The 1982 New York Legal Aid Strike: Ethical Implications Under the Code of Professional Responsibility

Randy Lee Arthur
THE 1982 NEW YORK LEGAL AID STRIKE:
ETHICAL IMPLICATIONS UNDER THE
CODE OF PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

The recent trend of unionization among attorneys employed in virtually every facet of practice has stimulated much comment within the legal profession. Although collective bargaining units of attorneys have been recognized by the National Labor Relations Board ("the Board"), prominent members of the profession have expressed resistance to the idea that attorneys should be permitted to join unions. The attorney's ethical duty under the American Bar

1. Flaherty, Attorneys, Look for the Union Label, Nat'l L.J., Aug. 15, 1983, at 1, col. 3. Since the inception of the first lawyer union 14 years ago, membership in similar organizations has comprised lawyers from all segments of the profession, "from prosecutors and law firm associates to public interest lawyers and bar association attorneys . . . [l]aw professors [and] lawyers who work for legal publishers . . . are also joining unions . . . ." Id. at 1, col. 4, 28, col. 1. One element that has traditionally resisted unionization is the private law firm associate. One union official reported that while "well-paid but overworked younger associate attorneys" frequently contact him to express an interest in improving their working conditions, they "have a terrific amount of fear" that they will be dismissed and often decide "not to take a chance on a union." Id. at 28, col. 1. Lewis, The Unionization of Law Firms and How To Avoid It, 16 ARIZ. B.J. 14 (1980). Lewis observes that the prospect of unionization by attorneys in the private, traditional law firm "is not outside the realm of possibility, particularly where a firm employs a sizable group of disappointed associates who failed to achieve partnership status or who are disgruntled for other reasons." Id. at 17.


Association ("ABA") Code of Professional Responsibility\(^4\) ("the Code") has been cited to restrain unionized attorneys from engaging in concerted job actions.\(^8\) The potential tension (between the Code and an attorney-employee's right to strike) merits close scrutiny. Discontent among public defenders, staff lawyers of legal service organizations, and private lawyers who defend indigent clients has increasingly resulted in the use of lawsuits and strikes to gain better pay and to obtain relief from unmanageable caseloads.\(^6\) The threat of disciplinary action is a potent obstacle to the use of a strike action to back up demands made during collective bargaining.\(^7\)

A case in point involved the staff attorneys of the New York Legal Aid Society\(^8\) ("the Society"). In 1982 they staged a ten week strike to protest low salaries and heavy caseloads.\(^9\) In response, the

---

4. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter cited as MODEL CODE].

5. Samad, Unionization of Law Offices: Some Ethical Concerns, 55 OHIO ST. B. A. REP. 1314 (1982) (ABA Informal Opinion 936 defined as unethical such actions as strikes, boycotts, and withholding of services, including refusing to cross a picket line); Flaherty, supra note 1, at 31, col. 4 ("Perhaps the most serious basis for the ambivalence over lawyer unions is the strong suspicion that a lawyer's duties as a union member may collide with his duties to his clients. That concern is codified in the American Bar Association's Code of Professional Responsibility . . . ."); Comment, NLRB Asserts Jurisdiction Over Law Firms: Has the Door Been Opened to Lawyer Unionization?, 27 BUFFALO L. REV. 361, 371 (1978) ("A further impediment to lawyer unionization is the possibility that such activity might be forbidden by the American Bar Association's Code of Professional Responsibility. Although ABA standards do not affect the Board's power to assert jurisdiction, they could nonetheless effectively deter lawyers from unionizing.").

6. Sylvester, supra note 3. Discussing a work stoppage by non-salaried, private, court-appointed indigent defense lawyers in Washington, D.C. in September 1983 which was precipitated on the issue of inadequate pay, the author wrote, "throughout the country, public defenders and private lawyers who accept the burden of defending poor people are up in arms about low pay and a crushing case load." Id. at 1, col. 1.

7. Pollock, supra note 3, at 11. In "New York, [Community Action for Legal Services'] CALS general counsel, Catherine Mitchell, wrote a not-so-polite memo, obviously directed at preoccupied unionizers, reminding them that CALS would report any violations of the Professional Code of Responsibility [sic] to the Appellate Division."

8. Shipp, New York Considers Replacing Legal Aid Society, N.Y. Times, Dec. 7, 1982, at B2, col. 1. The Society, a private, non-profit organization, founded in 1876, contracts for a fixed fee with the City of New York to provide legal defense services to criminally charged indigent clients. Since July 1966, the Society has been designated as the primary provider of criminal defense for the indigent. Private lawyers are used by the City as a backup. In 1981, private lawyers were assigned 24,000 cases, and the Society was assigned 154,500.


At the time the strike commenced, a two-year contract which was set to expire on

http://scholarlycommons.law.hofstra.edu/hlelj/vol2/iss2/5
Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York ("the Committee") issued Ethical Opinion 82-75 commenting on the ethical implications of a hypothetical strike. Ethical Opinion 82-75 reinforces the misconception held by many that under the Code strike activity by lawyers is unethical.

This Note examines Ethical Opinion 82-75's analysis of the Society staff attorneys' obligations under the Code when faced with a decision whether or not to engage in a strike against their employer. A prospective look is taken at whether a strike by legal aid lawyer-employees would be ethical under the recently proposed ABA Model Rules of Professional Conduct11 ("the Model Rules"). Under the Code and Model Rules, it was professionally responsible for Society staff attorneys to strike to improve the quality of client representation. It is the duty of an attorney to improve the judicial system.12 The objective of the October 1982 strike was to protest overly burdensome caseloads, which undermined competent representation, and to draw attention to the low pay, a factor in the high turnover in experienced litigators. Resorting to a ten-week strike to redress these grievances and to achieve salutory legal reform was justified when

---

10. N.Y. City Bar Ass'n Comm. on Professional and Judicial Ethics, Op. 82-75, in OPINIONS COMMITTEE ON PROFESSIONAL ETHICS (E. Wypyski ed.) [hereinafter cited as Ethical Opinion 82-75].


12. Id. Canon 8.
less extreme measures proved unsuccessful.

II. NATIONAL LABOR RELATIONS ACT\(^1\) JURISDICTION OVER THE LEGAL PROFESSION

Attorney-employees who unionize are protected by their right of freedom of association under the First and Fourteenth Amendments.\(^1\) The right to associate with a labor union is of dubious value without the protections codified in Section 7 of the Act.\(^1\) Congress empowered the Board with jurisdiction to "the fullest jurisdic-\(^1\) tional breadth constitutionally permissible under the Commerce Clause."\(^1\)

From its beginning, the Board has limited the exercise of its jurisdiction to cases having a "substantial impact" on interstate commerce.\(^1\) Prior to 1977, the Board excluded law firms from coverage under the Act.\(^1\)

Coverage has traditionally been granted to certain attorneys in

---


15. Note, *The Unionization of Attorneys*, 71 Colum. L. Rev. 100, 102-03 (1971). "Employees who fall outside the Act's protection are in a position analogous to that of labor union members prior to enactment of the Act in 1935; while such employees are free to organize, the conduct of management . . . is subject to none of the Act's sanctions against unfair labor practices." (Footnotes omitted).


17. Comment, *supra* note 5, at 361 n.7. From its inception the Board declined jurisdiction over cases it deemed essentially local in character. The Board had discretionary authority to decline jurisdiction over any industry for which no jurisdictional yardstick existed on August 1, 1959, provided the effect of a labor dispute on commerce is insubstantial. 29 U.S.C. § 164(c)(1) (1976). See generally A. Cox, D. Box & R. Gorman, *Cases and Materials on Labor Law*, 88-90 (9th Ed. 1977). For example, the Board will decline to exercise jurisdiction over retail concerns with less than $500,000.00 in gross yearly sales.

18. Bodle, Fogel, Julber, Reinhardt & Rothschild, 206 N.L.R.B. 512, 84 L.R.R.M. (BNA) 1321 (1973). (The Board declined to characterize the practice of law as a commercial activity, found its connection with the flow of commerce "incidental," and ruled that labor disputes at law firms did not have a significant enough impact on interstate commerce to warrant coverage under the Act.) See Evans & Kunz, Ltd., 194 N.L.R.B. 1216, 79 L.R.R.M. (BNA) 1181 (1972). (The first case before the Board where it was asked to decide whether it should exercise jurisdiction over a law firm. The Board declined, ruling that the firm's impact upon commerce was insufficient to warrant the exercise of its jurisdiction.)
their capacity as employees.\textsuperscript{19} Pertinent legislative history reveals that when Congress defined "professional employees"\textsuperscript{20} in the Act, it anticipated that coverage would extend to attorneys.\textsuperscript{21} In addition to referring to legislative history, the Board has applied the "right of control test"\textsuperscript{22} to find an employee-employer relationship where attorneys are subject to the control and direction of an employer in the course of their work. In directing an election of a unit comprised solely of lawyers from an in-house legal department in \textit{Lumberman’s Mutual Casualty Co.},\textsuperscript{23} the Board distinguished between attorneys of a corporation who received a regular salary and attorneys employed by private law firms.\textsuperscript{24} In that case, the Board determined that the attorneys could unionize and bargain collectively with their employer because the employee/employer relationship existed.\textsuperscript{25} Those attorneys were paid a salary, worked regular hours, accrued vacation time, and had their activities supervised by their employer.\textsuperscript{26} Society staff attorneys work under an arrangement strikingly similar to that in \textit{Lumberman} and distinct from the traditional private firm practice model. Under the legislative history and "right

\begin{enumerate}
\item 19. 29 U.S.C. § 152(3) (1982) states in pertinent part: "The term 'employee' shall include any employee . . . but shall not include . . . any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed . . . by any other person who is not an employer as herein defined."
\item 20. Professional employees include "any employee engaged in work (i) predominantly intellectual . . . (ii) involving the consistent exercise of discretion and judgment in its performance." 29 U.S.C. § 152 (12) (1982).
\[a\]lthough there has been a trend in recent years for manufacturing corporations to employ many professional persons, including . . . lawyers . . . no corresponding recognition was given by Congress to their special problems . . . . Under the committee bill, the Board is required to afford such groups an opportunity to vote in a separate unit to ascertain whether or not they wish to have a bargaining representative of their own.
\item 22. Deaton Truck Line, Inc. v. NLRB, 337 F.2d 697, 698 (5th Cir. 1964). "Under this test, an employer-employee relationship exists where the person for whom the services are performed reserves the right to control not only the end to be achieved, but also the means to be used in reaching such end." (quoting Deaton Truck Lines, Inc., 143 N.L.R.B. 1372, 1377, 53 L.R.R.M. (BNA) 1497, 1499 (1963)).
\item 23. 75 N.L.R.B. 1132, 21 L.R.R.M. (BNA) 1107 (1948).
\item 24. Id. at 1134-35, 21 L.R.R.M. (BNA) at 1108.
\item 25. Comment, \textit{supra} note 14, at 992.
\end{enumerate}
to control” analysis, the Society staff attorneys’ union activity is protected under the Act.

