more willing to do so in ethics complaint actions.[188] Thus, to the extent

---

186. If this contact occurs through the lawyer's place of work, even if not through the formal channels of, for example, the firm, the likelihood that an attorney-client relationship is created increases. *See* Friedman, *supra* note 180, at 220 ("The giving of legal advice by an attorney may be sufficient to create an attorney-client relationship, at least when given in traditional surroundings, notwithstanding the lack of a formal contract.").

187. *Cf.* Friedman, *supra* note 180, at 220. "For these reasons, it is, therefore, quite possible that courts may predicate an attorney-client relationship on casually rendered advice. Attorneys would therefore be wise to avoid giving advice at cocktail parties, in building corridors, over the backyard fence, and at civic organization meetings." *Id.*

188. *See generally* Friedman, *supra* note 180, at 226-27.

> In fact, it is possible for an attorney to be disciplined under those "high ethical standards" even in the total absence of a client, let alone in the absence of an attorney-client relationship. . . . The important point is that disciplinary actions are considered to be a different type of proceeding than the usual legal malpractice case.

that campaign ethics cases are more likely to be disciplinary rather than malpractice cases and to the extent that the case law provides any guidance, lawyers in campaigns are likely to be found subject to the rules of ethics.[189] Moreover, although malpractice courts are slower to find an attorney-client relationship premised on nonlegal actions, courts have, at times, shown a willingness to find such a relationship particularly where the actions involved were, at least, quasi-legal in nature.[190] Given that the actions of many campaigning lawyers will fall within the realm of being quasi-legal, malpractice liability cannot be excluded here.

The third area where the day-to-day realities of a political campaign complicate the conflicts analysis is the basic issue of who is the client. At the heart of a political campaign is a candidate; however, around that candidate, there is an organization which can be quite extensive. For example, a presidential campaign can be massive in size. Further, in addition to the formal campaign structure, there can be separate funding entities (such as PACs) and organizations that are specific to the candidate (such as the Committee to Elect Joe Smith), to a party (such as the Republican National Committee), or to a series of races (such as the Democratic Congressional Committee). Moreover, it is possible that these entities may not always agree on how things should be handled.[191] Deciding which of these entities is the ultimate client may prove to be more difficult than it appears at first glance.

The requirement of adversity also raises a number of interesting practical twists to the analysis of the ethics of campaign activities. For example, while it is clear that a government lawyer may not leave public service and then litigate against his former "client" on a matter in which he previously was

---

*Id.*

189. *See, e.g.*, *supra* notes 128-32 and accompanying text.

190. *See* Friedman, *supra* note 180, at 228-30.

191. *See, e.g.*, Friends of Phil Gramm v. Americans for Phil Gramm, 587 F. Supp. 769 (E.D. Va. 1984). In *Gramm*, the official campaign apparatus sought a preliminary injunction to stop a separate campaigning entity from raising monies and conducting other activities designed to re-elect Senator Phil Gramm. *Id.* at 771.

engaged,[192] what if the lawyer leaves the government not to litigate against it, but rather to work on a campaign? For example, would a lawyer who worked for the Food and Drug Administration strictly enforcing rules on drug testing be precluded from working on campaign efforts to undo these same rules? Similarly, would the minority staff counsel to a congressional committee be precluded from then serving on a campaign that sought to disband that committee? These questions can be posed more broadly: to what extent can a campaign's positions be adverse to the interests of the federal government? Moreover, to analyze these questions, the lawyer would need to examine both the rules of ethics and the laws pertaining to ethics in government, which, among other things, limit the lawyer's use of confidential information obtained while representing the government in subsequent employment.

Determining adversity may also be complicated by the fluidity inherent in political positions. In the campaign setting, a client's position may change at a moment's notice. What was at one time unacceptable to the client, may now be acceptable because of a promised legislative change elsewhere, the offer of pork, or a change in the political tides.

While practicalities may, generally, confuse the application of the rules on conflicts to campaign activities, they may also offer campaigning lawyers some relief. As a practical matter, it is likely that, if asked, most clients will opt to give a campaigning lawyer a waiver of any conflicts. In the political realm, access and influence are the prerequisites of success. Clients often will find it in their best interests to grant a campaigning lawyer a broad waiver from conflicts in order to obtain a friendly ear in high places. The problem is that under the current system few, if any, lawyers bother to ask a client, even one with a direct and unmistakable conflict, whether they consent to the lawyer's service on a campaign.

---

192. *See, e.g.*, Brown v. District of Columbia Bd. of Zoning Adjustment, 413 A.2d 1276 (D.C. 1980).

### 4. Imputed Disqualification

The potential for an individual lawyer to have a campaign conflict of interest raises the related issue of the possibility of imputed disqualification. Imputed or vicarious disqualification is provided for under Model Rule 1.10(a) and Disciplinary Rule 5-105(D) of the Model Code.[193] Under these rules, if an individual lawyer possesses a current conflict of interest, then her entire *firm* is also conflicted out.[194] These rules serve two functions. They prevent firms from taking matters that would jeopardize the interests of clients,[195] and they provide a means, through motions to disqualify, for a client to prevent an opponent from gaining a tactical advantage by hiring away the client's counsel.[196]

The analysis of imputed disqualification requires two steps. First, the individual lawyer must have a conflict. Second, that conflict must have contaminated, or will contaminate, the firm.[197] Under the rules of ethics, if a lawyer, her firm, or a court,[198] finds the existence of both of these conditions, then

---

193. *See* MODEL RULES, *supra* note 143, at Rule 1.10(a); MODEL CODE, *supra* note 143, at DR 5-105(D). If the lawyer in question is a former government lawyer or is now a government lawyer having left private practice, Model Rule 1.11 applies. *See* MODEL RULES, *supra* note 143, at Rule 1.11.

194. *Id. See generally* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 393 (1989); Randall B. Bateman, *Return to the Ethics Rules as a Standard for Attorney Disqualification: Attempting Consistency in Motions for Disqualification by the Use of Chinese Walls*, 33 DUQ. L. REV. 249 (1995).

195. *See* Note, *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1471 n.8 (1981) (discussing prophylactic application of the rules); Bateman, *supra* note 194, at 251; *see also* T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 266-68 (S.D.N.Y. 1953). This goal has three major underlying policy rationales. First, imputed disqualification protects the duty of loyalty and prevents the exposure of client confidences. Bateman, *supra* note 194, at 251. Second, it ensures the lawyer will be a zealous advocate. *Id.* Third, it prevents the lawyer's judgment from being clouded. *Id.*

196. *See* Bateman, *supra* note 194, at 249. Some commentators, however, argue that the use of the motion to disqualify has, over time, shifted from a defensive to offensive tactic. *See id.*; Zachary Tobin, *Towards a More Balanced Balancing: A Chronological Approach to Attorney Disqualification for Prior Representation*, 1985 U. ILL. L. REV. 219, 219-20 (1985).

197. *See* Bateman, *supra* note 194, at 252.

198. A court would be considering this issue in the context of a motion to disquali-

the firm is strictly precluded from the representation at issue. Over time, the application of this draconian prophylactic measure has caused the courts,[199] and the American Bar Association (ABA) to a more limited degree,[200] to allow for the use of screening devices known as "Chinese walls" to prevent the need for total disqualification.[201] However, under the rules of ethics, the ABA only allows private lawyers to use screening devices where the lawyer in question is a temporary lawyer.[202] Thus, the strict application of imputed disqualification remains the standard under the rules of ethics for most private lawyers.

The application of the rules on imputed disqualification to campaigns seems most unlikely. Under the rules of ethics, only "firms" can be disqualified.[203] The Model Rules define a "firm" for disqualification purposes as follows: "[T]he term 'firm' includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization."[204] While it is impossible to say that "other organizations" do not include campaigns,[205] such an interpretation would seem a large stretch from the original litigation focus of the rule.[206] Moreover, applying the ABA's

---

fy.

199. *See, e.g.*, Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222 (6th Cir. 1988); Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983); Cheng v. GAF Corp. 631 F.2d 1052, 1058 (2d Cir. 1980), *vacated on other grounds*, 450 U.S. 903 (1981). However, not all courts have adopted the use of screening devices. *See* Bateman, *supra* note 194, at 268-74.

200. The ABA allows for screening in cases involving government lawyers and, in limited cases, for private lawyers. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 356 (1988); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975) (government lawyers).

201. *See generally* Bateman, *supra* note 194. A "Chinese wall" is a non-physical screening device designed to isolate a lawyer from the firm as to a particular client or matter. *See* Note, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677, 701 (1980).

202. *See* sources cited *supra* note 200.

203. MODEL RULES, *supra* note 143, at Rule 1.10.

204. *Id.* at Rule 1.10 cmt. 1.

205. *See* Hejmanowski, *supra* note 153, at 890 n.32 ("Whether other groups of attorneys can constitute a firm is a factual question.").

206. *See* T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268

current strict rules on disqualification would lead to illogical results.[207]

### *B. Truthfulness*

Anyone who has worked a recent campaign understands the informational demands of such efforts. As campaigns have increasingly focused on what opponents have done—whether they inhaled[208] or avoided a draft[209]—and less on what each candidate will do for his or her constituency, possession of negative information has become a valued asset.[210] In the hopes of ginning up an opponent's negatives, recent campaigns have both stretched and abused the truth before the public's eye.[211] Moreover, in some instances, campaigns have also found the truth to be superfluous in the filings that they are required to provide to the appropriate election oversight bodies.[212] Instances of dishonesty in campaigns, when the act of misrepresentation, fraud, or deceit is done either by a lawyer or at the direction of a lawyer, can raise serious problems under the rules of ethics.

---

(S.D.N.Y. 1953). Discussing the "substantially related" test that is now the cornerstone of the imputed disqualification analysis, the *T.C. Theatre* court provided for disqualification where "matters embraced within the pending suit . . . are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client." *Id.*

207. Conceivably, the conflicted lawyer would have to either disengage from the campaign, or the campaign would be precluded from the issue involved. This result would seem utterly untenable.

208. *See, e.g.*, James Gerstenzang, *Bush Ridicules Clinton Over Marijuana Use*, L.A. TIMES, Oct. 4, 1992, at A1.

209. *See, e.g.*, Greg McDonald, *Bush Paints Clinton as a "Draft Dodger,"* HOUS. CHRON., Oct. 17, 1992, at A1; *Gramm's Protestations Insult Vietnam Veterans*, BUFFALO NEWS, Mar. 5, 1995, at 8.

210. This is not to imply that character issues are not properly a part of the selection process of a candidate. Rather, it is to say that the use and type of character information that now dominates political races has extended beyond the realm of both the truly germane and informative. For an excellent discussion between informative character questions and uninformative negative campaigning, see Peter F. May, Note, *State Regulation of Political Broadcast Advertising: Stemming the Tide of Deceptive Negative Attacks*, 72 B.U. L. REV. 179 (1992).

211. *See supra* notes 208-10.

212. *See, e.g., In re* Wild, 361 A.2d 182 (D.C. 1976).

### 1. Model Rule 4.1

When a lawyer represents a client, the rules of ethics prohibit the lawyer from knowingly[213] making a false statement of, or misrepresenting,[214] a material fact[215] or law[216] to a third person.[217] A lawyer also may not knowingly conceal or fail to disclose information that she is otherwise required by law to disclose.[218] Further, "a lawyer's ethical duty to not further a client's fraudulent conduct requires in some instances that the attorney disclose whatever information may be necessary to avoid assisting such conduct."[219]

The application of the duty of material truthfulness in statements made during campaigns is most interesting in two regards. First, the application of this duty raises issues concerning how the duty applies to the statements made by a lawyer to the public during a campaign about the campaign's oppo-

---

213. *See, e.g.*, Aaron v. SEC, 446 U.S. 680 (1980) (requiring scienter); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); *In re* Kaiser, 759 P.2d 392 (Wash. 1988) (requiring knowledge). However, willful blindness has been held to satisfy the knowledge requirement. *See* United States v. Benjamin, 328 F.2d 854, 862 (2d Cir.), *cert. denied sub nom.* Howard v. United States, 377 U.S. 953 (1964) (knowledge is shown where the lawyer "deliberately closed his eyes to facts he had a duty to see, or recklessly stated as facts things of which he was ignorant").

214. *See* MODEL RULES, *supra* note 143, at Rule 4.1 cmt.

215. *See* People v. Berge, 620 P.2d 23 (Colo. 1980); *In re* Wines, 370 S.W.2d 328 (Mo. 1963); *In re* Gladstone, 229 N.Y.S.2d 663 (App. Div. 1962); *see also* MODEL CODE, *supra* note 143, at DR 7-102(A)(5).

216. *See, e.g.*, Roberts v. Ball, Hunt, Hart, Brown & Baerwirtz, 57 Cal. App. 3d 104 (Ct. App. 1976); Grievance Comm'n v. Malloy, 248 N.W.2d 43 (N.D. 1976); *see also* MODEL CODE, *supra* note 143, at DR 7-102(A)(5).

217. ABA/BNA, *supra* note 143, at 71:201; MODEL RULES, *supra* note 143, at Rule 4.1.

218. ABA/BNA, *supra* note 143, at 71:201-202; MODEL RULES, *supra* note 143, at Rule 4.1; MODEL CODE, *supra* note 143, at DR 7-102(a).

