FACSIMILE TRANSMISSION SHEET

ARNOLD & PORTER

399 Park Avenue
New York, NY 10022-4690

Telephone Number ..... (212) 715-1000
Facsimile Number ..... (212) 715-1399

Date: October 20, 2000

NAME/COMPANY	FAX NUMBER	TELEPHONE NUMBER
John Halloran	(212) 953-6483	(212) 661-0011
Kevin Malone	(954) 763-8292	(954) 763-8292
Andrew Sacks	(215) 925-0508	(215) 925-8200
Ronald Rolfe	(212) 474-3700	(212) 474-1000
David Bernick	(312) 861-2200	(312) 861-2248
SENDER	**SENDER'S TELEPHONE #**	
Craig A. Stewart	(212) 715-1142	
CLIENT/MATTER #	**TIMEKEEPER #**	**NUMBER OF PAGE(S)**
11250.249	4710	We are transmitting 19 page(s) (Including this cover sheet)

Alternate telephone number at which the sender can be reached if there are difficulties with this fax:

IF THIS FAX IS ILLEGIBLE OR INCOMPLETE, PLEASE CALL (212) 715-1330

PRIVILEGED AND CONFIDENTIAL

Information intended only for the use of the addressee named above. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, please note that any dissemination, distribution or copying of this communication is strictly prohibited. Anyone who receives this communication in error should notify us immediately by telephone and return the original message to us at the above address via the U.S. Mail.

MESSAGE

ARNOLD & PORTER
399 PARK AVENUE
NEW YORK, NEW YORK 10022-4690
(212) 715-1000
FACSIMILE: (212) 715-1399

WASHINGTON, D.C.
DENVER
LOS ANGELES
LONDON

CRAIG A. STEWART
(212) 715-1142

October 20, 2000

VIA FACSIMILE

Hon. Nicholas G. Garaufis
United States District Court
Eastern District of New York
225 Cadman Plaza East
New York, NY 11201
Attn: Michael Tremonte
Law Clerk

Re: *Department of Amazonas, et al. v. Philip Morris Incorporated, et al.*
00 Civ. 2331 (NGG)

Dear Judge Garaufis:

At the request of Chambers, we are providing a copy of a letter sent on October 12, 2000 by my colleague Irvin Nathan to plaintiffs' counsel, as well as a copy of the retainer agreement referenced in that letter and pertinent portions of the New York Code of Professional Responsibility. During our October 13 conference in this matter, Your Honor had directed that a copy of the attached be provided to the Court. (*See* Tr. 13.)

Respectfully submitted,

Craig A. Stewart

Enclosure
cc: All Counsel (w/enclosure, via facsimile)

ARNOLD & PORTER
555 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20004-1202
(202) 942-5000
FACSIMILE: (202) 942-5999

NEW YORK
DENVER
LOS ANGELES
LONDON

IRVIN B. NATHAN
(202) 942-5070

October 12, 2000

BY FACSIMILE AND REGULAR MAIL

Kevin A. Malone, Esq.
Krupnick, Campbell, Malone, Roselli, Buser, Slama,
Hancock, McNelis, Liberman & McKee
700 Southeast Third Avenue, Suite 100
Fort Lauderdale, Florida 33316

John J. Halloran, Jr., Esq.
Speiser Krause Nolan & Granito
34th Floor, Two Grand Central Tower
140 East 45th Street
New York, NY 10017

Re: ***Department of Amazonas, et al. v. Philip Morris Companies Inc., et al.*, 00 CV 2881 (NGG) (consolidated)**

Dear Kevin and John:

Based on documents that we have received following our last conference with the Court, we feel constrained to raise with the Court at the oral argument scheduled for October 13 the question of whether the retention agreements between the plaintiffs and your firms violate the ethics rules governing the practice of law in New York and require dismissal of the actions or, at the very least, disqualification of your firms.