In the 1977 case of Foley, Hoag and Eliot, the Board reevaluated its prior decision to exclude law firms from coverage under the Act and asserted jurisdiction, subject only to a requirement that firms satisfy a monetary standard. Immediately prior to the Foley decision, the United States Supreme Court in Goldfarb v. Virginia State Bar held the practice of law to comprise “trade or commerce.” The Board then concluded in Foley that Congress intended to exercise fully the same extensive commerce power under the Act that it had exercised in regulating commerce. Thus, the practice of law was “commerce” within the meaning of Sections 2(6) and 2(7) of the Act. In Foley, the Board determined that file clerks and messengers who worked for a private law firm had a right to petition the Board for unionization.

Since its decision in Foley, the Board has reported two cases involving the unionization of attorneys who work for non-profit legal service corporations. In Wayne County Legal Services, Inc., the Board asserted jurisdiction over a non-profit law clinic that provided legal services to poor clients who lived in Michigan. A minimum “affecting commerce” standard of $250,000.00 in gross annual fees was established in Camden Regional Legal Services, Inc. Subsequently,

28. Id. at 457, 95 L.R.R.M. (BNA) at 1043.
30. Id. at 787-88. “Given the substantial volume of commerce involved, and the inseparability of this particular legal service [title examination] from the interstate aspects of real estate transactions, we conclude that interstate commerce has been sufficiently affected.” Id. at 785 (footnotes omitted). Wickard v. Filburn, 317 U.S. 111, 120 (1942). Congress may regulate activities that have both an indirect as well as direct affect on interstate commerce. A showing that the actual impact of the activities may affect interstate commerce is sufficient.
35. The Act's definition of employer states in pertinent part that “the term ‘employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government Corporation.” 29 U.S.C. § 152 (2) (1976). Therefore, lawyers who work for a city, county, or state attorney's office or for a public defender's office are excluded from protection of the Act. Comment, supra note 5, at 370.
37. 231 N.L.R.B. 224, 95 L.R.R.M. (BNA) 1545 (1977). The Board also noted that the law firm has a close nexus with interstate commerce because it purchased goods and services in
the monetary standard was relaxed in *Clark and Hinojosa*, where that firm's projected gross revenue for the year was $160,000.00, plus a projected $7,500.00 in annual direct and indirect purchases from out-of-state suppliers. A legal service organization easily meets the "affecting commerce" standard articulated in *Camden or Clark*, thus entitling its staff attorney-employees to petition the Board for recognition of a bargaining representative.

III. **The American Bar Association Code of Professional Responsibility**

Does the Code bar attorney-employees from engaging in a strike where the exercise of less drastic measures proves ineffective in ameliorating unsatisfactory conditions of employment which directly impinge on the quality of client representation?

The Code, promulgated by the ABA in 1969, replaced the longstanding ABA Canons of Professional Ethics. The ABA successfully waged a campaign to have the Code adopted by the states. By 1972, the Code had been adopted by court rule or unified bar resolution in nearly all states, usually with no more than marginal changes. The New York State Bar Association adopted the Code as its own code of ethics, effective January 1, 1970. Close scrutiny of the Code following its adoption has uncovered inconsistencies, omissions, and ambiguities in drafting which have precipi-
tated much criticism.45

The Code is divided into three separate but closely interrelated components: Canons, Ethical Considerations, and Disciplinary Rules.46 Its Preliminary Statement indicates that a lawyer may be penalized only for acts of conduct proscribed under the Disciplinary Rules ("D.R.'s").47 Ethical Considerations ("E.C.'s") are goals toward which each attorney should aspire. Canons are norms that set standards of professional conduct.48 Disciplinary infractions, which are not ranked according to their severity, are determined by the character of the offenses and their particular circumstances.49 The Code's framers understood that no such document could address every question of ethical behavior a lawyer might encounter in practice. Where Code language does not explicitly state standards, the attorney must exercise discretion in determining what behavior is appropriate.50 The Code makes no mention of the ethical responsibility of an attorney-employee who is contemplating a strike.51

45. REPORTER, supra note 40, at 500.

[R]eliance on [the Code's] three-part format has created considerable confusion about the nature and the effect of the rules that govern the practice of law. . . . [T]he ethical considerations blend, without distinction, law, explanation or interpretation of disciplinary rules, and aspiration . . . . How the lawyer is to know what purpose or effect the language . . . will have has not been adequately explained. Yet, we know the cases clearly show that he has only found that out after the fact — to his peril.

(quotting comments by Robert Kitak made during the American Bar Association House of Delegates Meeting on the Proposed Model Code of Professional Responsibility).

46. CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement, supra note 44, at 355.

47. The D.R.'s comprise the basic minimum competence "below which no lawyer can fall without being subject to disciplinary action." Id. at 355-56. "The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character." Id. at 355.

48. Id.
49. Id. at 356.
50. Id. at 356, n.4.

No general statement of the responsibilities of the legal profession can encompass all the situations in which the lawyer may be placed. Each position held by him makes its own peculiar demands. These demands the lawyer must clarify for himself in the light of the particular role in which he serves.


The late Charles Frankel argued that law practice involves problems of such ethical complexity that their solution can only be suggested by rules and must be worked out with close attention to the details of each problem . . . . On this view, rule interpretation may well be a more critical state in the regulation of lawyers then rule formulation.
In October 1982, Society staff attorneys encountered a challenge which, in the absence of a specific Code provision prohibiting or mandating a legal aid strike in their predicament required them to analyze the facts at hand in light of the professional ideals expressed in the E.C.'s and the basic requirement of competency of client representation contained in the D.R.'s. Thus, these attorneys had only the spirit of the Code to guide them in deciding whether a strike was the ethical action to take. Following a conscientious examination of the results of low pay and prohibitive caseloads on the quality of client representation, these attorneys voted to strike. The conclusion in Ethical Opinion 82-75 is faulty in communicating to members of the Bar the impression that the Code prohibits a strike like that initiated by Society staff attorneys in October 1982.

IV. ANALYSIS OF ETHICAL OPINION 82-75

A. The Opinion's Importance

In July 1983, Ethical Opinion 82-75 was released and addressed the ethical obligations of criminal defense attorneys employed by the Society when a strike action is approved. This opinion was requested by the “Mayor of the City of New York” and “some Legal Aid attorneys” regarding the October 22, 1982 through January 3, 1983 strike by staff attorneys of the Society. Ethical Opinion 82-75 is only advisory; no disciplinary action based on it resulted against

52. Ethical Opinion 82-75, supra note 10
   To trigger an ethics opinion, a party must usually make an inquiry to the committee. Ethics committees . . . most[ly] limit their services to members of their bar association or to lawyers living in the area from which the association draws its members . . . . The modern ethics opinion is always interpretive: it purports to evaluate conduct according to the prevailing rules of professional conduct.

Finman and Schneyer, supra note 51, at 70 n.4.

53. See generally Union Panel Advises Legal Aid Strikers to Accept Tentative Pact, N.Y. Times, Dec. 30, 1982 at B1, col. 1. The strike was settled on December 30, 1982 when union members, upon recommendation of the executive committee of the union, voted to accept a negotiated settlement. Lawyers returned to their jobs on January 3, 1983. A new contract was approved which provided for wage increases of 6% in the first year and 5.2% in the second. Prior to the agreement, the Society had offered the lawyers a 5.3% increase in the first year. The union had sought 9%. The agreement brought the salary range in the contract's final year to $19,500 for lawyers not yet admitted to the bar and $45,900 for those with 12 years experience. At the time the strike was called, wages were $18,500 for neophytes and $39,500 for those with 12 years experience.

On the issue of caseload size, a group of arbitrators was selected to decide on caseload disputes. Included in the settlement was an agreement by the Society to continue paying full salary to the senior Brooklyn Society lawyer whose firing over the caseload issue precipitated the strike until the merits of his discharge were decided by a labor arbitrator.

53.
any striking attorney.\textsuperscript{64} The opinion may, however, serve as persuasive authority should a striking attorney be brought before a disciplinary committee. It is important to analyze the opinion because it will serve as a guideline to future legal aid attorneys who may consider striking, but who do not want to jeopardize their good standing in the Bar. The Committee's opinion will have a chilling effect on staff attorneys of the Society, should they contemplate a strike action in the future.

Stanley A. Samad,\textsuperscript{65} in an article discussing the unionization of law offices in light of ethical considerations, has conceded that a lawful strike by attorney-employees might not be validly disciplined under the Code.\textsuperscript{66} One may infer from Samad's statement that he would consider a strike by attorneys to be inconsistent with the provisions of the Code. He concludes by expressing the hope that "where accommodations between one's loyalty to the profession and loyalty to the union's goals cannot be made, the attorney/employee will opt to be guided by the Code."\textsuperscript{67} A similar viewpoint is expressed in Ethical Opinion 82-75.\textsuperscript{68}

\section*{B. A Lack of Specificity}

The generalities and overly broad character of Ethical Opinion 82-75 substantially undermine its usefulness as an ethical guideline. Though requested as a response to a specific strike, the report states "we expressly disclaim comment on the propriety of [the 1982 strike] . . . the Committee has determined to express its views on

\textsuperscript{54} Telephone interview with Lizbeth Shalen of The Association of Legal Aid Attorneys of the City of New York.

\textsuperscript{55} Professor of Law and Former Dean (1959-1979), The University of Akron School of Law.

\textsuperscript{56} See Samad, \textit{supra} note 5, at 1317-18.