219. ABA/BNA, *supra* note 143, at 71:201. With one exception, this ethical duty of lawyers to disclose their own false or misleading statements is separate and distinct from a lawyer's duty to disclose the false or misleading statements of a client. *See infra* notes 248-66 and accompanying text (discussing duty to disclose client information). The one exception being where "the lawyer knows that materially false statements or omissions have been made by the client or the client's agent relating to a transaction in which a lawyer's services are being or have been employed." ABA/BNA, *supra* note 143, at 71:203.

nents. For example, how would this rule apply to a lawyer who knowingly makes a false charge to the public that an opponent had smoked marijuana or had, in some way, defrauded taxpayers in a real estate deal? Second, the application of this duty also raises questions concerning how the duty applies to the statements and filings that a lawyer makes to election oversight authorities.

In the first instance—concerning statements made to the public—the application of this rule is uncertain and will depend to a great measure on the nature of the falsehood or misrepresentation made by the lawyer in question. This uncertainty derives largely from the requirement of "materiality." The Model Rules offer little guidance as to what constitutes a material misrepresentation or falsehood. In the area of securities law, the United States Supreme Court has held that information is material when, had that information been properly conveyed, it would have assumed importance in the decision of the reasonable investor.[220] Borrowing from the securities area, one could argue that materiality in this context consists of information that, had it been properly conveyed, would have assumed importance in the decision of the reasonable voter. However, this standard would seem unworkable in the context of a political campaign. For example, would the reasonable voter be a Democrat, a Republican, or an independent?[221]

Further, a court or panel reviewing statements made by a lawyer to the public during a campaign about the candidate's opponent might be convinced to apply a discount factor. Namely, given that voters already doubt the rhetoric of cam-

---

220. A material misstatement or omission for the purposes of rule 10b-5 of the Securities and Exchange Commission requires a "substantial likelihood" that the omission or misstatement "would have assumed actual significance in the deliberations of the reasonable" investor. *See* Michael J. Kaufman, *No Foul, No Harm: The Real Measure of Damages Under Rule 10b-5*, 39 CATH. U. L. REV. 29, 32 (1989) (citing Basic, Inc. v. Levinson, 485 U.S. 224 (1988) (quoting TSC Indus., Inc. v. Northway, Inc. 426 U.S. 438, 449 (1976))).

221. This question is presented to highlight the difference between investors and voters. All reasonable investors want one thing: the best return on their investment. Voters, however, often have difficulty finding common ground within their party, let alone across party lines.

paigns, a statement would need to be particularly harmful and have all outward appearances of credibility to be material to a voter's choice.[222]

Uncertainties of application, however, have not prevented courts from applying the standard of truthfulness to the actions of campaigning lawyers. For example, the court in *State v. Russell*[223] emphasized that a lawyer is subject to disciplinary action "if he is guilty of known falsehood intentionally used and published for the purpose of misleading the voters and gaining personal advantage for himself or his candidate."[224]

A court or disciplinary board may be most likely to strictly apply the truthfulness standard with regard to statements that a lawyer made on behalf of a campaign to campaign regulatory bodies. Although a lawyer's duty of candor to regulatory agencies has been the topic of much debate,[225] a lawyer who knowingly, or with willful blindness, makes false statements to election regulatory officials is certainly placing himself at extreme risk of sanctions, not only under the civil and criminal statutes that govern the workings of such regulatory bodies,[226] but also under Model Rule 4.1.[227] In addition, a lawyer sanctioned under civil or criminal statutes for false or misleading

---

222. *But see, e.g.*, State v. Russell, 610 P.2d 1122, 1127 (Kan. 1980) (discussing and then rejecting the rhetoric of politics defense); Segretti v. State Bar, 544 P.2d 929, 934 (Cal. 1976) (rejecting unbelievability defense).

223. 610 P.2d 1122 (Kan.), *cert. denied*, 449 U.S. 983 (1980); *see supra* notes 41-42 and accompanying text.

224. *Russell*, 610 P.2d at 1127.

225. *See* ABA/BNA, *supra* note 143, at 50:101; Patricia F. Reilly, Comment, *Balancing Ethical Disclosure Requirements with Statutory Regulations for Lawyers Practicing Before Regulatory Agencies*, 46 OKLA. L. REV. 325 (1993); Michael P. Cox, *Regulation of Attorneys Practicing Before Federal Agencies*, 34 CASE W. RES. L. REV. 173 (1983-1984).

226. *Cf., e.g., In re* Fishbein, No. OTS AP 92-19, slip op. at 13 (Mar. 10, 1992) (final order) (setting out settlement agreement entered into by lawfirm Kaye, Scholer with the Office of Thrift Supervision for failure to comply with civil statutes governing thrift institutions).

227. *See* MODEL RULES, *supra* note 143, at Rule 4.1; *see also Statement of Policy Adopted by the American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising Clients with Respect to the Compliance by Clients with Laws Administered by the Securities and Exchange Commission*, 31 BUS. LAW. 543, 545 (1975) (discussing duty to disclose if no reasonable doubt of wrongdoing exists).

statements to regulatory bodies could also be sanctioned under Model Rule 8.4(b).[228]

### 2. Model Rule 8.4

Model Rule 8.4 has three catchall provisions that provide in pertinent part:

> It is professional misconduct for a lawyer to:
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty trustworthiness or fitness as a lawyer in other respects;[229]
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;[230]
>
> (d) engage in conduct that is prejudicial to the administration of justice; . . . .[231]

Sections 8.4(b) and 8.4(c), and their Model Code equivalents, are the rules of ethics most often invoked to address unethical behaviors by lawyers during political campaigns.[232]

---

228. *See infra* notes 232-36 and accompanying text.

229. MODEL RULES, *supra* note 143, at Rule 8.4(b). The Model Code offers a slightly different formulation of the criminal act catchall provision of Model Rule 8.4(b). *See* MODEL CODE, *supra* note 143, at DR 1-102(A)(3) (prohibiting a lawyer from engaging in "illegal conduct involving moral turpitude").

230. MODEL RULES, *supra* note 143, at Rule 8.4(c); *see also* MODEL CODE, *supra* note 143, at DR 1-102(A)(4). Whereas Model Rule 4.1 captures material falsehoods to third parties during a lawyer's representation of client, and Model Rule 8.4(c) supplements this obligation by regulating the behavior of lawyers towards both clients and in their personal lives. *Accord Dishonesty Rule and Personal Conduct*, *in* ABA/BNA LAWYER'S MANUAL OF PROFESSIONAL CONDUCT, CURRENT REPORTS, NEWS & BACKGROUND, June 29, 1994, *available in* LEXIS, ABA-BNA database (paraphrasing David Isbell chair of the ABA Standing Committee on Ethics and Professional Responsibility). One commentator has suggested that there is an "egregiousness requirement, something along the lines of the Model Code's moral turpitude standard" for the application of Model Rule 8.4. *Id.* (quoting Isbell).

231. MODEL RULES, *supra* note 143, at Rule 8.4(b)-(d); *see also* MODEL CODE, *supra* note 143, at DR 1-102(A)(5).

232. *See, e.g.*, Segretti v. State Bar, 544 P.2d 929, 932 (Cal. 1976); *In re* Wild, 361 A.2d 182, 184 (D.C. 1976); *In re* Johnson, 729 P.2d 1175, 1177 (Kan. 1986) (invoking DR 1-102(A)(4)-(6)); State v. Michaelis, 316 N.W.2d 46, 48 (Neb. 1982); *In re* Gross, 424 A.2d 421, 422-23 (N.J. 1980); State v. Nelson, 551 S.W.2d 433, 435-36 (Tex. Civ.

### *a. 8.4(b)*

Under Rule 8.4(b), lawyers who commit criminal acts during a campaign, such as misusing campaign funds,[233] engaging in illegal campaign finance activities,[234] improper reporting of campaign finances,[235] tampering with votes, and ballot stuffing, *should* face not only criminal charges but also disciplinary actions that could include disbarment.[236]

In addition, the ability to sanction lawyers for unethical campaign behaviors under Rule 8.4 offers three advantages. First, by depriving lawyers of the ability to practice, either permanently or temporarily, the disciplinary measure (such as a suspension or disbarment) strikes directly at the offending lawyer's pocket. Second, the level of proof of the act required to impose the disciplinary measure is lower than that needed for the criminal penalty. Third, because no criminal penalty is necessary, where the ethical infraction is not major, a disciplinary measure offers an alternative punishment that is stiff, but shy of criminal penalties.[237]

---

App. 1977).

233. *See, e.g.*, 26 U.S.C. § 9012(c) (criminal penalties for unlawful use of campaign monies); § 9012(e) (criminal penalties for kickbacks); § 9012(f) (criminal penalties for unauthorized expenditures).

234. *See, e.g.*, 26 U.S.C. § 9012(a)-(b) (1988) (criminal liability for spending in excess of limits in presidential races).

235. *See, e.g.*, 26 U.S.C. § 9012(d) (1988) (criminal penalties for improper financial reporting).

236. *See, e.g.*, *In re* Wild, 361 A.2d at 182-84 (providing that as a general rule, and listing no exceptions to that rule, campaign finance crimes are matters of fraud on the public); *Nelson*, 551 S.W.2d at 435-36 (finding no need to determine whether illegal contributions were crimes of moral turpitude in disbarring lawyer); *In re* Smith, 206 S.E.2d 920, 922-23 (W. Va. 1974).

The *In re Smith* court provided discussion on this point. The court explained that if, as has been previously decided, convictions of willfully attempting to evade income taxes, conspiracy to bribe a juror or public officials, interstate transportation in the aid of racketeering, and using the mails to defraud all involve moral turpitude requiring the annulment of a lawyer's license to practice law, then the instant conviction for ballot stuffing likewise entails moral turpitude. *Id.* at 922-23. *But see* State v. Jones, 566 P.2d 130, 132-33 (Okla. 1977) (finding that an unknowing violation of campaign finance laws did not involve moral turpitude).

237. One reviewer of this Article has, however, commented that where the act is punishable by criminal sanction, the punishment should be criminal law penalties and

### *b. 8.4(c)*

While many of the campaign ethics cases involved disciplinary proceedings under Rule 8.4(b), many of the courts have invoked 8.4(c) as an independent ground for sanction, and some of these cases did not involve 8.4(b) criminal conduct at all.[238] For example, in both the *Russell* and the *Michaelis* cases, the conduct at issue, making false statements, was not subject to criminal sanction; however, it was subject to sanction under the dishonesty, fraud, deceit, or misrepresentation prohibitions of Rule 8.4(c).[239]

Thus, merely avoiding criminal acts during a campaign is not a safe harbor for lawyer behavior that offends the broader parameters of Rule 8.4(c). Based upon these cases, lawyers who work on campaigns should take care to ensure that their actions and the actions of those whom they supervise conform to the letter of all applicable laws *and* maintain the highest standards of honesty and candor if "[they] wish . . . to remain . . . member[s] of the bar."[240]

The area where a greater application of, and conformance to, the provisions of Rule 8.4(c) would have the greatest impact is the negative campaign efforts that are now vogue in political circles. Rule 8.4(c) does not prevent lawyers working on campaigns from levelling harsh, but accurate, criticisms at their opponent. However, if the case law is any indication, much of the excessive rhetoric, egregious truth stretching, and actual falsehoods that recent campaigns have focused on would seem to conflict with the Rule's obligations.

---

that the ethics charge would be "piling on." This Author does not agree that the ethics charge would be piling on. The criminal penalty for an election infraction serves a different purpose from the ethics charge. The ethics charge serves to police the bar. If only a criminal penalty was applied, and say a misdemeanor penalty of probation or a fine was handed down, the lawyer would still be free, despite his misconduct to continue to serve as a bar member. This should not be the case.

238. *See, e.g.*, State v. Russell, 610 P.2d 1122 (Kan. 1980); State v. Michaelis, 316 N.W.2d 46 (Neb. 1980).

239. *See, e.g.*, *Russell*, 610 P.2d at 1122-25; *Michaelis*, 316 N.W.2d at 1095; *see also* MODEL RULES, *supra* note 143, at Rule 8.4(c).

240. *In re* Riley, 691 P.2d 695, 703 (Ariz. 1984).

For example, the campaign of Richard Thornburgh, a lawyer, ran advertisements making false insinuations that Harris Wofford had allowed Adnan Khashoggi's involvement in Bryn Mawr College affairs even though he knew of Khashoggi's role in the Iran-Contra scandal.[241] From the facts currently available, these allegations would seem to conflict with the lawyer's ethical duty of truthfulness. Similarly, during the 1990 race, Senator Jesse Helms' reelection campaign ran ads, not based in fact, that purported to expose the gay "secret campaign" of his opponent.[242] If a Helms' campaign attorney played a role in developing these ads, for example, clearing them for use, that lawyer would seem to be in violation of Rule 8.4(c).