Following our last conference in this matter, we have received copies of written retention agreements between counsel for the plaintiffs and several Departments, including the Department of Boyaca ("Boyaca"). We are advised that all of the retention agreements with the Departments are publicly available in Colombia as a matter of Colombian law. We presume and are currently checking that the retention agreements between plaintiffs' counsel and the other plaintiff Departments are substantially the same as the Boyaca agreement and the others we have obtained and reviewed.

The agreements contain at least two provisions that appear to contravene New York ethics rules, which have been incorporated into the local rules of the federal District

Court for the Eastern District of New York, and a New York statute.[1] First, the agreements provide that your firms and your co-counsel will indemnify and hold the plaintiffs harmless for (a) any award of costs or attorneys' fees issued by the Court against the plaintiff Departments for bringing an unfounded action against the defendants and (b) for any costs incurred or judgments rendered against the plaintiffs on any counterclaims that may be brought by the defendants. *See, e.g.*, Boyaca Agreement ¶ 12. Second, the agreements provide that your firms and your co-counsel will pay and ultimately be responsible for all expenses incurred in pursuing this litigation in the event that there is no recovery from the defendants. *See, e.g.*, Boyaca Agreement ¶¶ 2, 3, 6, and 12. Both provisions violate New York ethics provisions and the state statute.

The indemnification provisions contained in these agreements stand in clear violation of New York Code of Professional Responsibility DR 5-103(A), *codified* N.Y. Comp. Codes R. & Regs. tit. 22 § 1200.22 (1999), which prohibits a lawyer from acquiring any "proprietary interest in the cause of action or subject matter of litigation he or she is conducting for a client." *See also* Bar Ass'n Nassau County Op. 93-12 (1993) (finding that New York law prohibited proposed retainer agreement that contemplated higher than usual contingency fee but no reimbursement for expenses); ABA Model Rules of Professional Conduct 1.8(j) ("A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client."). Indeed, the indemnification provision also appears to violate a state statute that prohibits an attorney from promising or giving "valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands . . . a demand of any kind, for the purpose of bringing an action thereon, or of representing the claimant in the pursuit of any civil remedy for the recovery thereof." N.Y. Jud. Law § 488(2) (McKinney 1983). The promise of "valuable consideration," namely, insurance to pay an award of attorney's fees or the judgment on any counterclaim, in exchange for the retainer to bring the pending civil action, clearly violates this provision, which reflects the public policy of the state against champerty.[2]

The other provision referenced above, *i.e.*, the agreement that your firm and its co-counsel will be responsible for all costs and expenses in the absence of any recovery

---

[1] For that matter, the agreements appear to contravene the ABA Model Rules of Professional Conduct that have been adopted by Florida and a number of other states.

[2] This provision also appears to violate the ethics rules obtaining in Florida. *See* Fla. State Bar Ethics Op. 96-3 (February 15, 1997) (attorney may not ethically agree to pay fees and costs assessed against client as a sanction.)

also conflicts with New York law. DR 5-103(B)(1) provides that "[w]hile representing a client in connection with contemplated or pending litigation, a lawyer may advance or guarantee the expenses of litigation, a lawyer shall not advance or guarantee financial assistance to the client." While a lawyer may advance or guarantee the expenses of litigation, any non-indigent client must remain "ultimately liable for such expenses." *Id.*

Inasmuch as the provisions of the New York Code of Professional Responsibility cited above apply to cases pending in the United States District Court for the Eastern District of New York, we believe that we are under an obligation to raise these violations of New York law with Judge Garaufis at the earliest opportunity. *See* S.D.N.Y. & E.D.N.Y. Local Civil Rule 1.3(a)(7) (admission to bar requires declaration of adherence to rules); Local Civil Rule 1.5(b)(5) (grounds for discipline).