A case against the ABA's position can be made by asserting that (a) the peaceful strike by a recognized bargaining unit is a protected activity under the NLRA; (b) a strike is effective only when persons belonging to the unit act \textit{in concert}; (c) the services of lawyers in the short run are no more essential than . . . those of a public utility; (d) state legislative (or judicial) restrictions or penalties on federally protected activity is subject to the challenge of federal preemption of the field to protect the federal privilege and; (e) entities that provide legal services may provide for the contingency of a strike by providing essential services through alternative sources.

\textsuperscript{57} \textit{Id.} at 1318.

\textsuperscript{58} Flaherty, \textit{supra} note 1, at 36. "[Ethical Opinion 82-75] while not holding that all lawyer strikes are unethical - said that striking lawyers should get court permission to withhold their services from clients who are in litigation and may not ethically \textit{ignore} the 'impact' of a strike on the criminal justice system."
the general issues.” This conspicuous lack of reference to a specific fact pattern detracts from a clear understanding of the opinion. The absence of specificity makes it difficult to perceive exactly what actions are ethical and unethical under the Code.

Monroe H. Freedman directed this same criticism at Ethical Opinion 645 of the New York County Lawyers’ Association Committee on Professional Ethics which addressed the ethical implications of a strike by Society staff attorneys in 1974. Ethical Opinion 645 carefully described the Society without specifically indicating the nature or extent of the strike it was evaluating. Similarly, Ethical Opinion 82-75 does a disservice to the conscientious attorney who considers strike action and consults the document for a better understanding of what ethical options are available.

The narrow ambit of ethical strikes recognized by Ethical Opinion 82-75 is too restrictive to make a strike effective. Careful adherence to the opinion by striking lawyers would render their actions of little consequence. The opinion draws a sharp distinction between two categories of strikes. One category is clearly unethical, while the second category might be ethical, as viewed by the Committee.

The clearly unethical act is comprised of “strike activity in which a Legal Aid lawyer declines to continue the representation of a client for whom he or she has assumed professional responsibility . . . .” Implicit in this type of strike would be an action in which attorneys walked off the job, declining to represent clients whose cases were at the trial or hearing stage. This category would also include a strike by attorneys who refuse to continue to prepare cases that would be going to trial or hearing at a future date.

The alternative strike action, which under Ethical Opinion 82-75 would not necessarily violate the Code, is characterized by “the

59. Ethical Opinion 82-75, supra note 10, at 1.
60. Monroe Freedman is Professor of Law and former Dean (1973-77), Hofstra University School of Law. Professor Freedman has authored LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975).
61. Freedman, The Legal Aid Strike, N.Y.L.J., June 25, 1975, at 1, col. 1. “By choosing to deal with a real problem in abstract terms and through a Delphic pronouncement, the Committee has at best confused the issue. At worst, the Committee's opinion has provided the basis for the general inference that the Legal Aid strike has been condemned as unethical . . . .” Id. at 1, col. 2.
62. N.Y. County Lawyers Ass'n Comm. on Professional Ethics, Op. 645 (1975), reprinted in N.Y.L.J. June 9, 1975, at 3, col. 3. That opinion concluded by noting that although attorneys have the right to strike, they may not do so if it “disrupts the proper functioning of the courts and the judicial system or deprives indigent defendants of their right to proper representation and a speedy trial.” Id. at 3, col. 4.
63. Ethical Opinion 82-75, supra note 10, at 9-10.
refusal by a striking legal aid lawyer to accept new case assignments from supervisory personnel." Such an attorney owes no duty of representation to an unassigned client if he has "compelling reasons" to refuse additional cases. These reasons "may include the nature of the grievance, the existence or non-existence of alternative methods of presenting or resolving the grievance, the extent of disruption caused by the strike action and the response of other parts of the system and other lawyers to the strike." Even where this factual balance tips in the striking attorney's favor, however, the resulting permissible strike would be ineffective. Under Ethical Opinion 82-75's interpretation of the Code, lawyers would be constrained to continue representing clients whose cases were at the hearing or trial stage and to continue preparing cases already assigned. Carrying the ethical strike action contemplated by the Committee to its logical conclusion, little about it would resemble a concerted action. Some attorneys would be able to responsibly complete preparation tasks, such as interviewing witnesses, processing bail applications, and conducting investigations sooner than other attorneys, who would be unable to join their colleagues on the picket line.

Consequently, at the outset of such a strike, there would be little discernible impact on the attorney's employer. Only after much time passed would a backlog of unrepresented client cases develop. At the same time, those attorneys who had completed preparation work for pre-strike clients would find it unnecessary to be at the office regularly. The time spent away from work by each attorney would be on a staggered schedule, not coordinated with other attorneys. Little collective impact would be felt until long after the strike had begun. This strike would not upset the status quo and achieve a review of grievances. As such, it is an unacceptable solution to the dilemma of whether attorneys may ethically use their right to strike.

64. Id. at 10.
65. Id. at 14.
66. Id.
67. Flaherty, NY Lawyers Strike Shuts Some Courts, Nat'l L.J., Dec. 6, 1982, at 6, col. 2-3. Reporting on the 1982 strike by Society staff attorneys as it reached its sixth week, Flaherty observed "In the boroughs of Brooklyn and Manhattan, 10 criminal courtrooms have closed because of the lack of lawyers. Throughout the city, many defendants are being arraigned without lawyers, and city corrections department officials have appealed to the state to help house the increasing numbers of persons awaiting trial." Id.
68. Ruthizer, City Bar Opinion Misses Mark, N.Y.L.J., June 29, 1983, at 2, col. 5. Ruthizer asserts that "[i]t is setting up its own 'somewhat artificial distinction'... the Committee has acknowledged a theoretical right [to strike] which can never be exercised."
The Committee fails to acknowledge the middle ground for a strike by staff attorneys of a legal aid organization. In this mid-point scenario, trials and hearings in progress would be completed after the strike was called, but other cases that had been assigned before the strike, and were in the preparation stage, would not receive ongoing attention of the striking lawyers until the strike action was concluded. This was the strategy employed by striking Society staff attorneys in the fall of 1982. By declining to address this specific set of facts, the Committee rendered a significantly less useful opinion than might have otherwise been the case. A careful analysis of specific Code provisions indicates that the strike by Society staff attorneys in the fall 1982 was in fact justified under Disciplinary Rules and encouraged by Ethical Considerations.

V. CLIENT NEGLECT

A. Misapplication of D.R. 6-101(A)(3)

Ethical Opinion 82-75 bases its view that attorneys may ethically strike only by refusing to accept new clients on potential client neglect that might result. It is ironic, therefore, that the potential of client neglect due to unmanageable caseloads was one major factor that precipitated, and ultimately justified, the October 1982 strike. Staff attorneys were concerned that client rights were being infringed because the attorneys were unable to adequately prepare their cases. Ethical Opinion 82-75 cites D.R. 6-101(A)(3) and states "[w]e believe that such a deliberate refusal to provide services to such existing clients constitutes neglect of a legal matter entrusted to an attorney . . . ." The Committee properly emphasizes adequacy of representation as a pivotal concept in the dilemma of the Society staff attorneys' strike. Upon closer examination, however, it becomes clear that the Committee misapplied D.R. 6-101(A)(3).

The Rule requires diligence in representing a client while a fiduciary duty exists. The type of neglect the provision contemplates is different from a situation where a staff attorney for a legal aid organization declines to work on assigned cases due to a strike about

69. See Flaherty, N.Y. Legal Aid Lawyers Strike; Disruption Seen, Nat'l L.J., Nov. 8, 1982, at 2, col. 3.
72. Ethical Opinion 82-75, supra note 10, at 10.
73. Id.
which the client, employer, and court system have notice. Rather, as
one could infer from the provision's position in the Code's Index
under "Negligence of lawyer," D.R. 6-101(A)(3) applies where the
attorney fails to act while the client believes his interests are being
attended. Society staff attorneys have a unique responsibility to en-
sure competent representation of their indigent clients. A strike
designed to maintain legal services at a minimum professionally ac-
ceptable level for present and future clients is not properly barred
under this Rule.

ABA Informal Opinion 1273 examines D.R. 6-101(A)(3) and
states the proper application of the Rule. It notes that "[n]eglect
involves indifference and a consistent failure to carry out the obligations which the lawyer has assumed to his client or a conscious disre-

74. MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT
55 (1980).

75. The New York Supreme Court, Appellate Division has applied DR 6-101(A)(3)
only where an attorney has ignored an entrusted legal matter while the client was under
the impression his interest was being represented. See In The Matter of McGrath, 96 A.D.2d 267,
468 N.Y.S.2d 349 (1st Dept. 1983) (attorney's failure to appear for two scheduled pre-trial
conferences resulting in the complaintant case being marked "off calendar," and his failure to
restore the case to calendar coupled with his failure to respond under subpoena before the
Disciplinary Committee on a complaint arising out of the case constituted neglect); In The
Matter of Leverton, 56 A.D.2d 157, 392 N.Y.S.2d 133 (4th Dept. 1977) (attorney's failure to
commence a negligence action for clients after assuring clients that the case was in suit, and
which resulted in the cause of action being barred by the statute of limitations, violated DR 6-
attorney who failed to timely file income tax returns for a client who retained him for that
purpose, did not answer his clients inquiries and who finally gave false explanations for his
delay violated DR 6-101(A)(3) even though he ultimately paid tax penalty and interest after
the state bar's intervention).

76. The Sixth Amendment to the United States Constitution states: "In all criminal
prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his
defense." U.S. Const. amend. VI. In Gideon v. Wainwright, 372 U.S. 335 (1963) the Supreme
Court held that "fundamental and essential" constitutional considerations of fair procedure
and equal treatment required the appointment of counsel to indigent defendants charged with
felonies. Id. at 344. In Argersinger v. Hamlin, 407 U.S. 25 (1972) the Court held that indi-
gent defendants accused of misdemeanors had the right to counsel. Id. at 37.

The Sixth Amendment mandate is now widely construed as requiring "the reasonably
competent assistance of an attorney acting as [a] diligent conscientious advocate." U.S. v.
DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973); But see Brinkley v. Lefevre, 621 F.2d 45 (2d
Cir.) (Weinstein, J., dissenting), cert. denied, 449 U.S. 868 (1980) (The Second Circuit, un-
lke all other courts of appeals, does not accept the "reasonably competent" standard; it still
applies the "farce and mockery" test in assessing inadequacy of counsel.) A discussion of the
Sixth Amendment right to competent representation in the context of the 1982 Society staff
attorney strike is beyond the scope of this Note.

77. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1273 (1973)
[hereinafter cited as Informal Op. 1273], reprinted in COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, ABA, 2 INFORMAL ETHICS OPINIONS at 529 (1975) [hereinafter cited as INFORMAL OPINIONS].
This comment was elicited in response to a series of questions regarding attorney inactivity in a case, failure to note applicable statutes of limitation, and instances of ordinary negligence. D.R. 6-101(A)(3) does not apply to a strike, such as that of Society staff attorneys in 1982. Those attorneys were concerned that overcrowded caseloads would cause them to fall below a minimum standard of professional competence. D.R. 6-101(A)(3) should not be applied to characterize as “neglect” a refusal to represent presently assigned clients in order to raise the quality of representation of future clients to meet the minimum standard of competence. To imply otherwise, as does Ethical Opinion 82-75, distorts the Code.

A more appropriate understanding of the relationship of D.R. 6-101(A)(3) to a strike by staff attorneys of the Society may be found in ABA Informal Opinion 1325. That opinion addressed the issue of neglect arising out of a strike by unionized attorneys. It observed that “it is not necessarily true that such participation would violate D.R. 6-101(A)(3).” This statement is followed by annotation asking the reader to distinguish Informal Opinion 1325 from Informal Opinion 1273. Informal Opinion 1325 observes that strike activity in some circumstances may be no more disruptive of the performance of legal work than “taking a . . . vacation . . . .” It would not be responsible to contend that an attorney who took a vacation had violated this D.R. when a procedure to provide client representation in his absence was available. It is equally spurious reasoning to contend that a strike action, per se, is any more neglectful where surrogate counsel is available for the strike’s duration.

B. Attorney Self-Evaluation of Neglect

Staff attorneys for the Society comprise a group of highly capa-

---

78. Id.
79. Id.
81. Id. at 200.
82. Id.
83. Union official Laura Friedman of the National Organization of Legal Service Workers (NOLSW) notes that “striking lawyers often take steps to minimize any potential harms to clients . . . . ‘If a lawyer is in the middle of a case, he’ll finish it’ . . . and for other cases ‘the lawyer will prepare transitional memos for the management or try to get the cases adjourned.’” Flaherty, supra note 1, at 36, col. 1-2.
ble lawyers. In the popular press, Society staff attorneys have been portrayed as resourceful, vigorous advocates of their clients' rights.

Their assessment that continued handling of excessive caseloads would result in an on-going violation of D.R. 6-101(A)(3) should not be taken lightly. Nonetheless, critics are skeptical at the thought that staff attorneys of a legal aid society can credibly decide when the minimum standard of competent representation is no longer met.

It is the responsibility of defense attorneys, such as those of the Society, to determine when overcrowded caseloads cause services to drop below the minimum level of competence required by the Code. The ABA Standards for Criminal Justice place the onus on the defense attorney to determine when the adequacy of the defense efforts no longer meets the professional duty the lawyer has assumed. Standard 5-4.3, titled Workload, states in pertinent part:

> Whenever . . . assigned counsel determine, in the exercise of their best professional judgment, that the acceptance of additional cases . . . will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the . . . assigned counsel must take such steps as may be appropriate to reduce their pending or projected workloads.

---

84. H. Buttenweiser, Memorandum of the Legal Aid Society to the Mayor's Advisory Panel on Representation of the Indigent in Criminal Cases (December 1982) (unpublished manuscript) "The Society's staff is heavily populated with young attorneys who have been editors of the law reviews of their respective law schools, have clerked for federal and state judges, and have had considerable clinical experience in criminal trial advocacy."


86. See, e.g., Lewis, supra note 1, at 20. But see I ABA STANDARDS FOR CRIMINAL JUSTICE. 5-4.3 Commentary (1980).

87. 1 ABA STANDARDS FOR CRIMINAL JUSTICE (1980). The Introduction to Chapter 5, "Providing Defense Services," states that since there can be no guarantee that the defendant's lawyer will be the professional equal of his or her opponent, it is most important that the system for providing counsel and facilities for the defense be as strong and as vital as possible . . . . The growth and acceptance of organized defender services are responsible for important changes in several standards and the addition of a brand new one. [B]ecause defender programs in particular must frequently handle excessive caseloads, a standard concerning workload has been added to the chapter. Id. at 5.5-5.6.

88. Id. at 5.47. The commentary to Standard 5-4.3 provides that [o]ne of the most significant impediments to the furnishing of quality defense services for the poor is the presence of excessive workloads . . . . [N]ot even the most able and industrious lawyers can provide quality representation when their workloads are unmanageable. Excessive workloads, moreover, lead to attorney frustration, disillusionment by clients, and weakening of the adversary system. Id. at 5.48. An overview of different approaches employed by defender offices to assess workload levels is presented in the Commentary to Standard 5-4.3. Id. at 5.48-5.49.
The expectation contained in the ABA Standard is that staff lawyers of a legal aid organization are capable of recognizing when excessive case demands make it impossible for them to render competent representation. In the case of the striking Society staff attorneys, objective indicia supported their claim that caseloads had become too great. 89

C. D.R. 6-101(A)(3) As a Strike Justification

When properly understood to apply to the competency of representation in an on-going attorney-client relationship, D.R. 6-101(A)(3) justifies a strike. ABA Informal Opinion 1359 90 provides an alternative view of that Disciplinary Rule to that of Ethical Opinion 82-75. Informal Opinion 1359 commented on a situation where the refusal of the directors of a legal services office to institute a system of priorities or waiting lists resulted in an allegedly unmanageable caseload for each staff attorney. The ABA Committee on Ethics recognized the pernicious impact of caseload overcrowding by acknowledging that it may result in inadequate legal advice. Citing D.R. 6-101(A)(2) 91 and (3), it held that the “refusal to establish priorities is improper if it causes a violation of D.R. 6-101.” 92 Thus, Informal Opinion 1359 notes that refusal by legal aid directors to establish priorities could cause Code violations if it results in “inadequate preparation” or “neglect” by a staff attorney.

In the summer and fall of 1982, Society attorney supervisors did little to alleviate caseload overcrowding even though internal office grievance procedures were invoked. 93 The union contract then in force with the Society contained a provision permitting a staff attorney to file a grievance where he determined that the “burden of work for which he is responsible is about to reach a point beyond

---

89. Gerstl, supra note 70, at 4. The Society is assigned seventy percent of all criminal cases in the City (except homicides). Flaherty, supra note 69, at 2, col. 3-4. In the eighteen-month period preceding the strike vote, the number of criminal indictments in the City increased by forty-two percent, while the number of attorneys on the Society's staff grew by sixteen percent.


93. Flaherty, supra note 69, at 16, col. 4. “[L]awyer, Weldon Brewer, filed a grievance Aug. 26, claiming that his 65 case workload prevented him from adequately representing his clients. Mr. Brewer contended that to continue to shoulder such a workload would violate several disciplinary rules of the Code of Professional Responsibility.” Id.
which cases cannot be accepted consistent with professional responsibility.'” The ten week strike by staff attorneys over inadequate pay and excessive caseload assignments may have been precipitated by the Society's firing of the attorney who pursued a grievance to arbitration under that provision of the contract.

In the view of striking staff attorneys, Society management compelled staff attorneys to work under conditions bordering on direct violation of D.R. 6-101(A)(2) and (3). By taking no action to substantially relieve case overloading and by thwarting the actions of a conscientious attorney attempting to utilize an established grievance procedure, Society management violated Informal Opinion 1359. Further, management left staff attorneys with no alternative, other than striking, that would pressure the Society to remedy the threat to competent client representation.

D. Other Disciplinary Rules Justify the Strike

The Code provision D.R. 1-102(A)(1) states that “[a] lawyer shall not: . . . [v]iolate a Disciplinary Rule.” Attorney misconduct is further defined by D.R. 1-102(A)(5) which proscribes “conduct that is prejudicial to the administration of justice.” D.R. 7-101(A)(3) admonishes the attorney not to “[p]rejudice or damage his client during the course of the professional relationship . . . .” These D.R.'s placed the Society staff attorney/employees in a bind of competing loyalties: to uphold the Code while maintaining fidelity to their employer.

Under a careful analysis of the Code, the potential for neglect of assigned clients as the result of a conspicuous strike is less harmful than insidious, incompetent client representation on a daily basis by overburdened attorneys. In light of the complex nature of the problem confronting Society staff attorneys in October 1982, and the absence of a clear guideline to advise them, their decision to strike was ethically justified on the basis of D.R.'s contained in the Code. The Code’s provision for disciplinary action against lawyers who harm their clients because of inadequate preparation was a legitimate motivating factor for the strike.

94. Lewis, supra note 1, at 20.
95. See Flaherty, supra note 69, at 16, col. 4.
96. Id.
97. CODE OF PROFESSIONAL RESPONSIBILITY, supra note 44, at 361.
98. Id.
99. Id. at 486.
VI. ETHICAL CONSIDERATIONS

A. ATTORNEYS SHOULD IMPROVE THE LEGAL SYSTEM

In addition to D.R.'s, E.C.'s also support the decision of staff attorneys to strike. The Code does not specifically address the issue of whether an attorney strike, per se, is ethical. The Code does provide direction to the attorney who must choose between loyalty to his employer and the responsibility to provide competent counsel to criminally charged indigent clients. Many E.C.'s lend support for the staff attorneys' judgment that a strike against the Society was the most appropriate avenue available to improve the legal system. One such maxim is E.C. 1-1, which states in pertinent part that "every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical duty of every lawyer." Similarly, E.C. 8-1 and E.C. 8-3 challenge members of the profession to assist in improving the legal system. Their efforts are to be motivated by an altruistic desire to improve the quality of legal services. E.C. 6-5 asserts that a lawyer's "obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty."

B. AN EARLIER STRIKE IMPROVED THE LEGAL SYSTEM

The effort by staff attorneys in October 1982 to improve the quality of representation of their indigent clients by striking should be viewed in light of the attorney union's own unique history of interaction with the Society. In 1973, a similar action against the Society was successful in achieving the adoption of the Society of

100. E.C. 1-1, Id. at 358.
101. Id. at 500. "Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system . . . . By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein." Id.
102. Id. at 501. "The fair administration of justice requires the availability of competent lawyers . . . . Those persons unable to pay for legal services should be provided needed services." Id.
103. Provision E.C. 8-9, which was not incorporated in the New York Code, states: "The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements." MODEL CODE E.C. 8-9.
104. CODE OF PROFESSIONAL RESPONSIBILITY, supra note 44, at 464.
continuity of representation. Under this policy, each client, instead of being shuffled from one lawyer to another on each successive court date, has the benefit of representation by the same attorney throughout the trial court proceedings.\textsuperscript{106} Despite a 1971 recommendation by the New York State Appellate Division that continuity be adopted,\textsuperscript{107} and the endorsement of the Association of the Bar of the City of New York,\textsuperscript{108} the Society, in 1973, still had not implemented the policy. The major demand of the staff attorneys’ 1973 six-day strike against the Society was that continuity of representation be adopted.\textsuperscript{108}

To settle the 1973 strike, the Society management instituted a policy of continuity. One indication of the policy’s viability in Society practice is that the system is still in use today.\textsuperscript{110} In a December 1982 memorandum to the Mayor’s Advisory Panel on Representation of the Indigent in criminal cases,\textsuperscript{111} the Society’s continuity policy was highly touted.\textsuperscript{112} The memorandum sought to convince Mayor Edward Koch that the Society was the best entity available to provide quality representation to the indigent at low cost to the City. The continuity policy was cited by Society management as a positive innovation and contribution to the representation of indigent clients by the Society. In the 1982 statement, Society management lauded continuity as having “become widely recognized as an essential predicate of effective representation.”\textsuperscript{113} The success of the 1973 strike action illustrates that a strike can be used effectively by attorneys as a vehicle for improving the delivery of legal services to indigent clients.\textsuperscript{114}

\textsuperscript{106} For a discussion of the merits of adopting continuity of representation, see the Commentary to Standard 5-5.2. in \textit{STANDARDS FOR CRIMINAL JUSTICE}, supra note 86.

\textsuperscript{107} Gerstl, supra note 70 at 2; Freedman, supra note 61, at 2, col. 7.

\textsuperscript{108} Gerstl, supra note 70, at 2-3; Freedman, supra note 61 at 2, col. 7-8.

\textsuperscript{109} Gerstl, supra note 70, at 3.

\textsuperscript{110} 	extit{Id.} See, e.g., ABA STANDARD FOR CRIMINAL JUSTICE 5.53 (1979).

\textsuperscript{111} Shipp, supra note 8, at B2, col. 1. Following the October 1982 strike by Society staff attorneys, Mayor Edward Koch of New York City appointed an advisory panel of three attorneys to study the question of whether the contractual arrangement with the Society should be retained. “The city has the power under State law to hire the society, to set up a public defender system with an office staffed by city lawyers, to hire private lawyers on a case-by-case basis or to use any combination.” \textit{Id.}

\textsuperscript{112} Buttenweiser, supra note 84, at 6.

\textsuperscript{113} \textit{Id.}

\textsuperscript{114} Gerstl, supra note 70 at 3. According to Gerstl, in 1973, the union of Legal Aid attorneys had a choice:

\begin{itemize}
  \item either to compromise their professional standards by acquiescing to ethically untenable representational policies with immediate and long-term detrimental impact on their clients, or to uphold their professional standards by a concerted action which,
\end{itemize}
One would be hard-pressed to compose a hypothetical example that would better illustrate an attorney's effort to improve the legal system in accordance with the challenge of the Code's E.C.'s than that provided by the strike against the Society in 1973. Likewise, the strike in 1982 to avoid the deleterious impact of severely overcrowded caseloads was a responsible effort by attorneys to improve the quality of client representation.

VII. THE ISSUE OF ATTORNEY WITHDRAWAL FROM REPRESENTATION

A. Ethical Opinion 82-75 Misapplied D.R. 2-110

Ethical Opinion 82-75 betrays a cursory reading of the Code and an unsupportable conclusion that D.R. 2-110\textsuperscript{118} and D.R. 7-101 (A)(2)\textsuperscript{118} were violated by the Society staff attorneys' strike of 1982. The opinion's wording conveys the impression that following an exhaustive analysis by the Committee, the strike was found to violate these specific D.R.'s. Upon a close examination, however, the conclusion that the strike was an infraction of these two D.R.'s is troublesome.

Indigent criminal defendants who receive services from the Society are not assigned by the court to a specific staff attorney. Rather, the court designates the Society as the counsel of record. Society attorney supervisors then assign cases to specific staff attorneys. Therefore, a strike by staff attorneys against their employer is not appropriately viewed under D.R. 2-110 as withdrawal from employment. Only a withdrawal from representation by the Society would constitute withdrawal under D.R. 2-110 in this context. By

---

Cf. \textit{N.Y. Times}, Dec. 20, 1982, at B4, col. 6. Striking staff attorneys insisted that the 1982 strike was for the ultimate benefit of their clients. One such lawyer, Jona Schuder, was reported to have observed that because of low pay, some lawyers could not afford to work for the Society. "Every single person on that line cares a great deal about their clients or they wouldn't have taken this job . . . . In the long run it's going to be much better for our clients. That's why people are willing to strike."

115. \textit{Code of Professional Responsibility, supra} note 44, at 419. DR 2-110(A)(1) provides: "If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission."

116. \textit{Id.} at 486. "A lawyer shall not intentionally: . . . Fail to carry out a contract of employment entered into with a client for professional services . . . ." \textit{Id.}

117. Interview with Lizabeth Shalen, of the Association of Legal Aid Attorneys of the City of New York (Nov. 4, 1983).
Ethical Opinion 82-75 takes the view that a relationship between an indigent client and a Society staff attorney “is not functionally distinguishable from a ‘contract of employment’ as that term is used in [D.R. 7-101(A)(2)].”118 This view is inconsistent with an ABA Ethics Committee statement on the matter in Formal Opinion 334.119 It holds that “[i]t must be recognized that an indigent person who seeks assistance from a legal services office has a lawyer client relationship with its staff of lawyers which is the same as any other client who retains a law firm to represent him. It is the firm, not the individual lawyer, who is retained.”120

Ethical Opinion 82-75 does a disservice to scrupulous attorneys by making a vague allusion to D.R. 2-110 without specifying which component of the provision would be violated by a strike. This ambiguity is heightened because D.R. 7-101(A)(2) contains an exception for its standard against withdrawal from a contract of employment, where withdrawal is made under D.R. 2-110.

The latter D.R. indicates that an attorney must not continue representation where a Disciplinary Rule is being violated. An examination of the text of the ABA Model Code reveals a footnote121 immediately following the D.R.’s subtitle, which refers the reader to Canon 44 of the superseded Canon of Ethics. As a point of reference for persuasive interpretation of D.R. 2-110, Canon 44 is informative. Canon 44 lists as an example of when an attorney may withdraw, a situation where “the lawyer finds himself incapable of conducting the case effectively.”122 That concept of allowable withdrawal has been carried over in the present statute in D.R. 2-110(B)123 and (C).124 Either of these provisions provides a basis for discontinuing

---

118. Ethical Opinion 82-75, supra note 10, at 11.  
120. Id.  
121. Footnote 1 of the ABA Model Code was not adopted in the New York Code.  
122. CANONS OF PROFESSIONAL ETHICS. Canon 44 (1957).  
123. DR 2-110(B) provides: “Mandatory withdrawal. A lawyer representing a client before a tribunal, with its permission . . . shall withdraw from employment . . . if . . . (2) [The lawyer] knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule . . . .” CODE OF PROFESSIONAL RESPONSIBILITY, supra note 44, at 419.  
124. DR 2-110(C) provides: Permissive withdrawal. If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such a request or such withdrawal is because: . . . (2) [the lawyer’s] continued employment is likely to result in a violation of a Discipli-
representation when a Disciplinary Rule is being violated.

B. D.R. 2-110 Is Inadequate to Apply to a Legal Aid Service

Though D.R. 2-110(B) and (C) detail numerous acts and factors that make withdrawal either permissive or mandatory, they do not address attorney strikes. These Code sections on withdrawal are inadequate for application to the October 1982 strike. D.R. 2-110(B)(2) provides that where a matter is being represented before a tribunal, permission of the court is required for withdrawal if required by court rules. This is the case even where withdrawal is mandated because the attorney "knows" or "it is obvious" that continued employment will result in a disciplinary infraction. This provision, and the corresponding provision in D.R. 2-110(C)(2), contemplate an attorney-client relationship in which private practitioner receives a fee in return for his services. These provisions do not envision a situation where an organization like the Society is the attorney. Indeed, where the attorney is an employee of a legal aid organization, his only recourse is to complain to his employer about an excessive caseload. Because the employer is counsel of record, the lawyer/employee has no standing to directly apply to court to withdraw. Further, a leading authority on legal ethics has observed that most withdrawal issues are addressed in other sections of the Code. Therefore, the application of D.R. 2-110(B)(2) and (C)(2) to a legal aid staff attorney strike is all the more difficult to justify.

Both D.R. 2-110(B)(2) and (C)(2) are similar in that they prescribe withdrawal from a case where continuing with employment would subject the attorney to an infraction of a D.R. The degree of certainty in the attorney's conviction that a D.R. is being violated is pivotal to the distinction between the two. D.R. 2-110(C)(2) uses a less stringent standard allowing permissible withdrawal where continued employment "is likely to result in" a D.R. violation.