Admittedly, the line between aggresive campaign tactics and unethical practices can be difficult to draw; however, it may not be impossible. Compare the following two examples. Jim Rappaport's 1990 Senate race ran advertisements against incumbent Senator John Kerry that showed a portrait of Michael Dukakis dissolving into the face of Senator Kerry.[243] In the second case, Patrick Buchanan's 1992 Georgia primary campaign ran false ads alleging that President Bush had used federal monies to support the making of pornographic films.[244] Assuming that lawyers from the Buchanan and Rappaport campaigns participated in developing these ads and placing them in the public domain, would they be subject to discipline? In the Rappaport case, while the conduct may not be laudable or in the best interest of American politics, the advertisements were not based on actual falsehoods. However, in the Buchanan case the advertisements contained actual allegations that were false. Thus, the Buchanan campaign lawyer would seem more at risk of sanction than the Rappaport lawyer. Perhaps, the line drawn between these two examples is the

---

241. *See* John W. Mashek, *Shadow of the White House; Analysts See Pa. Senate Election as Referendum on Bush Policies*, BOSTON GLOBE, Nov. 2, 1991, at 3.

242. *See* Tom B. Vansun, *Smear Tactics: Nasty TV Political Ads Are a Time-Honored Tradition in the U.S.; B.C.'s Not So Pure, Either*, VANCOUVER SUN, Sept. 14, 1991, at D1.

243. *See* May, *supra* note 11, at 184.

244. *See* JAMIESON, *supra* note 11, at 262-64.

line that should be adopted in reviewing the ethics of campaign actions.

### *c. 8.4(d)*

A court or disciplinary board confronted with a lawyer who has behaved improperly during a campaign might also review that behavior under Model Rule 8.4(d), which prohibits acts that are prejudicial to the administration of justice. The use of Model Rule 8.4(d) is most likely where the campaign is for a judicial or legal officer position, or where the opponent is already a judicial or other legal officer, who is entitled to a greater degree of courtesy under the Model Rules and the Model Code.[245] However, there is the distinct possibility that a court or disciplinary board could also invoke Rule 8.4(d) where neither the office nor the candidates are judicial or legal in nature.[246] For example, the New Jersey Supreme Court in *In re Gross*[247] held that campaign finance misdeeds unrelated to any judicial or legal officer or office were "designed to corrupt the processes of government and impede the administration of justice."[248]

## *C. Confidentiality*

Distinct from, but related to, the issue of a lawyer's own misdeeds is the issue of when the misdeeds of the lawyer's client may be disclosed. Because the disclosure of a fraudulent or illegal act by the candidate or campaign by a lawyer who is a member of an ongoing political campaign would likely turn the tides of many election races, the application of these rules on confidentiality and disclosure are particularly interesting in these situations.

While the rules of ethics generally require a lawyer to

---

245. *See, e.g., In re* Johnson, 729 P.2d 1175, 1178 (Kan. 1986) (noting that "[u]nrestrained and intemperate statements against a judge or adjudicatory officer lessen public confidence in our legal system").

246. *See In re* Gross, 424 A.2d 421, 422 (N.J. 1980).

247. 424 A.2d 421 (N.J. 1980).

248. *Id.* at 422.

preserve inviolate the confidences of her clients, this prohibition on disclosure is not without exceptions.[249] For instance, under the Model Rules a lawyer *may* reveal a client's confidences to the extent that the lawyer "reasonably believes [is] necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."[250] The Model Code is somewhat broader, permitting disclosure to prevent *any* crime.[251]

In keeping with the Model Code's approach, a number of states, however, have gone further and included a range of provisions that allow lawyers to reveal client confidences to prevent other types of criminal or fraudulent acts. Arkansas, Indiana, Idaho, South Carolina, Washington, West Virginia, Kansas, and Mississippi permit a lawyer to disclose confidential information to prevent a client from committing a crime.[252] Similarly, Arizona and Colorado allow a lawyer to reveal a client's intent to commit a crime.[253] Other states, such as Maryland, New Jersey, Pennsylvania, South Dakota, and Wisconsin, permit a lawyer to disclose information necessary to rectify the consequences of a client's crime, and, in some cases, fraud.[254] Several other states, namely Michigan, Oklahoma,

---

249. For excellent overviews of the rules on confidentiality, see Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989) [hereinafter Zacharias, *Rethinking Confidentiality*]; Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Consitutional?*, 75 IOWA L. REV. 601 (1990).

250. MODEL RULES, *supra* note 143, at Rule 1.6(b)(1); *see also* ABA/BNA, *supra* note 143, at 55:101-02. Several states, however, have gone further to require disclosure of client confidences to prevent certain types of crimes, in some cases even nonviolent acts. *See* ABA/BNA, *supra* note 143, at 55:104-:108, 55:903-:904. For example, both Wisconsin and New Jersey require a lawyer to reveal information necessary to prevent a client from committing a crime or fraudulent act that is likely to result in a substantial injury to the financial interest or property of another. *Id.* at 55:106-:107, 55:903.

251. *See* MODEL CODE, *supra* note 143, at DR 4-101(C)(3).

252. ABA/BNA, *supra* note 143, at 55:104-:105.

253. *See* ABA/BNA, *supra* note 143, at 55:104-:107; Zacharias, *Rethinking Confidentiality*, *supra* note 249, at 352-53. Arizona also allows disclosure of the information necessary to prevent the crime. ABA/BNA, *supra* note 143, at 55:104.

254. *See* ABA/BNA, *supra* note 143, at 55:105-:108; Zacharias, *Rethinking Confidentiality*, *supra* note 249, at 352-53.

and Nevada, combine the two approaches, permitting disclosure to both prevent and rectify certain client misdeeds.[255]

In the context of a lawyer's campaign activities, these permissive disclosure laws allow a lawyer who has information of a candidate's or campaign's wrongdoing to publicly disclose such activities. For example, pursuant to the specific parameters of each of these state rules, a lawyer who has knowledge of campaign finance violations, the fraudulent use of campaign monies, or vote improprieties may be allowed to disclose these acts to the appropriate authorities.

Of course, in the context of campaigns, the same tension that exists in other contexts is present—the lawyer who turns in his client for misdeeds may, in effect, be destroying his practice. Though the rules have always required such of lawyers, practically speaking, the campaign lawyer who calls his candidate a criminal will likely end his career as a campaign lawyer.

In order to answer why a lawyer may, nevertheless, wish to make such a disclosure, one must turn to the issue of liability. As to liabilities for failing to disclose, the *ABA/BNA Manual* provides:

> [A]dherence to the principle underlying the rule [of confidentiality] gets a lawyer in trouble more readily than does invoking the exception [for client crimes and fraud]. If the lawyer chooses wrong, he or she will find no protection in the ethics rules from liability to those injured by the client: Failure to disclose what a client is really up to may end up being deemed actionable participation in the client's wrongdoing, exposing the lawyer to liability along with the client.
>
> A lawyer can be liable on any of several legal theories—typically, however, fraud or fraudulent misrepresentation—for silence or inaction found to have been in furtherance of client wrongdoing. And depending on the cause of action, a lawyer can be liable criminally or as a

255. *See* ABA/BNA, *supra* note 143, at 55:105-:108; Zacharias, *Rethinking Confidentiality*, *supra* note 249, at 352-53.

> tortfeasor, single or joint . . . .[256]

There have been no cases to date where a lawyer's mere failure to reveal without some form of active participation in campaign wrongdoing gave rise to liability. Nevertheless, cases decided in other contexts give ample reason for lawyers who participate in campaigns to be careful in this regard.

For example, in *SEC v. National Student Marketing Corp.*,[257] lawyers who knew that certain merger documents included material omissions but allowed a public offering to go forward were found liable as "aiders and abetters" under the Securities and Exchange Act of 1934.[258] Similarly, in *Seidel v. Public Service Co.*,[259] lawyers were held liable as "controlling persons" under § 15 of the 1933 Securities Acts "when they are in some sense culpable participants in the acts perpetrated by the controlled person."[260]

Lawyer liability has also been extended for the failure to disclose in the context of financial institution regulation.[261] For example, in *In re American Continental/Lincoln S & L Securities Litigation*,[262] the court, in applying liability, held

> [a]n attorney may not continue to provide services to corporate clients when the attorney knows the client is engaged in a course of conduct designed to deceive others, and where it is obvious that the attorney's compliant legal services may be a substantial factor in permitting the deceit to continue.[263]

At least two factors may distinguish lawyer liability in financial institution and securities cases from the potential for lawyer

---

256. ABA/BNA, *supra* note 143, at 55:908.

257. 457 F. Supp. 682 (D.D.C. 1978).

258. *Id.* at 715; *see also* ABA/BNA, *supra* note 143, at 55:910. *But see* Central Bank v. First Interstate Bank, 114 S. Ct. 1439 (1994) (finding no secondary liability on the part of securities lawyers to third parties).

259. 616 F. Supp. 1342, 1362 (D.N.H. 1985).

260. *Id.*; *see also* ABA/BNA, *supra* note 143, at 55:910.

261. *See, e.g.*, *In re* American Continental Corp./Lincoln S & L Sec. Litig., 794 F. Supp. 1424, 1452 (D. Ariz. 1992).

262. *Id.*

263. *Id.*

liability in campaign cases. First, lawyer liability in both securities and financial institution cases is the product of recent statutory provisions.[264] Second, in both instances, the lawyer liability is also the product of the fiduciary relationship that exists between lawyers and investors or depositors.

The degree to which these two factors distinguish lawyer liability for unethical securities and financial institution conduct from unethical campaign actions, however, can be questioned. First, the federal election laws also extended broad liabilities for misdeeds, such as the provision for false information or misrepresentations that would cover lawyers.[265] These provisions are in some ways quite similar to the liability provisions of the securities and financial institution laws. Second, there is an argument to be made that public officials, and arguably candidates for public offices, have a fiduciary duty to the American public as agents of the electorate.[266] Alternatively, elected officials, and again arguably candidates, might also owe a fiduciary duty to the public as "trustees."[267] Moreover, the

---

264. *Accord*, Robert G. Day, Note, *Administrative Watchdogs or Zealous Advocates? Implications for Legal Ethics in the Face of Expanded Attorney Liability*, 45 STAN. L. REV. 645 (1993). Due to the savings and loan scandal, lawyer liability was extended under the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified in scattered sections of 5, 12, 15, 18, 26, 31, 40, 42, and 44 U.S.C.). Similarly, because of the junk bond crisis, lawyer liability was extended under the Securities Law Enforcement Remedies Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (current version at 15 U.S.C. §§ 77-78, 80 (Supp. II 1990)).

265. *See, e.g.*, 26 U.S.C. § 9012(d)(1)(A)-(B) (1988).

266. *See* Gary C. Jacobson, *Campaign Finance and Democratic Control: Comments on Gottlieb and Lowenstein's Papers*, 18 HOFTSTRA L. REV. 369, 369 (1989) ("The relationship between a citizen and an elected official is, in the language of principal-agent theory, an agency relationship."); *see also* RESTATEMENT (SECOND) OF AGENCY § 1 (1958) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act.").

267. *See* Carpinello, *supra* note 16, at 87 (discussing ethical obligations of legislators under the "trustee" and "politico" theories of government); *see also* EDMUND BURKE: ON GOVERNMENT POLITICS AND SOCIETY 156-58 (B.W. Hill ed., 1975) (discussing "trustee" theory); Heinz et. al, *The Role of the Representative: Some Empirical Observations on the Theory of Edmund Burke*, 53 AM. POL. SCI. REV. 742 (1959) (discussing "politico" theory).

potential for liability should be of particular concern for those lawyers whose campaign tasks include signing, preparing, or assisting in the preparation of the various reports required under local, state, and federal election laws.

Permissive disclosure laws also display one of the major problems with the application of the rules of ethics to national campaigns. Given the wide disparities in disclosure rules among the various states and that a lawyer is bound to obey the ethics rules of all jurisdictions in which he is a member of the bar and any state in which he may be acting, a lawyer in a national campaign could find that a permissive disclosure in one state could be precluded and sanctioned in another state. In other words, what may be ethical at whistle-stop number one, may be unethical at whistle-stop number two.

### 1. Withdrawal

Another interesting aspect of the application of the rules of ethics to campaign activities occurs in the area of withdrawal. Under the Model Rules, a lawyer is obligated to withdraw from representing a client if, among other things, such representation would violate the rules of ethics.[268] In Model Code jurisdictions, the scope of the mandatory withdrawal rule also extends to incidences where the lawyer knows that the client is using his efforts to harass or injure another.[269]

Thus, if a lawyer is confronted with a situation where his efforts on a campaign would breach any of the numerous rules of ethics, that lawyer is obligated to leave the campaign. For example, assume that a lawyer who is serving as the campaign's finance counsel becomes aware of certain improprieties in the campaign's financial reports being provided to the state election commission. Assume also that the lawyer is, for the most part, sure that these improprieties constitute violations

---

268. MODEL RULES, *supra* note 143, at Rule 1.16(a)(1); *see also* ABA/BNA, *supra* note 143, at 71:202. Both the Model Rules and the Model Code also provide for voluntary withdrawal. *See* MODEL RULES, *supra* note 143, at Rule 1.16(b); MODEL CODE, *supra* note 143, at DR 2-110(C).