In our view, these violations would require dismissal of these cases or, at the very least, disqualification of counsel. We believe that the retainer agreements make clear on their face that but for the provisions which appear to violate the governing ethics rules, these lawsuits may never have been brought. We invite you to provide us with any factual information or legal authority that would reflect that the retention agreements between the plaintiffs and your firms (and your co-counsel) are proper under New York law. In the absence of such a showing, we will propose that the question of the propriety of those agreements be the subject of briefing to the Court on a schedule convenient to the Court.

Sincerely,

Irvin Nathan /COM

Irvin B. Nathan

cc: Andrew B. Sacks, Esq. (By Facsimile and Regular Mail)
Ronald S. Rolfe, Esq. (By Facsimile and Regular Mail)
David M. Bernick, Esq. (By Facsimile and Regular Mail)

CONTINGENCY FEE AGREEMENT
DEPARTMENT OF BOYACA V. MULTINATIONAL TOBACCO COMPANIES

THIS AGREEMENT is made between the DEPARTMENT OF BOYACA, (hereinafter designated as the "Client") and Sacks and Smith, L.L.C. and Krupnick, Campbell, Malone, Roselli, Buser, Slama Hancock McNelis Liberman and McKee, P.A. (collectively designated "Attorneys"). The agreement, once signed by all of the parties, is considered effective as of the first date indicated next to the name of the signatory. The parties to this agreement, to be executed in its entirety in a foreign country, with the intention to be legally bound by its provisions, have agreed to the following:

1. Object: The Client engages the Attorneys to represent the Client in litigation in foreign countries against United States and international tobacco manufacturers and other parties responsible on the basis of their activities relating to the contraband of their tobacco products in the DEPARTMENT OF BOYACA, together with all other subsequent claims that the Attorneys consider to be related and to have merit.

2. Costs and expenses: The costs shall not be paid by the Client if there is no compensation of any kind. The Attorneys shall advance the payment of all costs and expenses of the litigation. The sums submitted by the investigators who may be hired by the Client in relation to the preparation and support of the legal actions contemplated in this agreement as costs and expenses shall be paid and entered into the accounts of the Attorneys as a cost. The Attorneys shall be reimbursed by the Client for all of these costs and expenses in their entirety from any income recovered, that is, in addition to the fees payable pursuant to point 6 of this agreement. These costs and expenses shall be paid by the client upon the conclusion of the proceeding, with debit to the compensation obtained, or to the sums derived from any total or partial settlement reached prior to the final decision. The statement of the costs paid by the Attorneys shall be permanently available at the offices of the Attorneys, and shall be sent to the Client upon written request.

3. Additional attorneys: The Attorneys may, at their discretion, associate with or hire additional attorneys and/or law firms to assist them in this litigation. Every new attorney or law firm shall be paid by the Attorneys, and the Client shall not be obliged to pay any additional fee.

4. Warranty of the Client: The Client warrants that the person who enters into this agreement on behalf of the Client has full legal authority pursuant to all laws, ordinances and other rules applicable to the DEPARTMENT OF BOYACA to commit the Client according to the conditions of this agreement, and that all of the actions that must be accomplished for the making and perfection of this agreement have been accomplished.

5. Warranty of the Attorneys: The Attorneys shall represent the Client in a professional and competent manner, to the extent of its capability. The Client understands, however, that litigation is an uncertain process, that the Attorneys cannot guarantee, and, in fact, do not guarantee, a specific outcome of this case, and that the attorneys cannot predict, with precision, how long the litigation may take.

6. Fees: In the event that no monetary compensation, or court order by means of a judgment or settlement, is obtained, the Attorneys shall receive no fee, and the Client shall not be liable for the payment of any expense.

   In compensation for its aforementioned services, the Client agrees that the Attorneys shall receive fees equivalent to fifteen percent (15%) of the gross sums received in the entire proceeding, in accordance with United States or foreign legal customs and practice. The "gross sums received" shall include the amount of the non-monetary compensation received by the Client, in accordance with United States or foreign legal customs and practice.

7. Right of the Attorneys to withdraw: Subject to the rules applicable to professional conduct, the Attorneys may withdraw from representation of the Client in this matter if the Client does not cooperate substantially with the Attorneys in the handling of the case, if the representation of the Client by the Attorneys could reasonably create a conflict of interest or a violation of the rules of professional conduct applicable to attorneys, or a violation of the law, or if another action within the case, in the opinion of the Attorneys, lacks legal merit.

8. Other dismissal: In the event that the Client dismisses the Attorneys for just cause, the client shall owe no sum for fees, nor shall it be obliged to pay the expenses incurred by the Attorneys. In the event of a dismissal of the Attorneys for non-justified cause, the

Client shall be obliged to pay the expenses incurred by the Attorneys as of the date of the dismissal. In addition, if, at the time of the dismissal of the Attorneys for non-justified cause, an out-of-court settlement offer, or judgment against the defendant tobacco companies is pending, the client shall pay the Attorneys a sum equivalent to 15% of the amount of the final offer of out-of-court settlement, or of the sums that the defendants were ordered to pay, all in accordance with United States or foreign legal customs and practice.

9. Duration: Unless this agreement is rescinded pursuant to the preceding clauses, this agreement shall be effective during the lawsuit and all subsequent appeals of the litigation that is the subject of this agreement.

10. Filing with the court: The Attorneys may file this fee agreement with the court where the complaint was filed. The parties hereby authorize the court to enforce the provisions of this agreement.

11. Confidentiality of information: The Client acknowledges and agrees that the information provided under reserve to the Client by the Attorneys is the result of the work of the Attorneys and is the property of the Attorneys. In consequence, the Client shall maintain the confidentiality of all such information, and shall not divulge or utilize that information in any manner without the prior authorization in writing of the Attorneys.

In turn, the Attorneys shall maintain the confidentiality of all information received under reserve of the Client, and shall not divulge or utilize that information in any manner without the prior authorization in writing of the Client.
The obligations as to confidentiality of information pursuant to this clause shall remain in effect for a period of ten (10) years from the date of execution of this agreement.

12. Commitment in the event of counterclaim: Whereas, given the eventuality that the suit against the multinational tobacco companies will not prosper, and that the Department may be ordered by the competent foreign court to pay some amount of the costs and/or fees of attorneys paid by the defendants, the Attorneys shall assume and immediately pay this debt.

Whereas, given the eventuality that a subsequent complaint may be filed by the multinational tobacco companies against the Department for defamation, libel or slander, or for a similar charge, or for the alleged abuse of the right to sue, derived from the action filed by the Attorneys on behalf of the Department against the multinational tobacco companies for their activities relating to smuggling of tobacco products, the Attorneys engage to defend the Department judicially and extra-judicially from such accusations and to assume all of the costs of that defense. In addition, the Attorneys engage to assume all financial obligations derived from a ruling or decision issued within those potential actions relating to defamation, libel or slander, or for a similar charge, or for the alleged abuse of the right to sue, derived from the action filed by the Attorneys on behalf of the Department against the multinational tobacco companies for their activities relating to smuggling of tobacco products. The Department, on its part, engages to permit that defense and not to interfere with it.

13. The clauses of this agreement shall be binding upon the testamentary executors, heirs, successors and assigns of the parties. Neither the rights nor the obligations of this agreement may be assigned without the written consent of the parties to this agreement.

14. Applicable law: This agreement shall be governed and interpreted pursuant to the laws of the State of Louisiana, United States, and all legal action derived from it shall be filed before the courts of the State of Louisiana.

15. Independent legal counsel: The Client warrants that this agreement has been reviewed by an attorney chosen by the Client, prior to the execution of the agreement.

IN TESTIMONY WHEREOF, the parties have hereby executed this agreement on the dates entered beside the names of the signatories.

DEPARTMENT OF BOYACA
[signature]

BY: EDUARDO VEGA LOZANO Date: October 1st, 1999

TITLE: GOVERNOR OF BOYACA

RUBNICK CAMPBELL MALONE
ROSELLI BUSER SLAMA HANCOCK

MCNELIS LIBERMAN AND MCKEE, P.A.

BY: [signature] Date: October 8th, 1999

SACKS AND SMITH, L.L.C.

BY: [signature] Date: October 12th, 1999

Received: 4/14/00 3:48PM; 8499316 -> CS&N-RM-4070-; Page 7
04-14-00 15:48 B A T ID=8499316
FROM SECRET DE GOB DE BOY 03.09.2000 16:42 P.07
'00 03/09 16:18 FAX 3839814 FED.NAL.DEPTOS. 005

CONTRATO DE *CUOTA LITIS*

DEPARTAMENTO DE BOYACA V. *TABACALERAS MULTINACIONALES*

EL PRESENTE CONTRATO se celebra entre el **DEPARTAMENTO DE BOYACA** (en adelante denominado "Cliente"); y Sacks and Smith, L.L.C., y Krupnick, Campbell, Malone, Roselli, Boser, Slama Hancock McNeils Liberman and McKee, P.A. (en conjunto denominados "Abogados"). El contrato, una vez firmado por todas las partes, será considerado efectivo a partir de la primera fecha indicada frente al nombre del signatario. Las partes de este contrato que se ejecutará en su totalidad en el exterior, con la intención de quedar legalmente vinculadas por sus disposiciones, han acordado lo siguiente:

1. Objeto: El Cliente contrata a los Abogados para representar al Cliente en los litigios en el exterior contra los fabricantes de tabaco estadounidenses e internacionales y a otras partes responsables por sus actividades relacionadas al contrabando de sus productos de tabaco en el DEPARTAMENTO DE BOYACA, junto con todo otro reclamo posterior que los Abogados consideren relacionado y meritorio.

2. Costos y gastos: Los costos no serán pagaderos por el Cliente si no hay resarcimiento de ninguna clase. Los Abogados anticiparán el pago de todos los costos y gastos del litigio. Las sumas presentadas por los investigadores que sean contratados por el Cliente en relación a la preparación y apoyo a las acciones legales contempladas en este contrato por concepto de gastos y costos serán pagados y contabilizados por los Abogados como costo. Todos estos costos y gastos los serán reembolsados en su totalidad a los Abogados de la parte del Cliente de todo ingreso recuperado, es decir, además de los honorarios pagaderos según el Numeral 6 de este contrato. Estos costos y gastos serán pagados por el cliente al finalizarse el proceso, con cargo a la indemnización que se obtenga, o de las sumas derivadas de cualquier arreglo total o parcial a que se llegue antes del fallo final. La relación de los costos pagados por los Abogados estará disponible de manera permanente en las oficinas de los Abogados, y será remitida al Cliente habida solicitud escrita.

3. Abogados adicionales: Los Abogados pueden, a su juicio, asociar o contratar abogados adicionales y/o firmas de abogados para asistirlos en este litigio. Todo nuevo abogado o firma de abogados será pagado por los Abogados, y el Cliente no tendrá que pagar honorario adicional alguno.

4. Afirmación del Cliente: El Cliente afirma que la persona que celebra este contrato en nombre del Cliente tiene la total autoridad legal, según todas las leyes, ordenanzas y demás normas aplicables al DEPARTAMENTO DE BOYACA, para comprometer al Cliente en los términos de este contrato, y que todos los actos que requieran ser llevados a cabo para la celebración y finalización de este contrato se han llevado a cabo.

5. Representación de los Abogados: Los Abogados representarán al Cliente de un modo profesional y competente en la medida de su capacidad. El Cliente entiende, sin embargo, que el litigio es un proceso incierto, que los Abogados no pueden garantizar, y de

hecho no garantizan un resultado determinado en este caso, y que los abogados no pueden predecir con precisión cuanto durará el litigio.

6. **Honorarios:** Si no se obtiene compensación monetaria alguna, ni orden judicial mediante juicio o convenio, entonces los Abogados no recibirán ningún honorario, y el Cliente no será responsable del pago de gasto alguno.

Como compensación por sus servicios anteriormente descritos, el Cliente acuerda que los Abogados recibirán honorarios por el quince por ciento (15%) de las sumas brutas recibidas, de conformidad con las normas y prácticas legales estadounidenses o extranjeras. Las "sumas brutas recibidas" incluirán el valor de las compensaciones no-monetarias recibidas por el Cliente, de conformidad con las normas y prácticas legales estadounidenses o extranjeras.

7. **Derecho de los Abogados de retirarse:** Sujeto a las normas aplicables de conducta profesional, los Abogados podrán retirarse de la representación del Cliente en este asunto si el Cliente no coopera sustancialmente con los Abogados en el manejo del caso, si la representación del Cliente por parte de los Abogados pudiera razonablemente crear un conflicto de intereses o una violación de las normas de conducta profesional que se aplican a los abogados, o una violación de la ley, o si otra acción dentro del caso, en la opinión de los Abogados, careceria de mérito legal.

8. **Otro despido:** Si el Cliente despide a los Abogados por causa justificada, el cliente no deberá suma alguna por concepto de honorarios ni estará en la obligación de pagar los costos acumulados por los Abogados a la fecha del despido. Dado el caso de un despido de los Abogados por una causa no-justificada, el Cliente estará en la obligación de pagar los costos pagados por los Abogados hasta la fecha del despido. Adicionalmente, si en el momento del despido de los Abogados por una causa no-justificada, pende una oferta de arreglo extra-judicial, o condena a los demandados, el cliente deberá pagar a los Abogados una suma equivalente al 15% del valor de la última oferta de arreglo extra-judicial, o de las sumas a las que fueron condenados a pagar los demandados, todo de conformidad a las normas y prácticas legales estadounidenses o extranjeras.

9. **Duración:** A menos que se rescinda el presente contrato según los numerales precedentes, este contrato estará vigente durante el juicio y toda apelación subsiguiente del litigio objeto del presente contrato.

10. **Registro en el tribunal:** Los Abogados podrán registrar este contrato de honorarios en el tribunal donde se presentó la demanda. Las partes por el presente autorizan al tribunal a hacer cumplir las disposiciones de este contrato.

11. **Confidencialidad de información:** El Cliente reconoce y acuerda que la información entregada con carácter de reserva al Cliente por los Abogados es el resultado del trabajo de los Abogados y es de propiedad de los Abogados. En consecuencia, el Cliente mantendrá

dicha información bajo reserva de confidencialidad, y no divulgará ni utilizará de modo alguno dicha información sin previa aprobación escrita de los Abogados.

A su vez, los Abogados se comprometen a mantener en reserva toda información que, con carácter de reserva, reciban del Cliente, y, en consecuencia, no divulgarán ni utilizarán de modo alguno dicha información sin previa autorización escrita del Cliente.

Las obligaciones de reserva de información de que trate este numeral permanecerán en vigencia por un término de diez (10) años contados a partir de la firma de este contrato.

12. Compromisos en caso de reconvención: Que, dada la eventualidad de no prosperarse la demanda a las multinacionales tabacaleras, y que el Departamento sea condenado por el tribunal extranjero competente a pagar suma alguna por concepto de costos y/o honorarios de abogados pagados por los demandados, los Abogados asumirán y cancelarán inmediatamente esa obligación.

Que, dada la eventualidad de una demanda posterior incoada por las tabacaleras multinacionales al Departamento por difamación, injuria o calumnia, u otro concepto similar, o por el supuesto abuso del derecho de demandar, derivada de la acción presentada por los Abogados en nombre del Departamento en contra de las tabacaleras multinacionales por sus actividades relacionadas con el contrabando de productos tabacaleros, los Abogados se comprometen a defender judicial y extra-judicialmente al Departamento de tales acusaciones y de asumir todos los gastos de esa defensa. Adicionalmente, los Abogados se comprometen a asumir toda obligación financiera derivada de una sentencia o fallo producido dentro de esas acciones eventuales relacionadas con la difamación, injuria o calumnia, u otro concepto similar, o por el supuesto abuso del derecho de demandar derivada de la acción presentada por los Abogados en nombre del Departamento en contra de las tabacaleras multinacionales por sus actividades relacionadas con el contrabando de productos tabacaleros. El Departamento, por su parte, se obliga a permitir esa defensa y a no interferir con la misma.

13. Cesión: Las cláusulas de este contrato serán obligatorias para los ejecutores testamentarios, herederos, sucesores y cesionarios de las partes. Ni los derechos ni las obligaciones de este contrato podrán ser cedidos sin el consentimiento escrito de las partes del mismo.

14. Ley Aplicable: Este contrato será regido e interpretado de acuerdo a las leyes del Estado de Louisiana, Estados Unidos, y toda acción judicial derivada de la misma será presentada ante los tribunales del Estado de Louisiana.

15. Asesoramiento Independiente: El Cliente declara que este contrato ha sido revisado por un asesoramiento elegido por el Cliente antes de su firma.

EN FE DE LO CUAL, las partes del mismo han celebrado este contrato en las fechas establecidas frente a los nombres de los signatarios.

DEPARTAMENTO DE BOYACA:

POR: EDUARDO [illegible] LOZANO
CARGO: GOBERNADOR DE BOYACA

Fecha: 1º. de octubre de 1999

RUPNICK CAMPBELL MALONE
ROSELLI BUSER SLAMA HANCOCK
MCNELIS LIBERMAN AND MCKEE, P.A.

POR:

Fecha: 8 de octubre de 1999

SACKS AND SMITH, L.L.C.

POR:

Fecha: 12 de octubre de 1999

New York State Bar Association

THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY

Adopted by the
New York State Bar Association
Effective January 1, 1970
As Amended Effective June 30, 1999

Dedicated to the Memory of
Hon. Lewis R. Friedman
1941-1998

CANON 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

ETHICAL CONSIDERATIONS

EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither the lawyer's personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client.

Interests of a Lawyer That May Affect the Lawyer's Judgment

EC 5-2 A lawyer should not accept proffered employment if the lawyer's personal interests or desires will, or there is reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his or her judgment less protective of the interests of the client.

EC 5-3 The self-interest of a lawyer resulting from ownership of property in which the client also has an interest or which may affect property of the client may interfere with the exercise of free judgment on behalf of the client. If such interference would occur with respect to a prospective client, a lawyer should decline proffered employment. After accepting employment, a lawyer should not acquire property rights that would adversely affect the lawyer's professional judgment in the representation of the client. Even if the property interests of a lawyer do not presently interfere with the exercise of independent judgment, but the likelihood of interference can be reasonably foreseen by the lawyer, the lawyer should explain the situation to the client and should decline employment or withdraw unless after full disclosure the client consents, preferably in writing, to the continuance of the relationship. A lawyer should not seek to persuade a client to permit the lawyer to invest in an undertaking of the client nor make improper use of a professional relationship to influence the client to invest in an enterprise in which the lawyer is interested.

EC 5-4 As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions, a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. A lawyer may, however, enter into standard commercial transactions with a client for products and services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client and restrictions are unnecessary and impracticable.

If, in the course of the representation of a client, a lawyer is permitted to receive from the client a beneficial ownership in literary or media rights relating to the subject matter of the employment, the lawyer may be tempted to subordinate the interests of the client to the lawyer's own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from the client television, radio, motion picture, newspaper, magazine, book, or other literary or media rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of the literary or media rights to the prejudice of the client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though the employment has previously ended. Likewise, arrangements with third parties, such as book, newspaper or magazine publishers or television, radio or motion picture producers, pursuant to which the lawyer conveys whatever literary or media rights the lawyer may have, should not be entered into prior to the conclusion of the matter.

EC 5-5 A lawyer should not suggest to the client that a gift be made to the lawyer or for the lawyer's benefit. If a lawyer accepts a gift from the client, the lawyer is peculiarly susceptible to the charge that he or she unduly influenced or overreached the client. If a client voluntarily offers to make a gift to the lawyer, the lawyer may accept the gift, but before doing so, should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which the client desires to name the lawyer beneficially be prepared by another lawyer selected by the client.

EC 5-6 A lawyer should not consciously influence a client to name the lawyer as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name the lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.

EC 5-7 The possibility of an adverse effect upon the exercise of free judgment by the lawyer on behalf of the client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of the client or otherwise to become financially interested in the outcome of the litigation. However, it is not improper for a lawyer to protect the right to collect a fee for his or her services by the assertion of legally permissible liens, even though by doing so the lawyer may acquire an interest in the outcome of litigation. Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a non-lawyer can obtain the services of a lawyer of his or her choice. But a lawyer, who is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client.

EC 5-8 A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to the client. Although this assistance generally is not encouraged, there are instances when it is not improper to make loans to a client. For example, the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce a cause of action, but the ultimate liability for such costs and expenses must be that of the

client except, where not prohibited by law or court rule, in the case of an indigent client represented on a pro bono basis.

EC 5-9 Occasionally a lawyer is called upon to decide in a particular case whether the lawyer will be a witness or an advocate. If a lawyer is both counsel and witness on a significant issue, the lawyer becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate on issues of fact in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his or her own credibility. The roles of an advocate on issues of fact and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

EC 5-10 Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, the lawyer's decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate on issues of fact if it is unlikely that he or she will be called as a witness because the testimony would be merely cumulative or if the testimony will relate only to an uncontested issue. In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when the lawyer will likely be a witness on a contested issue, the lawyer may serve as advocate on issues of fact even though he or she may be a witness. In making such decision, the lawyer should determine the personal or financial sacrifice of the client that may result from the lawyer's refusal of employment or withdrawal therefrom, the materiality of the lawyer's testimony, and the effectiveness of the lawyer's representation in view of his or her personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against the lawyer's becoming or continuing as an advocate on issues of fact.

EC 5-11 A lawyer should not permit personal interests to influence the lawyer's advice relative to a suggestion by the client that additional counsel be employed. In like manner, the lawyer's personal interests should not deter the lawyer from suggesting that additional counsel be employed; on the contrary, the lawyer should be alert to the desirability of recommending additional counsel when, in his or her judgment, the proper representation of the client requires it.

EC 5-12 Inability of co-counsel to agree on a matter vital to the representation of their client requires that their disagreement be submitted by them jointly to their client for resolution by the client, and the decision of the client shall control the action to be taken.

EC 5-13 A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how to fulfill his or her professional obligations to a person or organization that employs the lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, the lawyer should be vigilant to safeguard his or her fidelity as a lawyer to the employer, free from outside influences.

→ **DR 5-103 [§1200.22] Avoiding Acquisition of Interest in Litigation.**

A. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he or she is conducting for a client, except that the lawyer may:
   1. Acquire a lien granted by law to secure the lawyer's fee or expenses.
   2. Except as provided in DR 2-106 [1200.11] (C) (2) or (3), contract with a client for a reasonable contingent fee in a civil case.

B. While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:
   1. A lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.
   2. Unless prohibited by law or rule of court, a lawyer representing an indigent client on a pro bono basis may pay court costs and reasonable expenses of litigation on behalf of the client.