No resolution presented herein represents the policy of the American Bar Association until it shall have been approved by the House of Delegates. Informational reports, comments and supporting data are not approved by the House in its voting and represent only the views of the Section or Committee submitting them.

AMERICAN BAR ASSOCIATION
SECTION OF BUSINESS LAW
SECTION OF STATE AND LOCAL GOVERNMENT LAW
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
REPORT WITH RECOMMENDATIONS
TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the ABA Model Rules of Professional Conduct be amended to add a new Rule 7.6, "Political Contributions to Obtain Government Legal Engagements or Appointments by judges", as follows:

RULE 7.6. POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES.

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.
Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.

The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.

Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.
Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.
REPORT

Background

The House of Delegates in August, 1998 by a decisive majority decided that the Model Rules of Professional Conduct should expressly prohibit “pay to play” by lawyers as recommended by the Task Force on Lawyers' Political Contributions (the “Task Force”), and instructed the Standing Committee on Ethics and Professional Responsibility (the “Standing Committee”) to promulgate a Model Rule of Professional Conduct to that effect. See Amended Recommendation 301A. In response, the Standing Committee, in August 1999, submitted to the House a proposed new Model Rule 7.6 and accompanying Comment. The Rule did nothing more than implement the instructions of the House of Delegates to draft a new Model Rule on lawyers’ political contributions. Nevertheless, at the 1999 Annual Meeting, the House of Delegates, by a vote of 164 to 146, rejected the Standing Committee’s proposal.

The Sponsors believe that the very important issue of pay-to-play should be reconsidered by the House. The vote was taken very late in the session after a substantial number of delegates had departed (only 310 of the 530 members of the House were present and voting) and without adequate opportunity for balanced debate (only one “pro” speaker, other than the moving sponsor, was recognized before a tired House called the question). Accordingly, the Sponsors resubmit the proposed Model Rule 7.6 governing lawyers’ political contributions to the House of Delegates at the 2000 Midwinter Meeting. A detailed description of the resubmitted Rule begins on page 12.

The practice commonly known as pay-to-play addressed by the Rule is a system whereby lawyers and law firms are considered for or awarded government legal engagements or appointments by a judge only upon their making or soliciting contributions for the political campaigns of officials who are in a position to “steer” such business their way. The fundamental
harm done by a pay-to-play system is the harm that befalls the public when a government official, motivated by campaign contributions, chooses lawyers or law firms that may not be the best qualified to perform legal services on the public's behalf. Thus it is the integrity of a basic governmental process, and not just the integrity of the legal profession, that is undermined when such action by a public official is tolerated.

The Sponsors note that although lawyers and their political contributions are an important component of the pay-to-play system, lawyers are not the most important players in such a system. The primary actor in any pay-to-play situation is the public official who, depending upon the style of his or her participation in the system, may be acting in dereliction of official duties. For this reason, the rules of professional conduct governing lawyer behavior should not be relied upon as the only method of preventing the practice of pay-to-play. Rather, consistent and diligent enforcement of statutory provisions governing fair campaign finance practices and the conduct of public officials is the most fundamental method of addressing the problem of pay-to-play.

A second method of protecting against the evils of a pay-to-play system also lies outside the scope of rules governing lawyer conduct: the use of uniform procurement or acquisition procedures for the placement of legal services engagements by government entities and the granting of appointments by judges. The Association has strongly supported the use by government agencies of such procurement procedures. As recently as August, 1998 it approved a recommendation proposed by the Section of Public Contract Law and the Section of State and Local Government Law supporting fundamental principles of competition in public procurements. That recommendation had as its aims both the promotion of the public interest in the integrity and honesty of the public procurement process and the promotion of competition itself. As such, it is a model to be recommended for use in the area of government legal engagements and appointments by judges.
Accordingly, the Sponsors emphatically believe that the ethical proscriptions of the Rule should be augmented by aggressive enforcement of prohibitions against pay-to-play conduct by public officials, and reliance on uniform procurement codes and procedures in the placement of legal engagements and in appointments by judges. The Sponsors therefore restate the Association’s support for each of these concepts, even as they propose regulatory measures within the Model Rules of Professional Conduct.

BACKGROUND FOR THE DEVELOPMENT OF A MODEL RULE

The Rule proposed by the Sponsors is the end result of initiatives that this Association has taken since 1997 to resolve the problem of pay-to-play. Following proposals made to the House of Delegates in 1996 and 1997 by the Association of the Bar of the City of New York, at the 1997 Annual Meeting, the House approved Report 10D, condemning the pay-to-play practice. The Report also called for the creation of a task force that would study the problems created by a pay-to-play system and develop appropriate professional standards or rules on the subject.

A second initiative began with the appointment by former President Shestack of the Task Force on Lawyers’ Political Contributions. The Task Force collected and reviewed empirical data and extensive media reporting on pay-to-play practices as it considered possible approaches the Association might take to discourage or prevent them. In carrying out its charge, the Task Force expanded the scope of its investigation in two important ways. Initial concerns had focused on the existence of pay-to-play in the area of municipal finance engagements. The Task Force's review revealed at least some evidence that the practice occurs in a wider range of practice areas. Early proposals for a Model Rule, which were limited to lawyers engaged in municipal finance work, were therefore put aside, and the Task Force focused on developing a Rule of wider application.
Part One of the Task Force’s August 1998 two-part Report to the House (filed as Reports 301A and 301B) made recommendations to prohibit pay-to-play in lawyers' political contributions to public officials who were in a position to influence the award of legal engagements by government agencies. The House took action on Part One in 1998 by directing the Standing Committee on Ethics and Professional Responsibility to prepare and submit to the House in 1999 a Model Rule that would "prohibit lawyers from making or soliciting political contributions for the purpose of obtaining government legal engagements."

The Task Force also found in Part II of its Report that there was evidence of pay-to-play practices in connection with appointments of lawyers made by judges where the making or soliciting of contributions to the judges' election campaigns was a prerequisite to consideration for a judicial appointment. Accordingly, the Task Force recommended that pay-to-play practices in judicial appointments of lawyers also be prohibited.

In preparing proposed Rule 7.6 the Standing Committee studied the issues necessarily considered when enforceable rules of professional or judicial conduct are to be promulgated. These included separate (although frequently intersecting) review of three types of issues: 1) the constitutional implications of such regulation, both with respect to its potential for abridging first amendment freedoms and with respect to its narrowness or breadth and its clarity; 2) the other regulations, either proposed or currently in existence, dealing with pay-to-play type practices; and 3) the ways that the different proposals might operate effectively — i.e., how each proposal might provide fair notice to lawyers of what is expected of them and how each would be enforced by disciplinary agency personnel — to achieve the objective of prohibiting pay-to-play.

The Standing Committee used the Task Force Report and additional information it obtained to develop two possible "trial" rules addressing lawyers' roles in the pay-to-play system. One was almost verbatim the recommendation that had been made by the Task Force, prohibiting political contributions when the purpose of such contributions was the obtaining of legal business.
A second possible rule approached the pay-to-play problem from a different perspective, prohibiting lawyers from accepting legal engagements where the awarding of the engagements was based upon lawyers' political contributions. Each draft rule was accompanied by extensive commentary in order to establish criteria whereby a contributing lawyer's "purpose" could be proven.

The draft rules were circulated widely for comment and discussed at a public hearing in February 1999. Many Association entities, individual members, and a variety of interested organizations outside the Association presented written or oral comments. The Standing Committee reported that it also sought comment from the community of constitutional scholars (in particular Prof. William Van Alstyne of Duke University School of Law) in order to become thoroughly familiar with the constitutional implications of any possible Model Rule. The Committee further reported that it sought formal and informal input from the community of disciplinary counsel as to the likelihood of either of the trial rules being favorably considered in the jurisdictions and effectively enforced through disciplinary agency proceedings. At the same time several of the Sponsors also conducted extensive analyses of the enforcement and constitutional issues raised by the proposed Rule. In particular, the Section of Business Law reviewed an extensive memorandum analyzing the constitutional issues and obtained the expert opinion of a leading constitutional law authority, Professor Jesse Choper of the Boalt Hall School of Law, University of California at Berkeley.

Constitutional Issues

The Standing Committee had on several past occasions written model rules that implicated First Amendment freedoms (e.g., rules regarding advertising and solicitation and governing trial publicity). It had not, however, specifically addressed lawyers' participation in the political process. Directed by the House to develop a Model Rule that involved lawyers' political "speech" in the form of making or soliciting campaign contributions, the Committee undertook a review of
recent First Amendment jurisprudence treating legislatively-enacted campaign contribution limits. It found, not surprisingly, that limitations on the making and solicitation of political contributions must be predicated on the need to protect a valid state interest; that they must be narrowly drawn; and that their language must be sufficiently clear as to provide fair notice of when and how they operate, thereby satisfying the requirements of due process.

Although Prof. Van Alstyne advised the Standing Committee that “nontrivial” First Amendment issues could be raised with respect to both draft proposals, all of the experts agreed that both proposals should pass First Amendment scrutiny. No constitutional expert has indicated otherwise. Indeed, Rule G-37 of the Municipal Rulemaking Board, which constitutes a far broader limitation on political contributions, was held to be constitutional by the Court of Appeals for the Fifth Circuit.

APPLICABILITY OF CURRENT MODEL RULES

In limited circumstances, the Model Rules of Professional Conduct already apply to lawyers' participation in pay-to-play. For example, a lawyer whose participation in pay-to-play is so egregious as to result in conviction of bribery or a similar serious crime would also violate Model Rule 8.4 (“Misconduct”). Model Rule 7.2 (c), which prohibits a lawyer from giving anything of value to another for recommending the lawyer for employment, may in some pay-to-play circumstances also be applicable, although that provision has traditionally been interpreted to apply to the use of "runners" and similar techniques for obtaining legal work.

However, violations of the existing Model Rules require proof of a *quid pro quo* — i.e., a promise or prior understanding between the contributor and the recipient. Since the typical pay-to-play system operates without such formal promises or understandings, the existing rules have little or no impact on the system. Accordingly, the House in August 1998 agreed with the Task Force's position that the Association should adopt more stringent restrictions on pay-to-play than
these Model Rules would afford. The Rule submitted herewith is designed to implement this decision of the House.

ENFORCEMENT ISSUES

The Sponsors recognize the concern of some disciplinary counsel that the requirement of proving purpose would make enforcement of the Rule difficult. However, the Sponsors believe that the Rule will permit effective enforcement.

It should be noted that the Rule should prove to be largely self-enforcing. The Sponsors believe that the overwhelming majority of lawyers who engage in pay-to-play are unwilling participants in the system, but believe that such participation is the only way to obtain meaningful consideration for government legal engagements and judicial appointments. These participants would welcome a Model Rule that provides an ethical basis to decline solicitations for campaign contributions for candidates whom they often do not know, are not even eligible to vote for, and whose political beliefs they may not share. The Sponsors believe, as in other Rule infractions (such as Rules relating to conflicts), guidance to lawyers and self-enforcement are the prime objectives rather than disciplinary counsel involvement.

The scope of disciplinary counsel involvement is narrowed because the Rule as drafted would not apply to every political contribution or solicitation, but only to those where the lawyer or law firm making a political contribution or solicitation for the purpose of obtaining legal business has been successful in obtaining the business. As with most Model Rule violations, enforcement would depend on external sources for reporting of violations. In the case of Model rule 7.6, these cases would most likely come to the attention of disciplinary authorities through
complaints by unsuccessful competitors who have complied with the Rule and by media exposure of unethical practices.

The concern over enforcement reflects the subjective nature of the proposed Model Rule because it requires proof of purpose. Proof of purpose is not unique to the proposed Rule; a similar “purpose” element is present in other Model Rules. See, e.g., Rule 4.4 prohibiting a lawyer from using “means that have no substantial purpose other than to embarrass.” The purpose requirement serves to narrowly limit the degree of intrusion into a lawyer’s ability to make political contributions. Other rules (such as Rule G-37) are broad, prophylactic rules, which constitute blanket prohibitions on making contributions to government authorities or judges, even with the purest of intents. This is not the case with Model Rule 7.6, which allows all political contributions, except those made “for the purpose of obtaining or being considered [for legal engagement or appointment].”

The subjective element inherent in this Rule, as is the case with other Model Rules, does not negate effective enforcement of the Rule. It simply means that only the clear cases will be subject to disciplinary action – the cases which are the most egregious - a contribution where no reasonable purpose could have existed except the consideration of the lawyer or law firm for legal work (e.g., the contribution by a lawyer in one state to the state treasurer of another state, where there is no personal relationship or political issue connection). In such cases, unlike Rule 8.4b which is customarily used only following conviction of a crime, proof of a Rule 7.6 violation can be established by clear and convincing evidence, not evidence beyond a reasonable doubt, and no criminal conviction would be needed.
EXPLANATION OF THE PROPOSED MODEL RULE

The Sponsors believe that the proposed Model Rule and explanatory Comments come as close to achieving the goals described above as a rule of professional conduct on pay-to-play could be expected to come. Any chilling effect from the regulation of political contributions is minimized by the clear standards contained in the proposed Rule. The Rule would provide:

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

Although the purpose for making or soliciting contributions is an element under the proposed Rule, it is not implicated until a government legal engagement or appointment by a judge is accepted. The inquiry to determine if the Rule was violated by accepting the work then becomes whether the purpose in making or soliciting contributions was to obtain or be considered for an appointment by a judge or a government legal engagement of the type that is offered to the lawyer or law firm.

The rationale for proscribing this conduct appears in Comment [1]: "when lawyers make or solicit political contributions in order to obtain [the engagement or appointment], the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit," and the integrity of the profession is thereby undermined.

A rule designed to limit political contributions and solicitations must, however, be carefully crafted in order to assure, as Comment [1] also says, that lawyers are free "to participate fully in the political process, which includes making and soliciting political contributions ......” The Comments to the proposed Rule, particularly Comments [3] and [5], provide guidelines to assist in identifying the purpose of contributions.
Two safe harbors are established within the definitions in Comment [3]. The first excludes from government legal engagements and appointments by judges those awarded based on merit in a request-for-proposal ("RFP") or other process “that is free from influence based upon political contributions.” The second excludes awards made on a rotational basis from lists compiled “without regard to political contributions.” Also excluded under both definitions are "substantially uncompensated services."

In addition, Comment [5] seeks to explain when the proscribed purpose is or is not present. For the proscribed purpose to be found, it must be shown that, "but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions." This language would permit lawyers to make political contributions to personal friends or clients or to candidates whose causes they support while remaining eligible to accept government legal engagements or appointments by judges. It effectively responds to any concern that the Rule would “chill” lawyers’ political participation.

Comment [5] also provides an example of facts from which, absent other factors to the contrary, it may be fairly inferred that the proscribed purpose is present: substantial contributions for a candidate who can influence the selection of the lawyer to perform the work, followed by selection of the contributor. Factors weighing against the inference (taken from the Report of the Task Force, Part One pages 26-28) set forth in Comment [5] include the existence of a prior family or professional relationship or the desire to further a political or social cause. Unlike awards made in the circumstances described in Comment [3] that are excluded from the Rules prohibition, the circumstances in Comment [5] are merely examples of factors that should be taken into account, among all others that are relevant, in order to determine if the proscribed purpose is present.

Comments [2] and [4] contain definitions that are necessary to apply the Rule properly. For the most part, these are the same definitions as appear in the Task Force Report and in the
Discussion Drafts the Standing Committee circulated in 1999 for comment. In Comment [2], defining "political contribution," those made to political parties now are specifically included. Comment [4] makes it clear that contributions made through a controlled PAC or other controlled entity used as a conduit to an official's campaign are to be treated the same as if the lawyer or law firm had made them directly. Lastly, Comment [6] notes that when bribery or another serious crime is involved, a violation of Model Rule 8.4(b) occurs.

Respectfully submitted,

February, 2000