269. *See* MODEL CODE, *supra* note 143, at DR 2-110(B)(1)-(2).

of the state election law. Under the rules of ethics, it would seem clear that this lawyer would have to fix the situation or withdraw from representing the campaign.

This example, however, can be made more difficult if we change the lawyer's role slightly. What if the lawyer is not the financial counsel with some role in reporting to the election authorities, but is just a major fundraiser who happens to overhear the improprieties?

In most cases where the lawyer must withdraw, he or she may go quietly;[270] however, as a practical matter, if the lawyer occupies a senior slot in the campaign, some explanation will likely be necessary. Thus, this rule provides not only an important check on the behavior of campaigning lawyers, it also indirectly provides a check on the campaigns for which they work. Moreover, a lawyer confronted with an emerging ethical dilemma can use the withdrawal rule as a shield for efforts to encourage a campaign to take the more ethical route.[271]

### 2. Supervision and Subordination

The ethical rules on the supervisory and subordinate aspects of the practice of law also give rise to a number of interesting issues with regard to campaigns. Under the rules of ethics, lawyers are obligated to ensure that those whom they supervise also conform to the rules of ethics.[272] Partners and senior lawyers, in turn, must police the actions of more junior lawyers acting under their supervision.[273] Partners in firms are

---

270. In fact, the lawyer may have an obligation to go quietly. *See* MODEL RULES, *supra* note 143, at Rule 1.16 cmt. 6.

271. *See* Peter Margulies, *"Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213 (1990) (discussing withdrawal as leverage for encouraging ethical action).

272. *See generally* Ted Schneyer, *Professional Discipline For Law Firms?*, 77 CORNELL L. REV. 1 (1991). Lawyers also have an obligation to ensure that non-lawyers working for them follow the rules. MODEL RULES, *supra* note 143, at Rule 5.3(a); MODEL CODE, *supra* note 143, at DR 4-101(D).

273. MODEL RULES, *supra* note 143, at Rule 5.1(b); *see also* Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, 70 NO-

also under a general duty to ensure that their firm's lawyers are in compliance with the rules of ethics.[274] The obligation upon any individual lawyer to act ethically, however, cannot be abrogated. Junior lawyers cannot claim that they were acting at the direction of a more senior lawyer as a shield against ethics charges.[275]

### 3. Volunteers and Firms

As the survey discussed in Part II of this Article shows, a lawyer who works part-time on a campaign while still practicing with a firm rarely receives any supervision over her actions by the firm. This raises two serious issues. First, the partners of law firms that do not supervise campaigning lawyers may be breaching their general ethical duty to put policies in place which ensure compliance with the rules of ethics.[276] Second, the failure of a particular partner or senior lawyer to supervise the campaign actions of a lawyer who she typically supervises could be a breach of the supervising lawyer's ethical obligations.[277]

### 4. Full-time Campaigners

Full-time campaigning lawyers may also be at risk of ethics violations. While Model Rule 5.1(a)'s general supervisory responsibility of a partner is limited to partners in law firms,[278] the definition of which would seem to exclude cam-

---

TRE DAME L. REV. 259, 278-82 (1995) (discussing specific supervisory duty).

274. MODEL RULES, *supra* note 143, at Rule 5.1(a); *see also* Miller, *supra* note 273, at 274-78 (discussing general duty).

275. MODEL RULES, *supra* note 143, at Rule 5.2; Miller, *supra* note 273, at 294-95.

276. MODEL RULES, *supra* note 143, at Rule 5.1(a). Several cases have criticized law firms for allowing a lawyer to "sink or swim" on their own absent supervision. *See, e.g.*, *In re* Yacavino, 494 A.2d 801 (N.J. 1985); *In re* Barry, 447 A.2d 923 (N.J. 1982).

277. MODEL RULES, *supra* note 143, at Rule 5.1(b); *In re* Weston, 442 N.E.2d 236 (Ill. 1982). In the *In re Weston* case the failure to provide adequate supervision led to the supervisory lawyer being disciplined. *In re Weston*, 442 N.E.2d at 238.

278. *See* MODEL RULES, *supra* note 143, at Rule 5.1(a) (focusing on partners in a law firm); MODEL RULES, *supra* note 143, at 11 (defining "Firm" or "Law firm"); *see*

paigns, no such definitional limit exists for the direct supervisory obligations imposed by Model Rule 5.1(b). Thus, if a senior campaign member or the candidate herself is a lawyer, she is under a duty to supervise and police the actions of all those under her. If an ethical misdeed of one of her charges can be linked to her failure to supervise the subordinate, she can be held responsible for the subordinate's transgression under the rules of ethics.[279] This liability exists even where the person making the ethical error is not himself a lawyer.[280]

For example, if a lawyer running for public office hires a political consultant, who is not a lawyer, and the political consultant disparages the character of the opponent with lies in an unethical manner, the candidate could be liable for the consultant's misdeed. As a practical matter, a one-time remark may be insufficient to give rise to such liability, particularly if the consultant were disciplined or rebuked in some way for action.[281] However, if a consultant repeatedly makes such egregious statements and the candidate knows of these remarks and takes no actions to halt and correct them, it is not difficult to see the potential supervisory liability arising.[282]

### 5. Duty to Report

The Model Rules also impose upon lawyers a duty to report substantial ethical violations of other lawyers.[283] This re-

---

*also* Miller, *supra* note 273, at 280, 280 n.93.

279. *See, e.g.*, *In re* Galbasini, 786 P.2d 971 (Ariz. 1990).

280. *Id.*

281. *Accord* Miller, *supra* note 273, at 276-77 (noting that "[a]lthough [Model] Rule 5.1 does not impose vicarious liability on a lawyer who has not ratified or participated in the substantive violation of the rules, it does impose an 'enhanced' standard of accountability"); GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 5.1:101, at 769 (2d ed. 1994).

282. *Cf., e.g.*, *In re* Galbasini, 786 P.2d 971 (Ariz. 1990).

283. *See* MODEL RULES, *supra* note 143, at Rule 8.3(a)-(c); MODEL CODE, *supra* note 143, at DR 1-103(A); *In re* Himmel, 533 N.E.2d 790 (Ill. 1988) (disciplining lawyer for failure to report); Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel*, 1988 U. ILL. L. REV. 977 (1988); Cynthia L. Gendry, Comment, *Ethics—An Attorney's Duty to Report the Pro-*

porting duty extends broadly to include opponents, co-workers, and other colleagues.[284] Applying Model Rule 8.3, a lawyer working on a campaign who has direct knowledge of a "substantial"[285] ethical transgression on the part of either a campaign colleague or an opponent must report such information.

For example, assume that A's campaign runs, with the approval of its general counsel, an advertisement that makes false and malicious allegations concerning the opponent B. B's general counsel may not only be compelled under the rules of ethics to report this transgression, but may actually find a tactical advantage in doing so: a disciplinary board ruling that the advertisement was unethical could substantially soften the original blow of the ad and may even turn the ad in B's favor.

While the alignment in campaigns may make co-worker reporting less likely, the co-worker requirement of Model Rule 8.3 could also help clean up political campaigns. For example, a lawyer who has knowledge of a potential co-worker transgression could use Model Rule 8.3 as leverage to encourage the colleague to change their course of action.[286] Further, the potential that a colleague may be compelled under the rules of ethics to disclose a colleague's wrongdoing may be enough to dissuade the colleague from taking the unethical route initially.

---

*fessional Misconduct of Co-Workers*, 18 S. ILL. U. L.J. 603 (1994). Despite this requirement, reporting of other lawyers remains low. *See* Miller, *supra* note 273, at 295-97.

284. *See In re* Himmel, 533 N.E.2d 790 (Ill. 1988); Rotunda, *supra* note 283; Gendry, *supra* note 283.

285. *See* MODEL RULES, *supra* note 143, at Rule 8.3(a) cmt. 3. Model Rule 8.3(a)'s substantiality requirement applies to the degree of the ethical offense and not to "the quantum of evidence of which the lawyer is aware." MODEL RULES, *supra* note 143, at Rule 8.3(a) cmt. 3.

286. *But see* Irwin D. Miller, *Breaking the Written Code of Silence in Legal Malpractice Settlements*, 6 GEO. J. LEGAL ETHICS 187 (1992) (criticizing use of threats of reporting as a leverage tool in the negotiation and settlement of legal malpractice cases). While encouraging the use of reporting threats in negotiations concerning malpractice cases may be unwise, these cases are sufficiently different from the use of reporting threats as leverage to encourage ethical campaigning. Most importantly, the leverage being discussed here is not leverage to compel a better settlement, but rather leverage to prevent ethical transgressions in the first place.

## VI. Sanctions and Liabilities for Campaign Ethics Violations

While the mere labelling of an act as unethical could have a major effect on a campaign, the ethical rules offer more than just public pressure to cause compliance with their tenets. Under the rules of ethics, lawyers who fail to meet their ethical obligations can be subject to a wide range of sanctions. "Statistics developed by the ABA Center for Professional Responsibility's National Discipline Data Bank show that the most commonly imposed final sanctions are disbarment, suspension, probation, public reprimand, fines and costs."[287] The types of sanctions handed down in campaign cases typically follow a pattern similar to sanctions in ethics cases generally.[288] As to the severity of sanctions in each case, campaign

---

287. ABA/BNA, *supra* note 143, at 101:3002. Disbarments are typically not permanent. *Id.*; *cf. In re* Daniel, 173 S.E.2d 153 (W. Va. 1970) (lawyer given a permanent disbarment allowed to reapply). However, in some instances, particularly involving moral turpitude crimes, disbarment can be both permanent and summarily or automatically applied. ABA/BNA, *supra* note 143, at 101:3002; *see also* Florida Bar v. Rassner, 172 So. 2d 818 (Fla. 1965) (permanent disbarment); *In re* Margiotta, 456 N.E.2d 798 (N.Y. 1983) (summary disbarment). *But see* State *ex rel.* Oklahoma Bar Ass'n v. Jones, 566 P.2d 130, 132-33 (Okla. 1977) (holding that guilty plea for political campaign fund improprieties was not a moral turpitude crime subject to summary disbarment).

288. *See* Sarno, *supra* note 38, at 213-28. Campaign improprieties alone, without any other ethical misdeeds, have been found to be cause for disbarment. *See, e.g.*, Florida Bar v. McCain, 330 So. 2d 712 (Fla. 1976); *In re* Bartholet, 198 N.W.2d 152 (Minn. 1972); *In re* Smith, 206 S.E.2d 920 (W. Va. 1974).

Campaign improprieties have also led to lawyer suspensions. *See, e.g.*, *Ex parte* Grace, 13 So. 2d 178 (Ala.), *app. dismissed*, 320 U.S. 708 (1943); Segretti v. State Bar, 544 P.2d 929 (Cal. 1976); Townsend v. State Bar, 51 P.2d 879 (Cal. 1935) (court rejected board's recommendation of private censure for vote tampering and suspended lawyer for six months); *In re* Ellis, 20 N.E.2d 96 (Ill. 1939) (two-year suspension for unethical campaign contributions); Kentucky State Bar Ass'n v. Lewis, 282 S.W.2d 321 (Ky. 1955); Nebraska State Bar Ass'n v. Cook, 232 N.W.2d 120 (Neb. 1975); *In re* Gross, 424 A.2d 421 (N.J. 1980); *In re* Mattice, 372 A.2d 1104 (N.J. 1977); *In re* Crum, 215 N.W. 682 (N.D. 1927); Snyder's Case, 152 A. 33 (Pa. 1930) (noting embarrassment of having a district attorney who could not represent the district, court sentenced a district attorney suspended for one year, save for appearances as the district attorney, for campaign improprieties).

Campaign ethics violations have also been cause for both censures and reprimands. *See, e.g.*, People v. Casias, 646 P.2d 391 (Colo. 1982); Florida Bar v. Stokes,

ethics cases also show the same wide disparities found in ethics cases generally.[289]

However, when viewed under the American Bar Association's 1986 Standards for Imposing Lawyer Sanctions (the ABA Sanction Standards),[290] the penalties for lawyers engaged in unethical campaign actions could, and should, be strict. The ABA Sanction Standards provide that the following factors should be looked at in imposing a disciplinary sanction: 1) the duty breached, 2) the mens rea of the breach (knowing, intentional, or unintentional), 3) the extent of the actual or potential injury, and 4) other aggravating or mitigating circumstances.[291] The potential for the application of strict sanctions for campaign ethical violations exists because courts should find, under factor one, that the breach involved, inter alia, duties to the administration of justice, the public trust, and the electoral process. Strict sanctions should also be considered

---

186 So. 2d 499 (Fla. 1966); State v. Russell, 610 P.2d 1122 (Kan.), *cert. denied*, 449 U.S. 983 (1980); *In re* Hayden, 197 A.2d 353 (N.J. 1964); *In re* Lang, 391 N.Y.S.2d 1002 (App. Div. 1977).

289. *Compare Townsend*, 51 P.2d at 879 (suspension of six months for efforts to deceive the registrar of voters) *with In re Smith*, 206 S.E.2d at 923 (counsel's license annulled for ballot stuffing conspiracy); *Gross*, 424 A.2d at 422 (suspension of three years for participation in a scheme to defraud federal government with respect to corporate campaign contributions). *See generally* ABA/BNA, *supra* note 143, at 101:303-:304.