Even under D.R. 2-110(C)(2)'s relaxed standard, the only responsible choice the attorney has when a D.R. is being violated is to discontinue representation. This would be the result where unmanageable caseloads made it "likely" that inadequate representation will occur. Under both D.R.'s, the stated condition for withdrawal requiring the attorney to gain the permission of the court is that the attorney in question be the counsel of record. This limitation exposes

\[\text{Id. at 419-20.}\]

the inadequacy of D.R. 2-110 in addressing a strike involving the staff attorneys of a legal services organization.\(^{126}\)

C. Adequate Notice of Withdrawal Under D.R. 2-110(A)(3)

Notwithstanding the inadequacy of the withdrawal provisions found in D.R. 2-110(B)(2), D.R. 2-110(A)(2)\(^{127}\) does articulate a minimum standard of notice that has utility where representation of previously assigned clients whose cases are not at trial or hearing stages will be discontinued due to a strike. When judges are put on notice of the inadequacy of legal representation to indigents and the pendency of a corrective strike, the onus is on the judiciary to appoint surrogate counsel.

Professor Freedman, a noted expert on legal ethics\(^{128}\) who commented on the issue of attorney withdrawal in the context of the 1973 strike by staff attorneys of the Society, stated that where judges act promptly to appoint private counsel in response to a strike, no client’s interests need be compromised.\(^{129}\) Professor Freedman observed that the court has a duty to appoint counsel from the private bar upon notice that no Society lawyer is available to represent a client.\(^{130}\)

The availability of legal representation need not be a casualty of a strike.\(^{131}\) In the case of undue delay in appointing surrogate coun-

---

126. See supra notes 115-117 and accompanying text.
127. DR 2-110(A) provides: “(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of the client, including giving due notice to his client, allowing time for employment of other counsel . . . .” Code of Professional Responsibility, supra note 44, at 419.
128. See supra note 60.
129. Freedman, supra note 61, at 2, col. 8.
130. Id.
131. See generally N.Y. Times, Dec. 20, 1982, at A1, col. 4. During the strike, the Society’s 118 non-union supervising and 25 to 50 non-striking staff attorneys handled pending civil and criminal matters. The Society’s 20 paralegals handled cases before administrative boards. The City made a successful effort to recruit members of the private bar to assist primarily in criminal arraignments. N.Y. County Law § 722-b (McKinney 1972) provides that localities shall appoint members of the private bar to represent indigent defendants for a fee of $25.00 per hour.

Nine weeks into the strike, New York City’s court officials and district attorneys indicated that the courts had managed to take up much of the “slack” through resort to the private bar. Although case backlogs estimated at 4 to 6 months had developed as had severe crowding at the City’s jails, it was difficult to assess to what extent such conditions were attributable to the strike.

City Correction Department spokesman Edward Hershey said: “Normally our population goes down in the last couple of weeks before Christmas . . . . But it has not gone down this year. We have no way of knowing for sure how much of this is due to the strike, but common sense would tell us that the strike is responsible for some of the problem.” Id. at B4, col. 5. Robert M. Morgenthau, the Manhattan District Attorney, explained that because of the extra
sel from the private bar, the defendant should be released on his own recognizance or the case should be dismissed "for want of prosecution or denial of the constitutional right to a speedy trial." The Code encourages the private bar to assist in the defense of indigent clients by express wording in E.C. 2-25. With active case representation by Society attorney/supervisors and emergency representation by members of the private bar, the disruptive impact of a strike on the smooth functioning of the court system is not as devastating as a reading of Ethical Opinion 82-75 might lead one to believe. In a strike, clients need not be abandoned without the benefit of counsel.

D. The Committee Should Reverse Its Position

An attorney who read Ethical Opinion 82-75's analysis of D.R. 2-110 could not help but conclude that a strike would be a violation of professional ethics. The distortion of D.R. 2-110 and D.R. 7-102(A)(2) contributed by Ethical Opinion 82-75 to the body of ethics opinions results in the dissemination of erroneous advice. The Committee should promptly retract the section of Ethical Opinion 82-75 which discusses the application of D.R. 2-110 and D.R. 7-101(A)(2) to a strike.

work completed by Society attorney supervisors and private lawyers, the strike's effect on the courts had been minimal. "There is such a backlog of cases that so far it really hasn't had that much effect," he said. "There are plenty of cases to keep the trial parts busy." Id. at B4, col. 6.

Realistically, there are limits to the reliance that can be placed upon the efforts of supervisory attorneys and members of the private bar in such a context. Although surrogate counsel sufficed in substituting for the striking staff attorneys through the ninth week, some spokesmen doubted that such stop-gap measures could succeed for an indefinite period. Id.


133. For a discussion of how the supply of private attorneys willing to take over cases previously assigned to the Legal Aid Society allegedly dwindled as the strike progressed, see generally N.Y. Times Dec. 20, 1982, at B4, col. 5., and Treaster, 150 Arraigned Without Lawyers in Queens Court, N.Y. Times, Nov. 5, 1982, at B4, col. 3.

134. EC 2-25 provides:

Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . . ."

CODE OF PROFESSIONAL RESPONSIBILITY, supra note 44, at 377-378.

135. Ethical Opinion 82-75 refers to the responsibility of the private bar under EC 2-25 but fails to relate the availability of such services to the concept of withdrawal from employment under DR 2-110.

136. Ethical Opinion 82-75's conclusion that legal aid attorneys' failure to provide services to existing clients would result in neglect of client representation in violation of DR 6-131(A)(3) is thus negated.
VIII. EXERTION OF THIRD PARTY INFLUENCE

A. Attorneys Must Exercise Independent Judgment

An issue which Ethical Opinion 82-75 examines only briefly is whether third party influence on the decision of staff attorneys to strike violated professional ethics. The Canon 5 axiom: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client" was fulfilled by each staff attorney who decided that a strike was necessary to avoid continued violations of D.R.'s concerning the adequacy of client representation. Ethical Opinion 82-75 cited Canon 5, but did not explicitly assert that attorneys who voted to strike to improve the legal system did so only after knuckling under to union pressure in abrogation of this goal. Using imprecise expression, the Committee observed that "legal aid attorneys contemplating strike activities may not permit either their employer or their union to interfere with the fulfillment" of their obligations under Canon 5.

In October, 1982 Society management attempted to unduly influence staff attorneys' independent judgment with respect to caseload size by encouraging them to continue working despite the prohibitive number of cases. By declining to appreciably reduce caseload overcrowding in response to the challenge of complaining lawyers, management allegedly contributed to the problem and risked that the quality of representation would drop below the minimum standard established by the Code. E.C. provisions contained in Canon 5 recognize that independent judgment of the attorney is especially vulnerable to third party pressure when the third party seeking to exert influence is paying the client's fees. E.C. 5-23, E.C. 5-21, E.C. 5-1, and E.C. 5-13 admonish the attorney to main-

137. CODE OF PROFESSIONAL RESPONSIBILITY, Canon 5, supra note 44, at 438.
138. Ethical Opinion 82-75, supra note 10, at 7.
139. See Flaherty, supra note 69.
140. EC 5-23 provides:
A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers . . . Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom. (Footnotes omitted).
CODE OF PROFESSIONAL RESPONSIBILITY, supra note 44, at 450.
141. EC 5-21 provides:
The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures
tain professional independence at all times.\textsuperscript{144}

B. Adhering to D.R. 5-107(B)\textsuperscript{145} in a Legal Services Organization

An attorney who permitted an employer’s economic power to persuade him to continue client representation against the attorney’s better professional judgment would breach D.R. 5-107(B). ABA Formal Opinion 324\textsuperscript{146} found that it was within the purview of the governing board of a legal aid society to impose broad policy restric-

upon the lawyer. (footnotes omitted).

\textit{Id.} at 449.

\textsuperscript{142} EC 5-1 provides: The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. (footnotes omitted). \textit{Id.} at 438.

\textsuperscript{143} EC 5-13 provides:

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 he should fulfill his professional obligations to a person or organization that employs him as a 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, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences.

\textbf{Code of Professional Responsibility, supra} note 44, at 445.

\textsuperscript{144} In other contexts, attention has also centered on the potential abuse of union influence by exerting pressure on attorney/employees to strike over frivolous issues. Flaherty, \textit{supra} note 1, at 31, col. 4. Informal Op. 1325, \textit{supra} note 80 distinguishes between membership in an employee organization and acts by members that breach D.R.’s. The opinion observes that “[i]t is possible that a lawyer who is a member of a union or bargaining organization will not violate any Disciplinary Rules as a result of his membership.” \textit{Id.} Nevertheless, the Opinion concludes: “lawyers who are union members should not permit the organization to prescribe, direct or suggest how to fulfill one’s professional obligations.” \textit{Id.} at 3. Cf. Informal Opinion 1029, where the Committee said that it was not necessary that a union organization’s by-laws stipulate that lawyer-members be bound by their obligations under the Canons of Ethics so long as attorneys adhered to ethical rules.

In the instance of the Fall 1982 strike by staff attorneys of the Society, the union comprised a unit of individuals who shared the same employer and worked under similar circumstances. The striking union members shared a consensus that the quality of client representation was at least on the verge of falling below the Code’s minimum standard of competency, and were confronted with an employer unresponsive to their dilemma. Not all Society staff attorneys joined the October 1982 strike, despite pressure from fellow employees not to work. Approximately 35 to 50 staff attorneys declined to participate in the strike action. N.Y. Times, Dec. 20, 1982, at B4, col. 5. At one point the Society “charged in state court that the union ha[d] illegally threatened reprisals against staff attorneys who continue to work.” Flaherty, \textit{N.Y. Lawyers Strike Shuts Some Courts}, Nat’l L.J., Dec. 6, 1982, at 6, col. 3.

\textsuperscript{145} DR 5-107(B) provides: “A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.” \textbf{Code of Professional Responsibility, supra} note 44 at 461.

tions\textsuperscript{147} on the types of cases staff attorneys could take and types of clients they could represent.\textsuperscript{148} Nevertheless, Formal Opinion 324 noted that D.R. 5-107(B) "militate[s] against any interference with the lawyer-client relationship by the directors of a legal aid society after a case has been assigned to a staff attorney."	extsuperscript{149} In ABA Formal Opinion 334,\textsuperscript{150} the Ethics Committee went even further and found that staff lawyers of a legal aid society have an obligation under D.R. 5-107(B) to refuse to acquiesce in governing board policy that interferes with the attorney's exercise of independent professional judgment on behalf of a client, or that is inconsistent with the Code.\textsuperscript{151}

D.R. 5-107(B), as interpreted in Formal Opinions 324 and 334, directs the attorney-employee to zealously safeguard the integrity of representation he provides to clients on behalf of a third party employer lest that employer interfere with the exercise of his professional discretion. In October 1982, staff attorneys of the Society did not flinch from their professional duty to their clients under the Code. Despite pressure from their employer, many elected to endure the personal inconvenience and financial hardship concomitant with a strike rather than accede to the implicit demand of society management that they continue to represent clients in derogation of the Code.

IX. INADEQUACY OF SALARY AS A BASIS FOR A STRIKE

Under the Model Code, staff attorneys of the Society were justified in calling for an increase in wages that had become inadequate by the time of the 1982 strike.\textsuperscript{152} E.C. 2-17\textsuperscript{153} states in pertinent part

\textsuperscript{147} Comparing the desirability of promulgating board policy guidelines with a procedure where potential clients are accepted on a case-by-case basis, the Committee observed: "There is in a case-by-case consideration the very real danger that the more controversial causes — those which often provide opportunities for law reforms aiding the poor — will be subject to board veto solely because of a fear of criticism from certain influential segments of the community." Id. at 55.

\textsuperscript{148} Id.

\textsuperscript{149} Id. at 54.

\textsuperscript{150} Formal Op. 334, supra note 119, at 78.

\textsuperscript{151} Id. at 82.

\textsuperscript{152} Even after adopting the negotiated settlement with the Society, beginning salaries of staff attorneys are well below starting salaries with the major law firms where many staff attorneys would have been competitive job applicants. See Buttenweiser, supra note 84. As such, these staff attorneys consider themselves underpaid and overworked. Further, caseload size has consistently grown. In 1973, the average criminal defense lawyer at the Society handled approximately 37 cases at a time. In December of the year following the settlement, the typical caseload was 53. N.Y. Times, Dec. 12, 1983, at B11, col. 2.

A major concern of staff attorneys at the time of the strike was that their salaries had
that "adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession." The striking staff attorneys of the Society were reacting in part to the fact that their relatively low wages impelled a high rate of turnover of long term, experienced litigators. This loss ultimately undermined the caliber of the legal representation available to criminally charged clients, which verged on below-minimum competency. As attorney-employees, these union members were exercising their recognized right under the Act to bargain and, if necessary, strike regarding the terms and conditions of their employment. The impact of substandard wages on the morale of staff attorneys in fulfilling the demands of their pressured jobs should not be overlooked. Furthermore, low pay has fallen below even those of assistant district attorneys, with which their wages had formerly been comparable. "If they can come up with an assistant district attorney (A.D.A.) who after 10 years earns only $37,000, I will go back to work post haste.... There is no such animal," said striker Charles S. Bobis, a Legal Aid Lawyer with 10 years tenure. N.Y. Times, Nov. 11, 1982, at B4, col. 4.

The Society argued that its pre-strike offer was close to the salaries paid A.D.A.'s and that should suffice. Id. at B4, col. 3. Further, spokeswoman Patricia Bath claimed the Society based its offer on an average of the base salaries paid by district attorneys in Manhattan, Brooklyn, and the Bronx through the fifth year. The staff lawyers rejected that approach. Gary Sloman, a striking staff attorney reportedly observed: "It's like apples and oranges. We recognize that you would look to similar jobs for a range of salaries. But it's a reference point and no more." Id. at B4, col. 4.

153. CODE OF PROFESSIONAL RESPONSIBILITY, supra note 44, at 374. The last sentence and footnote of EC 2-17 as promulgated in the Model Code was adopted by New York in 1970, but subsequently deleted in April 1978. 2A NAT'L REP. LEGAL AND PROFESSIONAL RESPONSIBILITY. However, it did remain part of the ABA Model Code until it was replaced by the Model Rules.

154. Id.

155. "In the strike of 1982, inadequate salaries remained an issue.... The salaries of attorneys with more than 5 years experience remained too low to prevent a high turnover among the senior staff, with a corresponding adverse impact on the quality of legal service rendered." Gerstl, supra note 70, at 5.

156. See Flaherty, supra note at 31, col. 2.


158. The footnote to EC 2-17 recognizes the relationship between low pay and the quality of legal services. "When members of the Bar are induced to render legal services for inadequate compensation, as a consequence the quality of the service rendered may be lowered, the welfare of the profession injured and the administration of justice made less efficient." CODE OF PROFESSIONAL RESPONSIBILITY, supra note 44 at 374 (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 302 (1961)).
an inhibiting effect on recruitment of capable lawyers.\textsuperscript{159} Society lawyers must be willing to work in what is, under the best of circumstances, a job characterized by hard cases, high pressure, and low status clients.\textsuperscript{160}

E.C. 2-16\textsuperscript{161} tacitly acknowledges that sub-professional pay may sap the vigor of the attorneys’ representation. ABA Informal Opinion 1236\textsuperscript{162} stated that “[i]n our opinion it is improper for a lawyer to agree in advance that services rendered to members of a group will be provided for fees less than those customarily being charged . . . .”\textsuperscript{163} The Opinion cites as a rationale the findings that an attorney who participates in such an arrangement would incur a “substantial loss” financially or “not take the time required to perform [the services] properly.”\textsuperscript{164} The first justification may reflect a paternalistic concern toward members of the legal fraternity. The second rationalization relates to the possible experience of the underpaid Society staff attorney whose vigilance in providing quality representation may waiver due to demoralization resulting in part from poor pay.

Under D.R. 2-106(B)(3), the reasonableness of legal fees is determined in part by “[t]he fee customarily charged in the locality for similar legal services.”\textsuperscript{165} By the fall of 1982, the salaries paid staff attorneys of the Society, which had formerly been comparable to those of Assistant District Attorneys employed in New York City, had failed to keep pace.\textsuperscript{166} Striking attorneys were therefore fulfilling their obligation under the Code by fighting for adequate compensation to ensure competent representation in the provision of legal services to their clients.

X. A Prospective View: The ABA Model Rules of Professional Conduct

A. Old Wine in New Bottles?

Less than a decade had elapsed following the States’ adoption

\textsuperscript{159} Gerstl, supra note 70, at 3; Freedman, supra note 61, at 2, col. 7.
\textsuperscript{160} See generally Pileggi, supra note 85.
\textsuperscript{161} EC 2-16 provides: “The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered . . . .” CODE OF PROFESSIONAL RESPONSIBILITY, supra note 44, at 374.
\textsuperscript{162} ABA Committee on Ethics and Professional Responsibility, Informal Op. 1236 (1972) (referring to discounted legal services for members of a club).
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} CODE OF PROFESSIONAL RESPONSIBILITY, supra note 44, at 413.
\textsuperscript{166} See supra note 152.
of the Model Code when the ABA convened the Kutak Commission to substantially revise the Code. Critics said the Code was poorly drafted and difficult to apply. The structure of the Code caused confusion, as it was comprised of axioms, aspirational ideals, and disciplinary standards. A seven-year effort to reform the rules of legal ethics culminated in the ABA's decision in August 1983 to abandon the Code altogether and instead endorse the Model Rules.

The drafters of the Model Rules have endeavored to avoid the confusion resulting from the Code's three-tiered structure. This drafting modification has been widely heralded as a great improvement over the Code. Yet the Model Rules retain traces of the Code's optional/mandatory dichotomy. The distinction in the Model Rules lies in what the attorney "may" and "shall" do. "Shall" defines conduct that will form the basis of disciplinary action. "May" refers to matters within the lawyer's discretion.

The Model Rules have been criticized for containing conspicuous omissions. The drafters themselves acknowledge that not every potential ethical problem the lawyer may encounter will be addressed in their proposed ethical guide. The large scale effort now being mounted by the ABA to urge adoption of the Model Rules may be hampered as states carefully analyze the proposal and grap-

167. The reason given for revising the professional rules was to provide "clarification of the ethical judgments lawyers must daily make in the practice of law." Abel, Why Does the ABA Promulgate Ethical Rules?, 59 Tex. L. Rev. 639, 641 (1981) (quoting MODEL RULES Preface (Discussion Draft 1980)).

168. REPORTER, supra note 40, at 499-500.

169. Id.


171. MODEL RULES Scope, supra note 11.

172. Id.


174. MODEL RULES Preamble, supra note 11. The Preamble posits that the lawyer must look beyond the black letter Rules to the spirit of the Rules. "Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules." Id.

175. Flaherty, supra note 170, at 8, col. 3. "[I]n December [1983] the ABA created a committee, known as the Special Committee on Implementation of the ABA Model Rules, to help the states evaluate the rules and to advocate their adoption." Id.
ple with perceived inadequacies. Adjustments in the proposed Model Rules prior to their adoption by respective states may substantially reduce the uniformity of ethical standards in the country.

One salient omission in the Model Rules is the failure to address strikes by lawyers of legal aid organizations. The discussion that follows examines how its provisions would apply to a strike under circumstances similar to the Society strike in October 1982. Also, a modification of the Model Rules is proposed to apply to strikes by staff attorneys of private defender organizations.

B. Competency of Representation

The Model Rules place preeminent emphasis on the competence of attorneys in professional practice. Given this mandate, a strike action to enforce ABA standards of competence on organizations that employ lawyers to defend indigent clients is ethical. Model Rule 1.1 states in part: “A lawyer shall provide competent representation to a client.” The comment to the Rule makes it clear that no exception or mitigation was intended to permit less competent service to be rendered to clients unable to afford private attorneys. The extent of lawyer preparation is measured in terms of thoroughness of investigation and completeness of legal analysis. Rule 1.3 addresses the need for diligence in the attorney’s conduct as an element of competence by stating that “[a] lawyer shall act with rea-

176. *Id.* at 8, col. 4. In most states, state bar committee reports are drafted, submitted to the bar’s board of governors or to its house of delegates, and eventually sent to the state supreme court for approval. In New York, however, the Appellate Division, the intermediate appeals court, must approve a new ethics code. *Id.*

177. *Id.* at 10, col. 1.

178. MODEL RULES Preamble, supra note 11.

179. The Rule continues: “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” MODEL RULES, Rule 1.1, supra note 11.

180. The Comments to the Rules are intended to elucidate the drafters’ intent, but each Rule’s text is authoritative. MODEL RULES Scope, supra note 11.

181. The Comment to Rule 1.1 discusses the requisite knowledge and skill in a particular matter which a lawyer should possess prior to undertaking representation. In handling legal problems of a type with which the lawyer is unfamiliar, it is not necessary that the lawyer have prior experience or special training. All that the Rules require is that “the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.” MODEL RULES Rule 1.1 comment, supra note 11.

182. The comment to Rule 1.1 further explains: “Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and the use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.” *Id.*
sonable diligence and promptness in representing a client.”\textsuperscript{183}

Inadequate client representation brought about by the pressures of an unmanageable caseload will result in violations of Rules 1.1 and 1.3. As the comment to 1.3 explains: “A lawyer's workload should be controlled so that each matter can be handled adequately.”\textsuperscript{184} A staff attorney of a legal aid organization who spends time adequately preparing, investigating, and analyzing the cases of some court-appointed clients at the expense of others might be in danger of violating Model Rule 1.7(b),\textsuperscript{185} which addresses conflicts of interest. Competing responsibilities which limit representation of one or more clients violates the principle of loyalty to all.\textsuperscript{186}

\textbf{C. Responsibilities of Supervisory Staff}

Unlike the Code, the Model Rules impose responsibility on supervisory personnel to actively monitor adherence to ethical practice by their subordinates. Supervisors in a legal aid office who knowingly overlook an ethical conflict will violate Rule 5.1(b),\textsuperscript{187} which codifies this duty. Under 5.1(c)(1) and (2),\textsuperscript{188} supervisory personnel would violate the Model Rules themselves where they knowingly encouraged or ordered staff attorneys to continue to work with unmanageable caseloads, thereby courting violation of Rules 1.1, 1.3, and 1.7(b).

Under the Model Rules, a supervisor is vicariously liable for a subordinate's violation of the Code if he knows of the act in time to avoid its effects but does not rectify the problem.\textsuperscript{189} This additional accountability is an improvement over the Code in strengthening attorneys' self-regulation of their profession. Had this provision been in

\begin{thebibliography}{9}

\bibitem{183} \textit{Model Rules} Rule 1.3, \textit{supra} note 11.
\bibitem{184} \textit{Model Rules} Rule 1.3, \textit{supra} note 11. comment.
\bibitem{185} The Rule provides: A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client . . . .” \textit{Model Rules}, Rule 1.7(b), \textit{supra} note 11.
\bibitem{186} \textit{Id.} Rule 1.7(b) comment.
\bibitem{187} \textit{Model Rules} Rule 5.1(b). “A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.” \textit{Model Rules}, \textit{supra} note 11.
\bibitem{188} \textit{Model Rules} Rule 5.1(c), \textit{supra} note 11.
\textit{A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.}
\textit{Id.}
\bibitem{189} \textit{Id.}
\end{thebibliography}
effect immediately prior to the 1982 strike, Society management might have been more responsive to the claims of staff attorneys that they were being asked to represent clients in a manner that fell below the ethical minimum level of competency.

Compounding speculation about how the Model Rules would apply to a strike is an ambiguity contained within the Rules: May a staff attorney knowingly provide less than competent client representation because a supervisor pressures her to continue to work with an unmanageable caseload? Rule 5.2(b) provides that “[a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” In the context of a legal aid organization, this provision contemplates a disagreement between staff and supervisors about how inadequate client representation must become before Rule 1.1 is violated.

The possibility remains that a subordinate who is convinced that continued client representation will result in incompetent lawyering may nonetheless choose to “hide” under the cloak of authority of the supervisor’s judgment to the contrary. Rule 5.2(b) substantially undermines any effect of the Model Rules to pressure the staff subordinate to “blow the whistle” when the supervisory attorney is willing to supercede certain ethical considerations with “more pressing” budgetary concerns.

The ambiguity in the Rules is heightened by Rule 5.2(a) which states that a subordinate “is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.” In the absence of an authoritative court ruling or an advisory committee ethical opinion clarifying this point, the subordinate’s assessment that an ethical violation is occurring leaves him susceptible to disciplinary action. The staff attorney is vulnerable even in the face of assurances to the contrary offered by a supervising attorney who may be motivated by political and budgetary considerations.

The staff attorney of a legal aid society who finds himself in a dilemma under Rule 5.2 may ethically decide to strike to pressure supervisory personnel to take corrective action. Rule 8.4(d) makes it professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.” Where indigent cli-

190. MODEL RULES Rule 5.2(b), supra note 11.
191. MODEL RULES Rule 5.2(a), supra note 11.
192. The comment to Rule 8.4(d) observes: “A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.”
ents are not being accorded their right to competent representation, knowing failure of a subordinate attorney to rectify the situation will constitute a violation of Rule 8.4(d). Where a consensus among staff attorneys develops that a violation of Rule 8.4(d) is occurring, the extreme act of a strike may be justified if less extreme measures are ineffective.

**D. Financial Considerations**

The impact of low salaries on the adequacy of representation due to low staff morale, high rates of turnover of experienced litigators, and its inhibiting effect on the recruitment of new legal talent, has been noted. The Model Rules contain provisions similar to the Code regarding the need for sufficient compensation for legal representation. Under Rule 1.5(a)(3), the attorney may refer to "the fee customarily charged in the locality for similar legal services" as an indication of what constitutes reasonable compensation. In a situation like that of Society staff attorneys in October 1982, some action to force salary scale revision is appropriate under the Model Rules. The effect of sub-standard salaries on the competency of representation is recognized in the Comment to Rule 1.5.

**E. Provisions for Attorney Withdrawal**

Provisions for withdrawal under the Model Rules are inadequate to address the issue of a strike by staff attorneys of a legal aid organization. The Model Rules indicate that where a matter is pending before a tribunal, the permission of the court to withdraw is usually required. As posited, where the organization is the counsel of record, the individual attorney has no standing to gain permission from the court to withdraw in the event of a strike against his employer. The factual scenario anticipated by the Model Rules that would justify a requirement for court permission to withdraw substantially differs from a strike against an employer legal services organization to compel it to provide competent legal representation.

Model Rule 1.16(c) applies where a defendant in criminal

---

193. See supra notes 155-60 and accompanying text.
194. MODEL RULES Rule 1.5(a)(3), supra note 11.
195. In referring to the arrangement of terms of payment the comment states: “An agreement may not . . . induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client’s interest.” MODEL RULES Rule 1.5, supra note 11.
196. MODEL RULES Rule 1.16 comment, supra note 11.
197. See supra notes 117-125 and accompanying text.
198. “When ordered to do so by a tribunal, a lawyer shall continue representation not-
court is urging the counsel of record to violate an ethical rule in the client’s defense effort. The attorney instead may wish to withdraw. By so doing, however, the client’s legitimate defense will be prejudiced. Rule 1.16(c) requires that in this situation, the attorney cannot withdraw without the court’s permission.\textsuperscript{199} This requirement should not apply where, as in the 1982 strike, Society staff attorneys attempt to redress legitimate grievances through striking. In such a strike, where adequate notice is given pursuant to Rule 1.16(d),\textsuperscript{200} the client is protected from prejudice because a supervising attorney will step in or the court will appoint private practitioners to assume representation of cases assigned to striking attorneys. The Model Rules should be revised to distinguish between attorney withdrawal as the draft presently views it and the right of attorney-employees of legal aid corporations to strike against their employer over salary and caseload size.

\textbf{F. Proposed Modification to Model Rule 1.16}

To reconcile language in the proposed Model Rules with the right of attorney-employees of legal service corporations to strike, the following language should be added to Rule 1.16:

(e) Paragraph (c) does not apply to strikes by attorney-employees against their employer when ten business days’ advance notice of the strike is given to the employer and to the court. In the event of such a strike, supervisory attorneys shall assume client representation of newly assigned cases and all cases previously assigned to striking attorneys. In the case of a strike by staff attorneys of a legal service corporation, private practitioners shall assume client representation as appointed by the court. Such court appointed representation shall continue throughout the duration of the strike.

Amendment of the Model Rules is necessary to recognize the attorney-employees’ right to strike against their employer whether it be a legal service corporation, a private firm, or a corporation. Further, attorney-employees must be given the right to notify the court directly when client representation falls below minimum standards of competence. The responsibility placed on individual staff attorneys

\begin{footnotesize}
\begin{enumerate}
\item[199.] Id. Rule 1.16(c) comment, supra note 11.
\item[200.] “Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel . . . .” MODEL RULES Rule 1.16 (d), supra note 11.
\end{enumerate}
\end{footnotesize}
under the Model Rules of Professional Ethics to ensure that competent representation is provided to clients need not be inconsistent with the right codified in the Act to bargain collectively over terms and conditions of employment. The proposed amendment to Model Rule 1.16 would codify these two principles.

To facilitate uninterrupted client representation and minimize disruption to the courts, advance notification of the intent to strike should be required. A specified period of time for notice to the employer and court prior to the strike is preferable to a vague, hard-to-enforce requirement of "adequate" notice. An analogy to provisions contained in the Act to minimize the disruptive effects of a strike by employees in the health care industry is appropriate.

Striking health care workers are required to give ten days advance notice to their employer prior to walking off their jobs. A similar requirement for strikes by attorney-employees should not be viewed as too great an encroachment on this ability to wage an effective strike where the quality of client representation is at issue. By giving the employer and the courts an indication of the serious nature of their grievance, corrective action may be achieved prior to the strike. Thus, disruption of the smooth functioning of the judicial system may be avoided.

XI. CONCLUSION

A goal of any code of professional ethics must be to preserve the standards of competent practice without infringing on the organizational rights of professional employees. The interest of the American Bar Association in maintaining the attorneys’ dignity may, for some, weigh against acknowledging the rights of attorney-employees to strike. Such overprotectiveness, however, must give way to a recognition of the protections accorded employees by the Act. When legal representation provided by a private legal services corporation is on the verge of falling below minimum practice standards, as was the case in New York City in the Fall of 1982, staff attorneys should be encouraged to police themselves and, when other measures fail, be permitted to impose accepted standards of competence on the offend-

201. Section 8(g) of the Act provides:
A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention. . . . The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.
29 U.S.C. § 158(g).
ing organization through a strike. By requiring notice of a strike to the employer and providing a "cooling off" period the concomitant disruption of the court system may be avoided. Achieving such a balance of competing interests represents lawyer self-governance at its finest.

Randy Lee Arthur