> It is difficult to identify general factors that are widely applied in disciplinary cases to determine appropriate sanctions for types of misconduct. Courts have stated that each case must be decided on its own particular facts, and one court has flatly admitted that wide divergence in sanctions for essentially similar misconduct necessarily results. *Bradpiece v. State Bar*, 10 Cal3d 742, 518 P2d 337, 111 CalRptr 905 (1974). . . .
>
> Other courts have attempted to articulate factors to be considered in determining sanctions but have met with little success in reducing the disparity among sanctions imposed for similar misconduct. *E.g.*, *Louisiana State Bar Association v. Hinrichs*, 486 So2d 749, 2 Law.Man.Prof.Conduct 137 (La 1986) . . . ; *Nebraska State Bar Association v. Cook*, 194 Neb 364, 232 NW2d 120 (1975) . . . ; *In re Espedal*, 82 Wash2d 834, 514 P2d 518 (1973).

*Id.* at 101:3003.

290. *See* ABA, *Standards for Imposing Lawyer Sanctions*, adopted February 1986, *reprinted in* ABA/BNA, *supra* note 143, at 01:801-:854.

291. ABA/BNA, *supra* note 143, at 08:815.

under factor three because campaign ethics breaches will often involve real harm to the reputation and campaign of an opponent or to the electoral process.[292]

In addition to being sanctioned, lawyers who engage in unethical campaign acts could also find themselves subject to civil liabilities to their clients—past and present. If such civil liabilities were to be applied in the campaign area, they would likely be awarded under theories of malpractice, breach of contract, negligence, and fraud.[293] For example, a lawyer whose campaign actions violate the duty of confidentiality and are the proximate cause of some real harm suffered by a present or past client could be found liable for any damages resulting.

Campaign misdeeds *might*, in certain instances, also give rise to third-party liability. While courts have traditionally found that a lack of privity of contract precludes third parties from recovering against lawyers for their transgressions,[294] the privity barrier is showing signs of erosion.[295] In areas such as fraudulent misrepresentation and negligence, particularly outside of the adversarial context, courts have held that lawyers are liable to third parties. In these cases, courts tend to be more willing to impose third-party liability where the lawyer owes a duty to the third party and where the third party was justified in acting on the lawyer's representations.[296]

---

292. *Cf., e.g.*, JAMIESON, *supra* note 11, at 3 (discussing poll results relating to the strong impact of negative campaign ads concerning Dukakis tank ride on voter choice) (citing PAUL ABRAMSON ET AL., CHANGE AND CONTINUITY IN THE 1988 ELECTIONS 47 (1990)).

293. *Cf.* ABA/BNA, *supra* note 143, at 301:101-:136, 401-03 (discussing negligence, breach of contract, fraud, and other related theories).

294. *See* Savings Bank v. Ward, 100 U.S. 195 (1879); *see generally* W. Probert & R. Hendricks, *Lawyer Malpractice: Duty Relationships Beyond Contract*, 55 NOTRE DAME L. REV. 708 (1980); ABA/BNA, *supra* note 143, at 301:601-:629.

295. ABA/BNA, *supra* note 143, at 301:601-:626.

296. *See* ABA/BNA, *supra* note 143, at 301:602-:609; *see also* Probert & Hendricks, *supra* note 294, at 726; RESTATEMENT (SECOND) OF TORTS § 766C cmt. e (1977). Some courts, however, will treat the violation of a rule of ethics as a breach of a duty, or, at least, evidence of such a breach. *See* William H. Fortune & Dulaney O'Roark, *Risk Management for Lawyers*, 45 S.C. L. REV. 617, 623 (1994). The rules for which a violation is most likely to result in liability include Model Rule 1.7 (con-

The special nature of a campaign may make such third-party liability issues particularly relevant. While, depending on the structure of a particular campaign, a lawyer's principal duty is to either the campaign or the candidate, a lawyer for a campaign could be found to owe a duty, for instance, to a campaign contributor.[297] A potential major campaign contributor, who, for instance, upon hearing a false representation, acts upon that representation and sends money to the campaign, might be able to recover against the lawyer for any harm caused. Imagine a candidate who is a member of the bar that makes a campaign pledge to not raise taxes, much like President Bush did. Based upon this pledge, an individual who is a campaign donor undertakes an investment—the success of which is entirely dependent upon a stabilization or decline in taxes. Upon obtaining office the lawyer/candidate immediately introduces a series of new taxes that bankrupt the donor/investor. While liability here is perhaps too remote, the example does show the potential ramifications in such a dynamic.

Where a lawyer's actions involve a degree of maliciousness, the extension of liability to a harmed third party becomes

---

flicts of interest) and Model Rule 1.9 (conflicts with former clients). *Id.*

297. However, the campaign contributor might best be analogized to a shareholder in a corporation. In general "an attorney retained by an organization represents the entity rather than any of its constituents." ABA/BNA, *supra* note 143, at 301:622; MODEL RULES, *supra* note 143, at Rule 1.13. *See, e.g.*, Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986); Lane v. Chowning, 610 F.2d 1385 (8th Cir. 1979); Griesemer v. Retail Store Employees Union, Local 1393, 482 F. Supp. 312 (E.D. Pa. 1980); Michel v. Gard, 536 N.E.2d 1375 (Ill. Ct. App. 1989). However, this rule is not absolute; in a range of cases, lawyers for organizations have been found to owe a duty to some member or constituent of that organization. *See, e.g.*, Halverson v. Convenient Food Mart, Inc., 458 F.2d 927 (7th Cir. 1972) (members of an unincorporated association held clients); Collins v. Fitzwater, 560 P.2d 1074 (Or. 1977) (duty owed to corporate director); *see also* Probert & Hendricks, *supra* note 294, at 726. A lawyer's liability in these circumstances will most readily be extended to the constituent if the lawyer's actions caused the constituent to reasonably believe that the lawyer was her adviser as well. ABA/BNA, *supra* note 143, at 301:622-:623; Schwartz v. Greenfield, Stein & Weisinger, 396 N.Y.S.2d 582 (1977); Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985); *see also* Probert & Hendricks, *supra* note 294, at 726; RESTATEMENT (SECOND) OF TORTS § 766C cmt. e (1977).

more likely. "Attorneys who engage in intentionally tortious conduct are as subject to liability as anyone else, and it does not matter that the lawyer acted as he did in the belief that his intentionally wrongful conduct would help his client."[298] One area where such liability could be extended in the campaign context concerns maliciously defamatory statements directed at the opponent and made by a lawyer for the campaign.[299] Moreover, while such claims would normally be protected under the First Amendment as political speech or precluded because the opponent would generally be considered a public figure,[300] a lawyer, who owes a number of ethical duties that preclude such statements, may be held to a higher standard than a layman.[301]

## VII. Ethics and Political Reform

As the preceeding section of this Article demonstrates, there are a wide range of ways in which the rules of ethics, if properly applied, should affect in a positive manner the American political process. However, as the mere smattering of political legal ethics cases illustrates, if ethics rules in general are poorly applied, there is even less effort underway to apply them appropriately in the political context.

It is in the best interest of both the bar and our political system for this to change. The rules of ethics have traditionally evolved to respond to societal threats and pressures on, or implicating, the legal system; the rules of ethics serve, in effect, as the profession's public pressure release valve. Lawyers and our political system, in general, face a crisis: the growing lack of public confidence. As discussed more fully below, taking a

---

298. ABA/BNA, *supra* note 143, at 301:626; *see also, e.g.*, Pelagatti v. Cohen, 536 A.2d 1337 (Pa. Super. Ct. 1987), *appeal denied*, 548 A.2d 256 (Pa. 1988).

299. *Cf., e.g.*, Pelagatti v. Cohen, 536 A.2d 1337 (Pa. Super. Ct. 1987), *appeal denied*, 548 A.2d 256 (Pa. 1988).

300. *See* Gertz v. Welch, Inc., 418 U.S. 323 (1974); *see also* Erik Walker, *Defamation Law: Public Figures—Who Are They?*, 45 BAYLOR L. REV. 955 (1993).

301. Even if no tort liability extended to a lawyer's malicious statements concerning an opponent, the lawyer could still face disciplinary charges based on the same statements.

more strict view of how the rules of ethics apply to campaign efforts could aid in addressing this crisis.

### *A. The Reactive Nature of the Rules of Ethics*

The evolution of the rules of legal ethics can, in many ways, be portrayed as the bar's response to a perceived crisis in the public's confidence in lawyers.[302] "For over two centuries, the American bar functioned without any formal rules of conduct."[303] Then, in the 1800s, a series of events occurred that called into question the direction of the legal profession: "The country was getting ready to go to war—its bloodiest

---

302. *See, e.g.*, Walter B. Jones, *Canons of Professional Ethics, Their Genesis and History*, 7 NOTRE DAME L. REV. 483 (1932); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981). For example, the 1881 report of Colonel Thomas Goode Jones, Chair of the Alabama State Bar Association's Committee On Judicial Administration and Remedial Procedure, which caused Alabama to adopt the nation's first ethics code provided the following:

> With such a guide pointing out in advance the sentiment of the Bar against practices which it condemns, we would find them disappearing, and should any one be bold enough to engage in evil practices the Code would be a ready witness for his condemnation and carry with it the whole moral power of the profession . . . . What just complaint exists of lawyers stirring up strife, or being swift to originate or initiate litigation, would vanish when the profession throughout the State raises its warning voice in advance against these pernicious practices . . . .

Jones, *supra*, at 484-85 (quoting ALABAMA ST. B. ASS'N, COMMITTEE ON JUD. ADMIN. & REMEDIAL PROC., REPORT OF THE THIRD ANNUAL MEETING 235-36 (1881) (alterations in original)).

Whether the impetus for this evolution is self-serving purposes or moralistic reasons is a matter of debate. For example, Rhode argues that the sole purpose of the 1983 Model Rules was a public relations event to fix image of lawyers. Rhode, *supra*, at 693. Similarly, many have argued that the rules of ethics evolved to allow lawyers to be autonomous and to control competition. *See, e.g.*, Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981). A third approach argues that while there are elements of self service in the evolution of ethics rules, more recent attempts are largely based in moral ideals. *See* Timothy P. Terrel & James H. Wildman, *Rethinking "Professionalism"*, 41 EMORY L.J. 403, 413-17 (1992).

303. Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 693 (1981); Zacharias, *Rethinking Confidentiality*, *supra* note 249, at 351.

war—ostensibly over a set of legal questions; the robber barons were in their youth and they were looking for lawyers to help them."[304] Stock manipulation scandals sullied the bar's reputation.[305] In essence, the bar faced a challenge similar to one that it now faces: many lawyers feared law devolving into the uncritical service of business interests.[306] "At the same time, the number of personal injury and immigrant lawyers, who the elite viewed with distaste, was increasing."[307] All this came at a moment when the leaders of the bar, spurred by Tocqueville's writings on "lawyer-aristocrats," were seeking to advance themselves as a third force in politics.[308] It was in response to these forces that Judge George Sharswood wrote his seminal essay on ethics from which our ethical rules stem.[309]

---

304. Thomas Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319, 321 (1987).

305. Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 266-67, n.200 (1992) (citing Robert W. Gordon, *"The Ideal and the actual in the Law": Fantasies and Practices of New York City Lawyers, 1870-1910*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51, 56-57 (Gerald W. Gawalt ed., 1984)).

306. *See* Pearce, *supra* note 305, at 249, 266 n.200; JEROLD AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 34-35 (1976); Louis Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555, 558-59 (1905).

307. Pearce, *supra* note 305, at 266-67 n.200 (citing AUERBACH, *supra* note 306, at 40-53, 62-64; JULIUS HENRY COHEN, THE LAW: BUSINESS OR PROFESSION? 181-83 (rev. ed. 1924)).

308. *See* Gordon, *supra* note 305, at 56.

> [H]igh-minded lawyers were embarked on a practical program of reform. As leaders of the bar, they belonged to a radiation, communicated through endless reiteration in formal speeches, of patrician Whig aspirations to play a distinctive role in American society as a Third Force in politics (in fact the role of "the few" in classical republican theory), mediating between capital and labor, between private acquisitiveness and democratic redistributive follies; thus, they kept looking for social stages on which to enact the role of Tocqueville's lawyer-aristocrats.

*Id.*

309. *See* Shaffer, *supra* note 304, at 321; Zacharias, *Rethinking Confidentiality*, *supra* note 249, at 351. Judge Sharswood's essay makes clear the role that societal forces played in causing his belief in the need for rules of ethics. *See* Shaffer, *supra* note 304, at 321. For example, regarding the pressures on young lawyers to act unethically, Judge Sharswood wrote that "the temptations are very great . . . . There is no class . . . among whom moral delinquency is more marked and disgraceful." *Id.* (quot-

Sharswood's essay then became the foundation for Colonel Jones' successful effort to have Alabama adopt the first written code of ethics. However, while the provisions of Alabama's first ethics rules were drawn from Sharswood's essay on professionalism, the impetus for the Alabama rules was clearly the need to respond to a number of then-recent scandals concerning the bar.[310] Similar forces then caused the Alabama ethics rules to become the basis for the first written ethics rules of the American Bar Association and the several states. One critic has argued: "The adversary ethic was invented in New York City after the Civil War; it had as its purpose the vindication of lawyers who helped the robber barons bribe judges and sell watered securities."[311]

Apart from shaping the general tenor of the ethics of the profession, societal events and perceptions have also shaped the rules themselves. For example, Model Rule 5.7—concerning lawyers providing nonlegal services—stems from fears, beginning in the 1930s that lawyers were using nonlegal services as feeder services for their legal work.[312] Spurred by a Supreme Court ruling against bans on lawyer advertising indicating qualifications in other professions[313] and a Justice department In-

---

ing GEORGE SHARSWOOD, ESSAY ON PROFESSIONAL ETHICS (1854) *reprinted in* 32 A.B.A. REP. 168, 170 (1907)). Sharswood served as Chief Justice of Pennsylvania, founder of the law school at the University of Pennsylvania, and a Presbyterian Sunday School teacher. *See* Shaffer, *supra* note 304, at 321. In addition to Sharswood, the work of David Hoffman also played a major role in the early development of our codes of legal ethics. *See* Zacharias, *Rethinking Confidentiality*, *supra* note 249, at 351.

310. *Cf.* Walter B. Jones, *Canons of Professional Ethics, Their Genesis and History*, 7 NOTRE DAME LAW. 483 (1932). For example, Colonel Jones remarked as to the need for rules on excessive hospitality towards judges, today known as bribery:

> That section was put in the Code . . . which, if members will recall for a moment, will leave no doubt that such abuses have existed in Alabama. When I mention a name everybody will at once confess that there has been in times past a necessity for having and acting upon such a rule. I refer to Busteed. There were others whom I might mention.

*Id.* at 489-90 (quoting ALABAMA ST. B. ASS'N, COMMITTEE ON CODE OF LEGAL ETHICS, REPORT OF THE TENTH ANNUAL MEETING (1887)).

311. *See* Shaffer, *supra* note 304, at 323 (1987).

312. *See* Dennis J. Block et al., *Model Rule of Professional Conduct 5.7: Its Origin and Interpretation*, 5 GEO. J. LEGAL ETHICS 739, 745-49 (1991).

313. *See* Block, *supra* note 312, at 749; *see also* Bates v. State Bar, 433 U.S. 350

formal Opinion stating that ABA opinions were no longer binding on lawyers,[314] a host of law firms began providing a wealth of nonlegal services.[315] When this rush to provide nonlegal services caused serious concerns to arise over the professionalism of these services,[316] the ABA adopted Model Rule 5.7.[317]

Similarly, the current debate over the need for mandatory pro bono service requirements[318] in the ethics rules can be traced back to the changes in the 1830s that caused law to become not just a method of settling disputes, but a force of social change.[319] This change in the role of law, in turn, caused law to permeate all aspects of the average person's life. The growing effect of law on the lives of average people, in turn, has led to the movement now afoot to ensure that the economically disadvantaged are not further hampered by their inability to obtain legal counsel.[320]

---

(1977) (repealing DR 2-102(E)).

314. *See* Block, *supra* note 312, at 750; CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 65 (1986).

315. *See* Block, *supra* note 312, at 749-50. In the 1980s, subsidiaries and affiliates of law firms began providing "law related" services. *Id.* By 1989, law firms were running banks, designing consulting firms, etc. *Id.* "Notwithstanding the ethical rules against fee-splitting, there was an expectation that there would be referals between the law firm and its affiliates." *Id.* at 751.

316. For a discussion of these concerns, see *id.* at 757-77.

317. *Id.* at 792.

318. For a discussion of the mandatory pro bono debate, see Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFTSTRA L. REV. 1113 (1991).

319. *See* Kenneth L. Penegar, *The Five Pillars of Professionalism*, 49 U. PITT. L. REV. 307, 316-18 (1988). From colonial time to, roughly, the 1830s, two events occurred that caused law to become a social force. First, there was a "gradual strangulation of the private commercial arbitration system by the courts." *Id.* at 319; MORTON HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 140-59 (1977). Second, there also occurred a loosening of common law attitudes to commerce. Penegar, *supra*, at 319. These changes caused law to become, over time, a tool for societal change and control. *Id.*; HOROWITZ, *supra*, at 154-55.

320. Penegar, *supra* note 319, at 318; Robert F. Drinan, S.J., *Legal Ethics 1983 to 1993: Golden Age or a Decade of Decline?*, 6 GEO. J. LEGAL ETHICS 693 (1993) (discussing evolution of the ABA's position on mandatory *pro bono*). For a discussion on the access debate—whether America is over-lawyered or under-lawyered, see Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531 (1994).

However, perhaps the best example of how the legal profession has used the rules of ethics to respond to societal changes in the perception of lawyers and law is the profession's response to the Watergate scandal.[321] "It has been speculated that the Watergate scandal was the proximate cause for the requirement of the ABA that each accredited law school require a course in legal ethics"[322] and that it also spurred other advances such as the enormous growth in legal ethics scholarship.

### *B. The Need to React to the Current Dynamics of Politics*

In his biting critique *Why Americans Hate Politics*, E.J. Dionne argued:

> Over the last three decades, the faith of the American people in their democratic institutions has declined, and Americans have begun to doubt their ability to improve the world through politics. At a time when the people of Poland, Hungary, and Czechoslavakia are experiencing the excitement of self-government, Americans view politics with boredom and detachment.[323]

In gauging the public mood, one can argue that Dionne may have been too kind to our institutions of democracy.[324] More than being merely detached,[325] the American public is out-

---

321. *See* Robert F. Drinan, *Moral Architects or Selfish Schemers?*, 79 GEO. L.J. 389 (1990) (reviewing RICHARD ABEL, AMERICAN LAWYERS (1989)).

322. ABEL, *supra* note 321, at 142-43.

323. E.J. DIONNE, JR., WHY AMERICANS HATE POLITICS 10 (1991).

324. Michael Nelson, Why Americans Hate Politics and Politicians, Address at the M.L. Siedman Town Hall Lecture (June 15, 1994), *available in* LEXIS, CURNWS database. Mr. Nelson provides the following:

> I sometimes do a little word association on the first day of my introductory American government classes at Rhodes College. The first word I say is "politics" and back from my students come replies such as these . . . : "corrupt," they say, "dirty," "games-playing," "ego trip," "a waste." [sic] The nicest thing I heard the last time I did this was "boring."). Here is how they respond to "politician": selfish, ambitious, mediocre, unprincipled.

*Id.* at *1.

325. *See, e.g.*, Meg Turville-Heitz, *'Why Bother' Many Ask About Voting*, CAPITAL

raged at the failure of our leaders to move the country forward,[326] and the trend is not promising.[327] One reason, among many, why our leaders seem incapable of moving the country forward is that the political processes of today simply do not reward the politics of remedies[328]—what Jim Wallis has aptly titled the "Soul of Politics."[329]

The tenor of current political debate provides a number of serious disincentives to any effort to bring the substance of solutions into the rhetoric of campaigns. Negative campaigning has created a fixation among the media and the public with titillating character flaws and prior bad acts. After all, tattling on the sexual peccadillos of a candidate is far easier and more interesting than reporting on the nitty-gritty of, for example, regulatory reform. This vulgar preoccupation is highly detrimental to the conduct of politics and, in turn, democracy in America.

Most notably, this fixation drowns out any attempt to discuss substance. Nothing displays this effect better than Presidential candidate Bill Clinton's appearance on the Phil Donahue show. Then Governor and Presidential candidate Clinton ap-

---

TIMES, Nov. 7, 1994, at 3A.

326. *See id.*; STANLEY B. GREENBERG, MIDDLE CLASS DREAMS 18-19 (1995). Stanley Greenberg, the noted Democratic pollster, has written:

> The lies, the perks, the bounced checks, the waste, the sweetheart deals, the privileges, the indifference to popular opinion—all stirred outrage when the country's leaders could no longer show ordinary Americans the way forward. And no amount of muckraking, ethics investigations, campaign reform, or term limits will restore the public trust. Political distrust is rooted not in corruption but in a larger failure of ideas.

*Id.* at 19. Dionne also argues that the failure of politics is rooted in the failure of ideas occasioned by the failure of liberalism and conservatism alike. *See* DIONNE, *supra* note 323.

327. *See* Rene Sanchez, *Political Bug Bites Fewer College Freshman*, WASH. POST, Jan. 9, 1995, at A5. A 1995 survey of 238,000 college freshmen from around the country, conducted by the University of California at Los Angeles Higher Education Research Institute, found that political interest and activity was at an all time low. *Id.* Alexander Astin who headed up the study has stated that "the negative campaigning that has come to dominate many elections, and the growing hostility you hear toward government and public service, is certainly being picked up a lot by young people." *Id.*

328. DIONNE, *supra* note 323, at 16-17.

329. *See generally* JIM WALLIS, THE SOUL OF POLITICS (1994).

peared on the Donahue show to discuss his plans for America only to find that the once serious Donahue was more interested in discussing Clinton's infidelities. Clinton finally became so exasperated that he replied: "We're going to sit here a long time in silence, Phil. I'm not going to answer any more of these questions . . . . I've answered 'em until I'm blue in the face. You are responsible for the cynicism in this country. You don't want to talk about the real issues."[330]

Even when some semblance of an issue does manage to creep into political discourse, the real issue is almost certain to be distorted, and the facts manipulated, if not wholly re-fabricated, in order to create a catchy, viable political message. For example, while issues of national defense certainly deserve a place in campaign debate, when this issue was engaged during the 1988 Bush-Dukakis Presidential race, the real issues were obscured by advertisements showing Governor Dukakis riding in a tank, accompanied by a voice-over making false charges about the Governor's record on defense.[331] Not to be outdone, when the Dukakis camp attempted to engage on the real issue of social security, it did so by "invit[ing] the false inference that George Bush had voted to substantially cut Social Security."[332] A more recent example of the hyperbolization of real issues concerns welfare. Christine Todd Whitman, the Governor of New Jersey, recently attempted to engage the public on the issue of public support of illegitimate children, by charging that black men participated in a contest to see who could father the most illegitimate children. Illegitimacy is an issue worthy of public debate absent any fabricated contest. Yet, the current discourse of politics invites, if not de facto requires, that real issues be hyperbolized.

Further, because news is made by the assertion regardless of its truth and the disproof of any invalid assault garners

---

330. JAMIESON, *supra* note 11, at 265 (quoting then Governor Bill Clinton). The Willie Horton campaign waged against the Dukakis candidacy is another dramatic example of how attack campaigning replaces real policy discussions with ad agency created visceral dribble. *Id.* at 31.

331. *See id.* at 5-7.

332. *Id.* at 53.

much less media or public attention,[333] current political discourse rewards dishonesty and fabrication. Add to this the fact that because political candidates are public persons, their opponents can act with almost absolute impunity free from even the constraints of liability for slander and libel.[334] In other words, the ethical, who are most needed in office, do not run,[335] finish last, or, worse yet, find that to win they must compromise their ethical character.

Writing on the failure of modern day politics, Wallis eloquently notes:

> Candidates compete against each other with quick media sound bites, negative attack ads, and carefully calculated images on the stage of television, which has become the primary—and virtually only—arena of public political discourse. After the exchange of symbols, code words, and dishonest slander, a poll is taken and the winners declared. An election is merely the final poll.
>
> This closed system of media-oriented political entertainment continually preempts genuine public dialogue and debate about the issues that most affect people's lives and the character of the nation.[336]

Combatting this plague on political discourse requires us to force the issue on the public. Something must happen to require all of us to pay more attention to the necessary tedium of real issues rather than the distractions of dirty politics. Requiring lawyers to live up to their professional commitments as officers of the court in their political conduct will not, by itself, bring about this change. However, given the profusion of

---

333. *See, e.g., id.* at 102-04, 123-59.

334. *Cf.* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (applying actual malice standard to cover persons caught up in matters of public interest); Time, Inc. v. Hill 385 U.S. 374 (1967) (extending actual malice standard to public figures); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (enunciating actual malice standard for public officials).

335. *See* Floyd E. Thompson, *The Lawyer's Responsibility to His Government*, 7 NOTRE DAME L. REV. 518, 523 (1932) ("Politics is rotten, not so much because of the bad men who are in it as because of the good people who stay out of it.").

336. WALLIS, *supra* note 329, at 10.

lawyers within politics, requiring politically active lawyers to be ethical in their conduct could play a major role in this effort.

Imagine what would happen if every campaign statement in which any lawyer was involved in creating or disseminating had to be factual in its content and not calculated to mislead. While non-lawyers could continue to act with impunity, the enforcement of such a requirement, which already exists under the rules of ethics, would begin to force a shift away from smear campaigns and toward real discourse on major issues.

Similarly, imagine the reduction in corrupt campaign finance practices that would occur if lawyers involved with a campaign's finances placed their professional reputations and potentially the tools of their livelihood on the line any time they lied, cheated, deceived, or mislead the regulatory authorities or the public. Although these acts are already prohibited under campaign finance laws, adding ethical enforcement will help close gaps in campaign finance enforcement and will up the penalty ante on bad acts. Here again, merely preventing lawyers from campaign finance improprieties will not fix all of the problems of money and politics; however, it can bring a modicum of ethics back into the business of politics.

Using the rules of ethics to help make politicians and the political discourse in the United States more responsive to the needs of the American people will require a number of changes in the status quo. As noted above, lawyers and the bar must be far more vigilant in policing the actions of lawyers in political campaigns.[337] The bar must be far more aggressive in pursuing sanctions where a lawyer's campaign actions have failed to comply with the rules of ethics.[338] Sanctions for such transgressions must be made more severe than the slap on the wrist that often follows an ethics violation. In deciding on an appropriate sanction, the reviewing court must weigh the extent to which the bad conduct caused prejudice or harm to the most essential elements of our democracy, namely the political pro-

337. *See supra* notes 272-86 and accompanying text.
338. *See supra* notes 287-301 and accompanying text.

cess and the right of franchise.

Some, however, will oppose stricter enforcement of the rules of ethics on campaign activities. Critics likely will argue that such strict enforcement would violate a lawyer's constitutional rights of free speech, chill political discourse, and place lawyers at a disadvantage in politics vis-a-vis laymen and hamper their participation. Each of these arguments falls far wide of the mark.

First, with regard to the constitutional argument that such constraints would violate the First Amendment, the Supreme Court in *Buckeley v. Valeo*,[339] explicitly held: "Neither the right to associate nor the right to participate in political activities is 'absolute.' Even a 'significant interference' with protected rights of 'political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms."[340] In this regard, courts have routinely held that the interest of the state in regulating the conduct, including the political activities of lawyers, is sufficient so that the reasonable regulations of the rules of ethics do not infringe on the right of free speech.[341] For example, the *In re Woodward* court held that

> [a] layman may, perhaps, pursue his theories of free speech or political activities until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canon of Ethics; and if he wishes to remain a member of the bar he will conduct himself in accordance therewith.[342]

The argument that the more stringent application of the rules of ethics to campaign actions will chill vigorous public

---

339. 424 U.S. 1 (1976).

340. *Id.* at 25 (citations omitted).

341. *See, e.g.*, State v. Russell, 610 P.2d 1122, 1126 (Kan. 1980); Kentucky State Bar Ass'n v. Lewis, 282 S.W.2d 321, 326 (Ky. Ct. App. 1955); Nebraska State Bar Ass'n v. Michaelis, 316 N.W.2d 46, 53 (Neb. 1982); *In re* Thatcher, 89 N.E.2d 39, 88 (Ohio 1909).

342. 300 S.W.2d 385, 393-94 (Mo. 1957).

political discourse is also misguided. Political campaigns now spend record amounts of money to conduct massive advertising campaigns to get their messages out to the public. Yet, candidate after candidate, scholar after scholar, leader after leader, and commentator after commentator agree that the discourse of political debate is fundamentally broken. The threat then to democracy is not that this extensive debate will be quelled; the real threats to democracy are the unethical and misleading arguments that obfuscate issues and misrepresent the statements and actions of other candidates. While the public has a right to vigorous political debate, that right is worthless unless the debate that ensues is based on substance and truth. Thus, a more stringent application of the rules of ethics advances, not constrains, the public interest in vigorous political discourse.

The third argument likely to be set against the more stringent application of the rules of ethics to campaign activities is that such application will place lawyers at a disadvantage and deter them from participating in politics.[343] Taken to the extreme, such an argument could be couched in terms of constitutional Equal Protection requirements. Replying to this argument requires two parts. First, an equal protection challenge to more stringent ethics enforcement is all but certain to fail.[344]

---

343. *Cf., e.g.*, Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 645 (1981): "Indeed, lawyers reject the rigors of a higher morality: they resent ethical restrictions on dealing with legislative and administrative bodies for 'fear that [they] will thus be put at a competitive disadvantage with nonlawyers.'" *Id.* (quoting MODEL RULES, *supra* note 143, at proposed Rule 3.12 cmt. (Discussion Draft)).

344. The Supreme Court has established three levels of scrutiny over differential governmental classifications. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 578 (4th ed. 1991). Heightened scrutiny, including both mid-tier and strict review, is limited to cases involving fundamental rights or certain suspect classes. *Id.* at 579. In this instance, the strict application of differential rules of election ethics on lawyers does not involve either of the triggers for heightened review. While the application of the rules of ethics to election activities does indirectly affect the right of franchise, such application would not in any way deny the voters' right to select candidates, access to the polls, or even a candidate's interest in running. *Cf.* Buckley v. Valeo, 424 U.S. 1, 92 (1976) (differentiating between cases involving direct burdens on the right of franchise and those that do not hamper voter or candidate choice). Further, lawyers are not a suspect class. *See* Guralnick v. Superior Court, 747 F. Supp. 1109,

Second, while it is true that the more rigid application of the rules of ethics would require a higher standard of care from political lawyers than political laymen, such a difference of obligations is neither improper, nor will it have a significant impact on lawyers in politics. Differential responsibilities are a price that lawyers, as officers of the courts, pay to be members of the profession.[345] Moreover, lawyers are routinely held to a higher standard than laymen in everything from conducting business negotiations for clients to selling their cars, yet this higher standard has not deterred lawyers from continuing to do these things. Similarly, the stringent application of the rules of ethics to campaign activities should not deter lawyers from politics. Further, those lawyers who are so concerned that egregious political actions may bring about liabilities as to remove themselves from participating in politics probably should not be involved in matters of public trust in the first place.

Moreover, it is entirely appropriate to hold lawyers to a higher standard here. First, lawyers occupy roles different from laymen in our society. As the Honorable Floyd E. Thompson once wrote: "The lawyer is, in the broader and truer sense, a public servant. He secures the privilege to practice his profession from the State, and he depends for his success upon the favor and esteem of the public."[346]

---

1114 (D.N.J. 1990), *aff'd*, 961 F.2d 209 (3d Cir. 1992). Thus, the more strict application of ethics rules would need to pass rationality review, which should not prove difficult. Here the states have a strong interest in maintaining the integrity of both the American democratic process and the legal profession. *See, e.g.*, Clements v. Fashing, 457 U.S. 957, 965 (1982) (interest in democratic process); Bullock v. Carter, 405 U.S. 134 (1972); United States v. Classic, 313 U.S. 299 (1941) (interest in democratic process); Hagestrad v. Trasgesser, 49 F.3d 1430 (9th Cir. 1995) (regulation of legal profession); Anonymous v. Association of the Bar, 515 F.2d 427, 432 (2d Cir. 1974), *cert. denied*, 423 U.S. 863 (1975) (regulation of legal profession); *Russell*, 610 P.2d at 1126 (regulation of legal profession).

345. *Cf. In re* Woodward, 300 S.W.2d 385 (Mo. 1957); *see also* MODEL CODE, *supra* note 143, at Canon 2A; Bradley A. Siciliano, Note, *Attorney Contributions in Judicial Campaigns: Creating the Appearance of Impropriety*, 20 HOFSTRA L. REV. 217, 242 (1991) (noting that the differential rules of campaign finance in judicial elections imposed on lawyers is the "price that one must pay to be a member of the legal community").

346. Thompson, *supra* note 335, at 524.

In a practical sense, the lawyer is also different from a layman, and this practical difference carries over into the lawyer's work within a campaign. For example, assume there is an ongoing debate over the legality of some campaign finance issue. While the layman can speak to the practicalities of the situation the lawyer can and must speak to the legalities implied by the choice. In other words, the lawyer's differential knowledge and her profession's monopoly on that knowledge[347] and the authority it provides, like it or not, create differential responsibilities.

Further, differential treatment is also appropriate because lawyers have played a greater role in creating the situation we now face. While lawyers have had plenty of help in undermining the public's confidence in our political system, lawyers have literally done more than their share in its demise. Recall that Watergate, the defining moment of the public's utter mistrust of politics, which rocked the nation, led to the punishment of twenty-eight lawyers.[348]

## VIII. Avoiding Campaign Ethics Problems

While lawyers and law firms have developed advanced systems for avoiding ethical problems, such as rules against conflicts of interests, these systems are not being applied to campaign activities. Avoiding these ethical conflicts will require a commitment on the part of individual law firms, lawyers, campaigns, and the disciplinary authorities to ensure that a lawyer's campaign actions are ethically above board.

### *A. Law Firms and Supervising Lawyers*

Recognizing that the rules of ethics apply to campaign actions is the first step a law firm must take to avoid ethical problems arising from the political actions of its members.

---

347. *See, e.g.*, Rhode, *supra* note 303, at 714 (discussing how rules of ethics assist lawyers in maintaining an autonomous monopoly on the profession and its tasks).

348. *See* Robert F. Drinan, *Moral Architects or Selfish Schemers?*, 79 Geo. L.J. 389 (1990) (reviewing Richard L. Abel, American Lawyers (1989)).

Once this recognition occurs, law firms can avoid most campaign ethics problems by ensuring that the same ethics checks that they apply to other matters are applied in the context of campaign actions.

Law firms ensure that their lawyers are acting ethically in principle through two means: (1) systems designed to identify and thereby prevent conflicts of interests and (2) supervisory hierarchies that oversee attorney behavior.[349] Neither of these mechanisms are currently being utilized in the context of campaign efforts.[350] While most new matters, including pro bono efforts, are run through a conflicts check,[351] such conflicts checks are rarely done with regard to political matters.[352] In fact, in many instances, lawyers doing work on political campaigns do not even notify their firm's conflicts coordinator of these efforts.[353]

Even where notice is given and conflicts checks are run, current conflicts checks are ill-equipped to identify the types of problems presented by campaign activities.[354] For example, most conflicts checks are too party-oriented and would only identify a conflict where the principal of the campaign was in litigation as a named party against a client of the firm.[355]

In order to rectify this situation, law firms who employ politically active lawyers must require these lawyers to put their campaign efforts through the firm's conflicts process. Additionally, firms must modify their conflicts checks to better identify, particularly in the political realm, positional conflicts of interest.[356] This will require the campaigning lawyer to

---

349. *See generally* Ted Schneyer, *Professional Discipline For Law Firms?*, 77 CORNELL L. REV. 1 (1991) (discussing conflicts prevention); Miller, *supra* note 286, at 18 (discussing methods of supervision reported in THE MACCRATE REPORT: BUILDING THE EDUCATIONAL CONTINUUM—CONFERENCE PROCEEDINGS (Joan S. Howland & William H. Lindberg eds., 1994)).

350. *See supra* notes 276-77 and accompanying text.

351. *See, e.g.*, Dzienkowski, *supra* note 146, at 536.

352. *See supra* part II.

353. *See supra* part II.

354. *Accord* Dzienkowski, *supra* note 146, at 536-37.

355. *Cf. id.*

356. *Cf. id.*

identify the areas of their campaign efforts, which should then be circulated to the other lawyers within the firm for a review of any potential conflicts—a process now greatly facilitated by the advent of e-mail.[357] Where such a review identifies a potential or real conflict, the firm must submit the conflict to the same process it would follow with a more traditional conflicts problem. In some instances, this may require the firm to receive the consent of the parties. In other instances, it may require the lawyer to refrain from the campaign action or to sever his relationship with the firm.

Law firms also ensure that their lawyers are behaving ethically by providing supervision over the acts of individual lawyers.[358] However, while lawyers are increasingly assigned to a senior lawyer or partner who oversees their work, this rarely occurs when lawyers' actions are political in nature. Because firms have a responsibility to oversee the actions of their members, the supervisory functions of a firm's more senior members must be extended to include political actions. In other words, once a firm has agreed to allow a lawyer to conduct political actions while a member of the firm, the firm must treat these actions with the same diligence and care that it provides over all the other representations undertaken by the firm.

### *B. Lawyers*

As with all ethical issues, the ultimate responsibility for ensuring that the political actions of an individual lawyer comport with the rules of ethics lies with the individual lawyer.[359] No matter how advanced the ethics checks of a firm or cam-

---

357. *See id.*

358. *See* Schneyer, *supra* note 272, at 17 (discussing the direct and indirect supervisory aspects of Model Rule 5.1(a)).

359. *Accord* MODEL RULES, *supra* note 143, at Rule 5.2; Attorney Grievance Comm'n v. Kahn 431 A.2d 1336, 1351 (Md. 1981) (even threat of firing cannot justify breach of ethical obligation); *In re* Knight, 281 A.2d 46, 47-48 (Vt. 1971) (junior lawyer who was domineered by a supervisor was prevented from avoiding responsibility for own participation). *See also* Miller, *supra* note 273, at 295 ("the subordinate bears ultimate disciplinary responsibility").

paign may be, these checks will only work if individual lawyers submit themselves to these processes and work to ensure their effective functioning. Each lawyer must take it upon himself to serve as the primary policeman over his own behavior.

Here again, the first step is recognition. Politically active lawyers must realize that the rules of ethics apply to their political endeavors and must treat these matters with the same degree of ethical circumspection that they treat other matters in their practices. During discussions over this piece with colleagues, it became readily apparent that *most* of the most vexing campaign ethics issues could be ironed out to a satisfactory result by a careful analysis of the facts and the law on point.

The role of the individual lawyer is particularly important with regard to lawyers who leave a firm to join a campaign. In these instances, the individual lawyer is best situated to identify and prevent ethical problems. The individual lawyer is the most capable of reviewing the matters assigned to him as part of the campaign with an eye to determining when these matters might conflict with the interests of clients of his prior firm. The individual lawyer is also best suited to review his or her own behaviors to ensure their ethical nature. For example, the lawyer must be reasonably certain, based on adequate investigation, that the charges that he or she is making concerning an opponent are both based in fact and not misleading. The lawyer must conduct similar reviews of the actions of those who he or she is charged with supervising.[360] Each lawyer, whether they are the candidate or a functionary, must undertake these and other personal ethical reviews.

In addition, lawyers also have an obligation to police the actions of other lawyers. First, they have an obligation to oversee the campaign activities of those people, both lawyers and non-lawyers, who they supervise.[361] Second, they also have an obligation to police the actions of other members of their

360. MODEL RULES, *supra* note 143, at Rule 5.1(b).

361. *See* MODEL RULES, *supra* note 143, at Rule 5.3 (duty to supervise non-lawyers); MODEL CODE, *supra* note 143, at DR 4-101(D) (duty to supervise non-lawyers); MODEL RULES, *supra* note 143, at Rule 5.1(b) (duty to supervise subordinate lawyers).

firm[362] and the bar generally. For example, if a lawyer working on a campaign has reason to believe that another lawyer, whether on the competing campaign or on the same campaign, has violated the rules of ethics, the lawyer with knowledge must report that information to the proper authorities.[363]

### *C. Campaigns*

Campaigns also have a major role to play in ensuring that their actions meet the rules of ethics. Like firms, campaigns must establish ways of identifying conflicts of interests that affect their volunteers and staff members who are lawyers.[364] Where conflicts are identified, campaigns must put in place procedures designed to prevent any breach of ethics. For example, certain lawyers might need to be screened, or "Chinese walled," away from certain information or issues.[365] Further, the principal legal officer on each campaign has an obligation to ensure that campaign workers in general, but lawyers in particular, are familiar with the ethical obligations and are properly supervised to ensure compliance with these obligations.

---

362. MODEL RULES, *supra* note 143, at Rule 5.1(c).

363. Under the rules of ethics, the preferred first means of disclosure is within the client, or in the case of a campaign as client, up the campaign ladder. *Cf.* Reilly, *supra* note 225, at 335; John K. Villa, *Emerging Theories of Liability for Lending Counsel, in* THE ATTORNEY-CLIENT RELATIONSHIP AFTER KAYE, SCHOLER (PLI Corp. Law & Practice Course Handbook Series No. 779, 1992). Up ladder disclosure, however, may not be a panacea. First, "as a practical matter . . . any disclosure 'up the [campaign] ladder' has a strong disincentive and could jeopardize the attorney's continued employment . . . ." Reilly, *supra* note 225, at 335; Villa, *supra*, at 125. Second, if the up ladder disclosure does not adequately address the egregious conduct, the lawyer may still have an obligation of external disclosure.

364. *Cf.* Dzienkowski, *supra* note 146, at 536-38 (discussing necessary risk management steps for law firms).

365. For discussions on the use of screens or "Chinese walls" see generally, Randall B. Bateman, *Return to Ethics as a Standard for Attorney Disqualification: Attempting Consistency for Disqualification By the Use of Chinese Walls*, 33 DUQ. L. REV. 249 (1995); Peter Moser, *Chinese Walls: A Means of Avoiding Law Firm Disqualification When a Personally Disqualified Lawyer Joins the Firm*, 3 GEO. J. LEGAL ETHICS 399 (1990).

### *D. Disciplinary Authorities and the Bar*

While the most effective vehicle for ensuring that lawyers acting on campaigns do so in the most ethical manner rests with the individual lawyer, disciplinary authorities and the bar must also play a role in this effort. Despite the longstanding tradition of applying the rules of ethics to lawyers on campaigns, ethics enforcement efforts in this area have been too few and far between. The bar must take seriously its obligation to police how its members act on campaigns. The bar must be more vigorous in overseeing campaign actions and stricter in applying the rules of ethics when transgressions occur. In addition, the bar must also recognize the seriousness of unethical conduct during campaigns. When lawyers foul the fundamental processes by which our democracy works, their actions must be swiftly and severely sanctioned.

Apart from merely enforcing these rules in the context of campaigns, the bar has another significant role to play. If the rules of ethics are to be applied more thoroughly to campaign actions, the bar will need to give better guidance to its members on how these rules should be applied to campaign activities. Above, this Author noted that *most* campaign ethics issues could be resolved by simply applying with great care the rules to the facts. However, in a significant number of even fairly straight-forward campaign ethics dilemmas, the rules offer no clear course of action.[366] These difficulties arise because the rules of ethics were not developed with campaigns in mind, yet, there is good reason to apply them to lawyers in campaigns. Moreover, as the practice of both law and politics has become more complex, the more difficult permutations may swallow the simpler applications leaving even the most ethical and diligent campaigning lawyers no recourse but to throw their hands in the air. The bar needs to provide better guidance on how the rules of ethics should apply in these situations, so that lawyers can follow the rules.

---

366. *See, e.g.*, *supra* notes 205-07 (discussing the difficulties inherent in applying the rule on imputed disqualification to campaigns); *supra* part IV.C (discussing problems with conflicting jurisdiction rules on permissive disclosure in national campaigns).

Developing such guidance would present the bar with an important opportunity to, in effect, re-craft the rules of ethics as applied to campaign activities. This opportunity would allow the bar to develop sensible rules tailored to the ethical issues raised by the work of a politically active lawyer. Rules crafted through such an important effort could provide a better balance between the competing interests at stake. For example, the bar could through this exercise adopt a clarification or a new rule that would prohibit a campaigning lawyer from making malicious and defamatory charges, but would not exclude him from partaking in vigorous public debate. Similarly, a helpful new rule or clarification of the existing rules on conflicts might prevent a lawyer's campaign actions from directly undercutting a position of, or otherwise harming, her client, but would not prevent her from working on both sides of an issue in public debate.

## IX. CONCLUSION

From the very birth of our nation, lawyers have played an integral role in advancing the cause of democracy.[367] Among the founding fathers who fashioned this grand experiment at great personal risk were attorney-statesmen like John Marshall, Thomas Jefferson, John Adams, James Wilson, John Jay, George Wythe, and Francis Hopkinson.[368] "Twenty-five of the fifty-six signers of the Declaration of Independence were lawyers, and thirty-one of the fifty-five delegates to the Constitutional Convention were lawyers."[369] Throughout the nation's development, lawyers have continued to play indispensable roles in our democratic political processes. Senator Matthew Hale Carpenter fought for women's suffrage in the Senate and defended Susan B. Anthony in court when she was fined for

---

367. *See generally* Thompson, *supra* note 335.

368. *See* LAWRENCE C. FRIEDMAN, A HISTORY OF AMERICAN LAW 101 (2d ed. 1985); WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS (1950).

369. *Id.* In fact, all the committee of drafters of Declaration of Independence with the lone exception of Dr. Franklin were also lawyers. Thompson, *supra* note 335, at 518-19.

attempting to vote in the 1874 Presidential election.[370] While a litigator with the NAACP Legal Defense Fund, Supreme Court Justice Thurgood Marshall battled seemingly insurmountable odds to ensure that African-Americans have a voice in our political system of democracy.[371]

The origins of the rules of ethics themselves reflect the bar's attempts to realize a republican legal ethic[372] designed to secure for lawyers a guiding role, along the lines of that envisioned by Tocqueville,[373] in the political course of our country.[374]

The legal profession now has the opportunity to once again play a catalyst role in righting the course of democracy in America. By holding ourselves and our fellow members of the bar to the highest standard of ethical conduct, we can lead by example. We can show that it is possible to return the discourse of politics to the substance of issues based on truth. Moreover, to paraphrase Cornell West, while law and lawyers alone cannot fix the American political process, the American political process cannot be fixed without their involvement.[375]

Stepping away from the more lofty goal of improving the quality of democracy in America, members of the bar have an existing obligation to conform with the rules of ethics that has yet to be fully realized. From a very practical perspective, in order to avoid the real world of liabilities and sanctions, lawyers must begin to take more seriously their ethical obligations

---

370. *See* EDWIN BRUCE THOMPSON, MATTHEW HALE CARPENTER: WEBSTER OF THE WEST 102, 292 n.39 (1954).

371. *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953) (prohibiting exclusion of African Americans from the Democratic Party); Smith v. Allwright, 321 U.S. 649 (1944) (prohibiting exclusion of African-Americans in state primary elections).

372. Sharswood summarized the republican ethic as follows: The "lawyer's principal obligation was the republican pursuit of the community's common good even where it conflicts with either her client's or her own interests." Shaffer, *supra* note 304, at 1.

373. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 288-89 (Francis Bowen trans., Vintage Books 1945) (1835).

374. *See* Gordon, *supra* note 305, at 56.

375. *See* Cornell West, *The Role of Law in Progressive Politics*, *in* DAVID KAIRYS, THE POLITICS OF LAW 468, 468-70 (1990).

in their political efforts.

Will Rogers once said, "[I]f you ever injected truth into politics you have no politics."[376] Perhaps he was as right as he was wrong. Perhaps if you injected truth and the other constraints of ethics into politics, you have no politics as we now know it, and that might not be such a bad thing.

376. WILL ROGERS, THE AUTOBIOGRAPHY OF WILL ROGERS 82 (16th ed. 1949).

## APPENDIX I

### Confidential Survey on Legal Ethics and Campaign Activities

Please answer the following question:

1. While a member of a bar, have you ever worked, volunteered or otherwise assisted on a political campaign?
__ yes
__ no

**Please proceed to the following questions only if you answered "yes" to question number 1 above. If you have worked on more than one campaign while a member of a bar please answer all questions as they relate to the last campaign you worked on.**

With regard to the last campaign you worked on, please answer the following questions:

2. What election year did this effort occur in? ____

3. Describe the office for which the campaign was running:
__ local nonjudicial office
__ local judicial
__ federal
__ state judicial
__ state nonjudicial

4. Describe your role on this last campaign (check all that apply):
__ candidate
__ unpaid, part time
__ paid, part time
__ unpaid, full time
__ paid, full time

5. During the time period during which you were working on this campaign were you (check all that apply):

__ solely employed by, or otherwise working only for, the campaign
__ on leave from a law firm, association, company or corporation
__ simultaneously working for a law firm, association, company or corporation
__ simultaneously employed by the government
__ on leave from the government

6. Describe the work that you performed on this last campaign (check all that apply):

__ fundraising
__ rendering legal opinions
__ providing advice on policy options
__ advance (including press advance)
__ political strategy development/implementation
__ opposition research
__ litigation
__ regulatory work
__ speech writing/surrogate speaking
__ other research/writing

7. Before going to work on this campaign was a conflict of interest check performed by any of the following (check all that apply):

__ the campaign
__ any other law firm, association, company or corporation that employed you at the time
__ by yourself
__ no check performed

**If you checked any of the choices in question 7 proceed to question 8. If you did not check any of these choices go on to question 9.**

8. For any conflicts of interest check identified in question 7 above, did that check(s) examine (check all that apply):

__ current client conflicts
__ past client conflicts
__ positional or issue conflicts
__ don't know

9. Were you assigned a supervising attorney for your work on the campaign?

__ yes
__ no

**If you answered "yes" to question 9 go on to question 10. If you answered "no" go on to question 13.**

10. Who assigned the supervising attorney (check all that apply)?

__ the campaign
__ the law firm, association, company or corporation

11. Did the supervising attorney specifically discuss how the rules of legal ethics (e.g. the ABA Model Rules) applied to your campaign work with you (check only one)?

__ no, never
__ yes, discussed once
__ yes, discussed on occasion
__ yes, regularly/frequently discussed

12. Did the supervising attorney establish or apply an oversight system designed specifically to ensure compliance by you with the rules of legal ethics?

__ yes
__ no

13. During your work on this campaign were you assigned to supervise anyone (including other lawyers, nonlawyers, and support staff)?
__ yes
__ no

**If you answered "yes" to question 13 go on to question 14. If you responded "no" go on to question 15.**

14. Did you specifically discuss how the rules of legal ethics applied to those under you with your subordinates (check only one)?
__ no, never
__ yes, discussed once
__ yes, discussed on occasion
__ yes, regularly/frequently discussed

**Based upon your work on this campaign please answer the following questions by checking the statement that follows the question that you MOST agree with. You need not totally agree with the statement, but it should BEST REFLECT your choice among the options presented.**

15. The positions of the campaign:
__ always agreed exactly with the positions of my other clients (including then present and former clients)
__ sometimes were at odds with the positions of my other clients (including then present and former clients)
__ often were at odds with the positions of my other clients (including then present and former clients)

16. Statements made by your campaign about your opponent:
__ always were entirely accurate
__ sometimes were untrue
__ regularly were untrue
__ I would not know

17. Statements made by your campaign about your opponent:
__ always were based on fact(s)
__ sometimes were not based on, or mischaracterized, fact(s)
__ regularly were not based on, or mischaracterized, fact(s)
__ I would not know

**Final Comments**
Please feel free to provide us with any additional information: