

STATE OF MINNESOTA
IN SUPREME COURT
No. C8-84-1650

OFFICE OF
APPELLATE COURTS

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FILED

In re:

Amendment to
Rules of Professional Conduct

PETITION OF
MINNESOTA STATE BAR ASSOCIATION

September 19, 2003

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PETITION OF MINNESOTA STATE BAR ASSOCIATION

TO THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT:

Petitioner Minnesota State Bar Association (“MSBA”) respectfully asks this Court to adopt the revised Minnesota Rules of Professional Conduct set forth in Attachment A to this Petition in place of the existing Minnesota Rules of Professional Conduct. The differences between the proposed revised Minnesota Rules of Professional Conduct and the existing Minnesota Rules of Professional Conduct are set forth in redlined version in Attachment C to this Petition. The differences between the proposed revised Minnesota Rules of Professional Conduct and the ABA Model Rules of Professional Conduct, as amended through 2002 are set forth in redlined version in Attachment D to this Petition. In support of this Petition, Petitioner would show the Court the following:

1. Petitioner MSBA is a not-for-profit corporation of attorneys admitted to practice law before this Court and the lower courts of the State of Minnesota.
2. This Honorable Court has the exclusive and inherent power and duty to administer justice and to adopt rules of practice and procedure before the courts of this state and to establish the standards for regulating the legal profession and to establish mandatory ethical standards for the conduct of lawyers and judges. This power has been expressly recognized by the Minnesota Legislature. *See* MINN. STAT. § 480.05 (2002).

3. By order dated June 13, 1985, this Court adopted the Minnesota Rules of Professional Conduct (“Minnesota Rules”), modeled in large part on the American Bar Association (“ABA”) Model Rules of Professional Conduct. The Minnesota Rules supplanted the Minnesota Code of Professional Responsibility, which had also been modeled in large part on the ABA Model Code of Professional Responsibility. The MSBA played an important role in reviewing the ABA Model Rules and Model Code and assessing whether and how they should be implemented in Minnesota.

4. This Court has from time to time amended the Minnesota Rules, and the MSBA has repeatedly advised the Court on issues relating to the professional responsibility of lawyers. There has not been any comprehensive review of the Minnesota Rules since their adoption in 1985.

5. In 1997 the ABA undertook a comprehensive review of the ABA Model Rules and how they were being implemented in the various states. The study was performed by a newly-formed committee: the Commission on the Evaluation of the Rules of Professional Conduct, known more commonly as the Ethics 2000 Commission. The ABA Commission’s process is described in Part I of the MSBA Task Force Report, attached to this Petition as Attachment B, at B-2.

6. In July 2002 the MSBA established a task force to study the Minnesota Rules, to review the amendments to the ABA Model Rules, and to recommend any amendments thought appropriate. The MSBA Task Force on the ABA Model Rules of Professional Conduct was chaired by William J. Wernz of Minneapolis, and its procedures and guiding principles are described in detail in its Report, Attachment B at 3. The MSBA Task Force conducted a comprehensive review of the Minnesota Rules and recommended numerous changes to them. Its recommendations, with three modifications set forth below, are included in the proposed rules

attached to this Petition. The MSBA Task Force worked in cooperation with the Minnesota Lawyers Professional Responsibility Board (“LPRB”). Petitioner is informed and believes that the LPRB will support this petition in all respects except for one provision.

7. At a meeting of the MSBA General Assembly held on June 20, 2003, the General Assembly considered the MSBA Task Force report, and made three amendments to it:

- (a) the language of Rule 3.6(a) was modified;
- (b) the proposed Rule 4.1(b) and Comment [3] to that rule were deleted; and
- (c) the language of Rule 5.4(a)(4) was modified.

8. The General Assembly unanimously adopted the report of the MSBA Task Force as amended and the amended version is attached to this Petition as Attachment A.

9. Petitioner submits that the changes to the rules proposed in this petition will advance a number of interests of the Court, the Public, and the Bar in the supervision of the practice of law and the administration of justice. The rationales for the most significant of these changes are set forth in Section III of the MSBA Task Force Report, Attachment B at B-5 through B-15. The proposed changes will promote the uniformity of rules among jurisdictions, an increasingly desirable goal as multi-jurisdictional law practice grows; realize the benefits of the efforts of the ABA and ALI in improving professional standards; and retain and enhance a limited number of rule variations drawn from Minnesota history and values.

10. In addition to adopting the text of the rules proposed in this petition, Petitioner urges the Court to adopt, as “guides to interpretation,” the Comments adopted by the MSBA, which are in turn drawn from the Comments to the ABA Model Rules. Comment [21], Preamble and Scope, ABA Model Rules, describes the status of the Comments as follows:

“21. The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are

intended as guides to interpretation, but the text of each Rule is authoritative.”

In the past, the Court has not adopted Comments to the Minnesota Rules of Professional Conduct. Nonetheless, the MSBA strongly recommends that the Comments be adopted as guidelines with the text of the Rules being “authoritative,” for several compelling reasons. First, the Comments are an integral and increasingly important part of the ABA Model Rules. The number of Comments has greatly increased, *e.g.*, ABA Model Rule 1.7, as adopted in 2002, has 35 Comments, many of them restating important applications of the conflicts rules. Second, the ABA has informed the Task Force that all but a handful of states that have adopted the Model Rules have also adopted the Comments. Third, it has been the custom and practice of the Lawyers Board, the Office of Lawyers Professional Responsibility, the practicing bar, and many courts, including from time to time the Minnesota Supreme Court, to cite the Comments for their interpretative value. Fourth, in this Court’s decisions in *In re 99-42*, 621 N.W.2d 240 (Minn. 2001,) and *In re Westby*, 639 N.W.2d 358 (Minn. 2002), the opinions of the Minnesota Lawyers Professional Responsibility Board were held to be merely the Board’s guidelines to interpreting the Rules. Several of the Board opinions have been recast by the Task Force, on the Board’s recommendation, as proposed Rules or proposed Comments. It is important for the guidance of the bench and bar that the Court adopt the Comments as guidelines for interpretation.

11. The MSBA is undertaking to review and decide whether to make further recommendations relating to Rule 1.10(b), dealing with lateral-hire conflicts, and the ABA’s August 2003 amendment of Model Rules 1.6 and 1.13, dealing with the reporting responsibilities of lawyers for organizations. Petitioner may make further recommendations to this Court in the future on those matters, but does not believe that consideration of the report and revisions contained in this Petition should be delayed.

For the foregoing reasons, Petitioner respectfully requests that the Court amend the Minnesota Rules of Professional Conduct as set forth in and attached to this Petition as Attachment A.

Dated: September 19, 2003.

Respectfully submitted,

MINNESOTA STATE BAR ASSOCIATION

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Its President

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PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time

and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, 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. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested

concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. For example, Minnesota's Professionalism Aspirations provide guidance on best practices in situations typical in the practice of law. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in

intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

RULE 1.0: TERMINOLOGY

- (a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.
- (b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (f) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
- (c) "Consult" or "Consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.
- (d) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.
- (e) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.
- (f) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
- (g) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.
- (h) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
- (i) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.
- (j) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
- (k) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.
- (l) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(m) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(n) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(o) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (d) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(b) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (o) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (o).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however,

assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where 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. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering from diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The objectives or scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

RULE 1.3: DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

RULE 1.4: COMMUNICATION

(a) A lawyer shall

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might be likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(f).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

RULE 1.5: FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client. All agreements for the advance payment of nonrefundable fees to secure a lawyer's availability for a specific period of time or a specific service shall be reasonable in amount and clearly communicated in a writing signed by the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one

lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) Except when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client.

(b) A lawyer may reveal information relating to the representation of a client if:

- (1) the client gives informed consent;
- (2) the information is not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client;
- (3) the lawyer reasonably believes the disclosure is impliedly authorized in order to carry out the representation;
- (4) the lawyer reasonably believes the disclosure is necessary to prevent the commission of a crime;
- (5) the lawyer reasonably believes the disclosure is necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;
- (6) the lawyer reasonably believes the disclosure is necessary to prevent reasonably certain death or substantial bodily harm;
- (7) the lawyer reasonably believes the disclosure is necessary to secure legal advice about the lawyer's compliance with these Rules;

(8) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;

(9) the lawyer reasonably believes the disclosure is necessary to comply with other law or a court order; or

(10) the lawyer reasonably believes the disclosure is necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. See Rule 8.3.

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(f) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(6) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(7) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[8] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(8) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[9] A lawyer entitled to a fee is permitted by paragraph (b)(8) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[10] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure,

paragraph (b)(9) permits the lawyer to make such disclosures as are necessary to comply with the law.

[11] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(9) permits the lawyer to comply with the court's order.

[12] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[13] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(10). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Withdrawal

[14] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Acting Competently to Preserve Confidentiality

[15] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[16] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[17] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(f) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(n)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(f) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(o) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent to the client's own representation and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interest is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit under Rule 1.7 (a)(2) the lawyer's effectiveness in representing another client in a different case.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear to the parties involved. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve

potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the

obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
 - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
 - (3) the client gives informed consent, in a document signed by the client separate from the transaction documents, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
- (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

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

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

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

(3) a lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by that client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent or the acceptance of compensation from another is impliedly authorized by the nature of the representation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients unless each client gives informed consent in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced. For purposes of this paragraph:

(1) "Sexual relations" means sexual intercourse or any other intentional touching of the intimate parts of a person or causing the person to touch the intimate parts of the lawyer.

(2) if the client is an organization, any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization shall be deemed to be the client. In-house attorneys while representing governmental or corporate entities are governed by Rule 1.7 rather than by this rule with respect to sexual relations with other employees of the entity they represent.

(3) this paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client.

(4) if a party other than the client alleges violation of this paragraph, and the complaint is not summarily dismissed, the Director, in determining whether to investigate the allegation and whether to charge any violation based on the allegations, shall consider the client's statement regarding whether the client would be unduly burdened by the investigation or charge.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a document signed by the client separate from the transaction documents, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(f) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift

be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

[10] Lawyers may not subsidize lawsuits brought on behalf of their clients, such as by making loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted. A lawyer may guarantee a loan to enable the client to withstand delay in litigation under the circumstances stated in Rule 1.8 (e)(3).

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client, or acceptance of compensation from another is impliedly authorized by the nature of the representation. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional

judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement is accepted. See also Rule 1.0(f) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization from having a sexual relationship with a person who oversees the representation and gives instructions to the lawyer on behalf of the organization.

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of

the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

RULE 1.9: DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by rules 1.6 and 1.9 (c) unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number

of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(f). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer becomes associated with a firm, and the lawyer is prohibited from representing a client pursuant to Rule 1.9 (b), other lawyers in the firm may represent that client if there is no reasonably apparent risk that confidential information of the previously represented client will be used with material adverse effect on that client because:

- (1) any confidential information communicated to the lawyer is unlikely to be significant in the subsequent matter;
- (2) the lawyer is subject to screening measures adequate to prevent disclosure of the confidential information and to prevent involvement by that lawyer in the representation; and
- (3) timely and adequate notice of the screening has been provided to all affected clients.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(d). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b) and (c).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(l) and 5.3.

[5] Rule 1.10(c) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who

formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(d) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(f).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the

lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(f) for the definition of informed consent. It is generally improper for a county attorney to accept the defense of a criminal case in another county, and for a city attorney to accept a criminal case that arises within the boundaries of the city or municipality that he or she represents. In extraordinary circumstances, where the accused would otherwise be deprived of competent counsel, a county attorney may seek to represent a client accused of a crime in another county by obtaining permission from the court before which the matter will be tried. The disqualification of county and city attorneys is only imputed to those lawyers in the county or city attorney's law firm who actually participate in representing the county or the city.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(l) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

RULE 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

- (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those Rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(f) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(l). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

RULE 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of

the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking for reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), a violation of law appears likely, the lawyer may resign in accordance with Rule 1.16 and may disclose information in conformance with Rule 1.6.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[4] The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[5] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency

[6] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[7] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent,

and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[8] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[9] Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[10] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[11] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably protective action, including consulting individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6 (b) (3) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers an impairment does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the

known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

RULE 1.15 SAFEKEEPING PROPERTY

(a) All funds of clients or third persons held by a lawyer or law firm in connection with a representation shall be deposited in one or more identifiable interest bearing trust accounts as set forth in paragraphs (d) through (g). No funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds of the lawyer or law firm reasonably sufficient to pay service charges may be deposited therein.

(2) funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm must be deposited therein.

(b) A lawyer must withdraw earned fees and any other funds belonging to the lawyer or the law firm from the trust account within a reasonable time after the fees have been earned or entitlement to the funds has been established and the lawyer must provide the client or third person with: (i) written notice of the time, amount and the purpose of the withdrawal; and (ii) an accounting of the client's or third person's funds in the trust account. If the right of the lawyer or law firm to receive funds from the account is disputed by the client or third person claiming entitlement to the funds, the disputed portion shall not be withdrawn until the dispute is finally resolved. If the right of the lawyer or law firm to receive funds from the account is disputed within a reasonable time after the funds have been withdrawn, the disputed portion must be restored to the account until the dispute is resolved.

(c) A lawyer shall:

(1) promptly notify a client or third person of the receipt of the client's or third person's funds, securities, or other properties.

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them.

(4) promptly pay or deliver to the client or third person as requested the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive.

(5) deposit all fees in advance of the legal services being performed into a trust account and withdraw the fees as earned, unless the lawyer and the client have entered into a written agreement pursuant to Rule 1.5(b).

(d) Each trust account referred to in paragraph (a) shall be an interest bearing account in a bank, savings bank, trust company, savings and loan association, savings association, or federally regulated investment company selected by a lawyer in the exercise of ordinary prudence.

(e) A lawyer who receives client or third person funds shall maintain a pooled interest bearing trust account for deposit of funds that are nominal in amount or expected to be held for a short period of time. The interest accruing on this account, net of any

transaction costs, shall be paid to the Lawyer Trust Account Board established by the Minnesota Supreme Court.

(f) All client or third person funds shall be deposited in the account specified in paragraph (e) unless they are deposited in a:

- (1) separate interest bearing trust account for the particular third person, client or client's matter on which the interest, net of any transaction costs, will be paid to the client or third person; or
- (2) pooled interest bearing trust account with subaccounting which will provide for computation of interest earned by each client's or third person's funds and the payment thereof, net of any transaction costs, to the client.

(g) In determining whether to use the account specified in paragraph (e) or an account specified in paragraph (f), a lawyer shall take into consideration the following factors:

- (1) the amount of interest which the funds would earn during the period they are expected to be deposited;
- (2) the cost of establishing and administering the account, including the cost of the lawyer's services;
- (3) the capability of financial institutions described in paragraph (d) to calculate and pay interest to individual clients.

(h) Every lawyer engaged in private practice of law shall maintain or cause to be maintained on a current basis books and records sufficient to demonstrate income derived from, and expenses related to, the lawyer's private practice of law, and to establish compliance with paragraphs (a) through (f). Equivalent books and records demonstrating the same information in an easily accessible manner and in substantially the same detail are acceptable. The books and records shall be preserved for at least six years following the end of the taxable year to which they relate or, as to books and records relating to funds or property of clients or third persons, for at least six years after completion of the employment to which they relate.

(i) Every lawyer subject to paragraph (h) shall certify, in connection with the annual renewal of the lawyer's registration and in such form as the Clerk of the Appellate Court may prescribe, that the lawyer or the lawyer's law firm maintains books and records as required by paragraph (h). The Lawyers Professional Responsibility Board shall publish annually the books and records required by paragraph (h).

(j) Lawyer trust accounts shall be maintained only in financial institutions approved by the Office of Lawyers Professional Responsibility. Every check, draft, electronic transfer, or other withdrawal instrument or authorization shall be personally signed or, in the case of electronic, telephone, or wire transfer, directed by one or more lawyers authorized by the law firm.

(k) A financial institution shall be approved as a depository for lawyer trust accounts if it shall file with the Office of Lawyers Professional Responsibility an agreement, in a form provided by the Office, to report to the Office in the event any properly payable instrument is presented against a lawyer trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The Lawyers Professional

Responsibility Board shall establish rules governing approval and termination of approved status for financial institutions, and shall annually publish a list of approved financial institutions. No trust account shall be maintained in any financial institution which does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon three days notice in writing to the Office.

(1) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors.

(2) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, as well as the amount of overdraft created thereby.

Such reports shall be made simultaneously with, and within the time provided by law for notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

(m) Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

(n) Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

(o) Definitions.

"Financial Institution" includes banks, savings and loan associations, savings banks and any other business or person which accepts for deposit funds held in trust by lawyers.

"Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

"Notice of dishonor" refers to the notice which a financial institution is required to give, under the laws of this jurisdiction, upon presentation of an instrument which the institution dishonors.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (a) (1) provides that it is permissible when necessary to pay bank

service charges on that account. Accurate records must be kept regarding which part of the funds is the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid.

The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (b) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) 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, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.

(e) Papers and property to which the client is entitled include the following, whether stored electronically or otherwise:

(1) In all representations, the papers and property delivered to the lawyer by or on behalf of the client and the papers and property for which the client has paid the lawyer's fees and reimbursed the lawyer's costs.

(2) In pending claims or litigation representations:

(i) all pleadings, motions, discovery, memoranda, correspondence and other litigation materials which have been drafted and served or filed regardless of whether the client has paid the lawyer for drafting and serving the document(s), but shall not include pleadings, discovery, motion papers, memoranda and correspondence which have been drafted, but not served or filed if the client has not paid the lawyer's fee for drafting or creating the documents; and

(ii) all items for which the lawyer has agreed to advance costs and expenses regardless of whether the client has reimbursed the lawyer for the costs and expenses including depositions, expert opinions and statements, business records, witness statements, and other materials which may have evidentiary value.

(3) In non-litigation or transactional representations, client files, papers and property shall not include drafted but unexecuted estate plans, title opinions, articles of incorporation, contracts, partnership agreements, or any other unexecuted document which does not otherwise have legal effect, where the client has not paid the lawyer's fee for drafting the document(s).

(f) A lawyer may charge a client for the reasonable costs of duplicating or retrieving the client's papers and property after termination of the representation only if the client has, prior to termination of the lawyer's services, agreed in writing to such a charge.

(g) A lawyer shall not condition the return of client papers and property on payment of the lawyer's fee or the cost of copying the files or papers.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

RULE 1.17: SALE OF LAW PRACTICE

(a) A lawyer shall not sell or buy a law practice unless:

(1) The seller sells the practice as an entirety, as defined in paragraph (c) of this Rule, to a lawyer or firm of lawyers licensed to practice law in Minnesota:

(2) The seller sends a written notification that complies with paragraph (d) of this Rule to all clients whose files are currently active and all clients whose inactive files will be taken over by the buying lawyer or firm of lawyers.

(b) The buying lawyer or firm of lawyers shall not increase the fees charged to clients by reason of the sale for a period of at least one year from the date of the sale. The buying lawyer or firm of lawyers shall honor all existing fee agreements for at least one year from the date of the sale and shall continue to completion, on the same terms agreed to by the selling lawyer and the client, any matters that the selling lawyer has agreed to do on a pro bono publico basis or for a reduced fee.

(c) For purposes of this Rule, a practice is sold as an entirety if the buying lawyer or firm of lawyers assumes responsibility for at least all of the currently active files except those that deal with matters that the buying lawyer or firm of lawyers would not be competent to handle, those that the buying lawyer or firm of lawyers would be barred from handling because of a conflict of interest, or those from which the selling lawyer is denied permission to withdraw by a tribunal in a matter subject to Rule 1.6(c).

(d) The written notification that the seller lawyer must send pursuant to paragraph (a)(2) of this Rule must include at a minimum:

(1) A statement that the law practice of the selling lawyer has been sold to the buying lawyer or law firm;

(2) A summary of the buying lawyer's or law firm's professional background, including education and experience and the length of time that the buying lawyer or members of the buying law firm has been in practice;

(3) A statement that the client has the right to continue to retain the buying lawyer under the same fee arrangement as the client had with the selling lawyer or to have the client's complete file sent to the client or to another lawyer of the client's choice.

(e) If the written notification described in paragraph (d) has actually reached the client through personal service or by certified mail, the notification may include a provision that states that if the client does not respond to the buying lawyer by ninety days from the date that the client receives the notification, the client's silence shall be deemed to be the client's waiver of confidentiality and the client's consent to the buying lawyer's representing the client in the matter that was the subject of the selling lawyer's representation. The client's failure to respond within that time shall be such a waiver and consent.

(f) The transaction may include a promise by the selling lawyer that the selling lawyer will not engage in the practice of law for a reasonable period of time within a reasonable geographic area and will not advertise for or solicit clients within that area for that time.

(g) The selling lawyer shall retain responsibility for the proper management and disposition of all inactive files that are not transferred as part of the sale of the law practice.

(h) For purposes of this Rule, the term “lawyer” means an individual lawyer or a law firm that buys or sells a law practice.

Comment

[1] A representative of a deceased, disabled or disappeared lawyer may sell the lawyer’s law practice under the same restrictions as imposed by this Rule. See Rule 5.4 (a)(4).

[2] Rule 1.6 on Confidentiality of Information limits the amount and type of information that the selling lawyer may give to the potential buying lawyer during negotiations. Before the prospective buyer could see the client’s files the selling lawyer would be required to obtain from the affected client a waiver of confidentiality.

[3] The selling lawyer should consider extending malpractice insurance for some reasonable period of time following the sale to insure against losses arising from errors that might come to light after the sale.

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

- (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or
- (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (ii) written notice is promptly given to the prospective client.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(f) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used against the prospective client in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(l) (requirements for screening procedures). Paragraph (d)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the client, a reasonable delay may be justified.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

RULE 2.1: ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

RULE 2.2 (deleted)

RULE 2.3: EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Comment

Definition

[1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent,

however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(f).

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

RULE 2.4: LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(n)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

RULE 3.2: EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(n) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for

litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(g). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding,

such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(a) Before the trial of a case, a lawyer connected therewith shall not, except in the course of official proceedings, communicate with or cause another to communicate with anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case.

(b) During the trial of the case:

(1) a lawyer connected therewith shall not, except in the course of official proceedings, communicate with or cause another to communicate with any member of the jury.

(2) a lawyer who is not connected therewith shall not, except in the course of official proceedings, communicate with or cause another to communicate with a juror concerning the case.

(c) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service.

(d) A lawyer shall not conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of a juror or prospective juror.

(e) All restrictions imposed by this rule apply also to communications with or investigations of members of a family of a juror or prospective juror.

(f) A lawyer shall reveal promptly to the court improper conduct by, or by another toward, a juror or prospective juror or a member of the family thereof, of which the lawyer has knowledge.

(g) In an adversary proceeding a lawyer shall not communicate or cause another to communicate as to the merits of the case with the judge or an official before whom a proceeding is pending except:

(1) in the course of official proceedings.

(2) in writing, if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party if the party is not represented by a lawyer.

(3) orally upon adequate notice to opposing counsel or to the adverse party if the adverse party is not represented by a lawyer.

(4) as otherwise authorized by law.

(h) A lawyer shall not engage in conduct intended to disrupt a tribunal.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can prevent the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

RULE 3.6: TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a criminal matter shall not make an extrajudicial statement about the matter that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing a jury trial in a pending criminal matter.

(b) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(c) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing a pending criminal jury trial. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[3] Extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[4] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

RULE 3.7: LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(f) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) exercise reasonable care to prevent employees or other persons assisting or associated with the prosecutor in a criminal case and over whom the prosecutor has direct control from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal

prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case.

RULE 3.9: ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Comment

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly make a false statement of fact or law.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if,

after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. The term "constituent" is defined in Comment [1] to Rule 1.13. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(g). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

RULE 4.3: DEALING WITH UNREPRESENTED PERSON

- (a) In dealing on behalf of a client with a person who is not represented by counsel: a lawyer shall not state or imply that the lawyer is disinterested;
- (b) a lawyer shall clearly disclose that the client's interests are adverse to the interests of the unrepresented person, if the lawyer knows or reasonably should know that the interests are adverse;
- (c) when the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding; and
- (d) the lawyer shall not give legal advice to the unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of the unrepresented person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where the lawyer knows or reasonably should know that the interests are adverse, disclose that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents a party whose interests are adverse and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

RULE 5.1: RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(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.

(c) 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 or has comparable managerial authority 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.

Comment

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(d). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

RULE 5.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) 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.

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers

is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
 - (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
 - (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement;
 - (4) subject to full disclosure and court approval a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter; and
 - (5) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer the proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.
- (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if
- (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
 - (2) a nonlawyer possesses governance authority, unless permitted by the Minnesota Professional Firms Act; or
 - (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8 (f).

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so, except that a lawyer admitted to practice in Minnesota does not violate this rule by conduct in another jurisdiction that is permitted in Minnesota under Rule 5.5 (c) and (d) for lawyers not admitted to practice in Minnesota.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

- (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
- (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

- (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
- (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
- (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
- (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. The exception is intended to permit a Minnesota lawyer, without violating this Rule, to engage in practice in another jurisdiction as Rule 5.5 (c) and (d) permit a lawyer admitted to practice in another jurisdiction to engage in practice in Minnesota. A lawyer who does so in another jurisdiction in violation of its law or rules may be subject to discipline or other sanctions in that jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraph (d), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction

requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Paragraph (d) identifies a circumstance in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a

temporary basis. Except as provided in paragraph (d), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[17] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[18] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[19] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

RULE 5.6: RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

- (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
- (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Comment

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] paragraph (b) prohibits a lawyer from agreement not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstance by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comment

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A

lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

RULE 5.8: EMPLOYMENT OF DISBARRED, SUSPENDED, OR INVOLUNTARILY INACTIVE LAWYERS

(a) For purposes of this rule “employ” means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid.

(b) A lawyer shall not employ, associate professionally with, or aid a person the lawyer knows or reasonably should know has been disbarred, suspended, or placed on disability inactive status by order of the court to do any of the following on behalf of the lawyer’s client:

- (1) render legal consultation or advice to the client;
- (2) appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer unless the rules of the tribunal involved permit representation by nonlawyers and the client has been informed of the lawyer’s suspension, disbarment, or disability inactive status;
- (3) appear as a representative of the client at a deposition or other discovery matter;
- (4) negotiate or transact any matter for or on behalf of the client with third parties;
- (5) receive, disburse or otherwise handle the client’s funds; or
- (6) engage in activities that constitute the practice of law.

(c) A lawyer may employ, associate professionally with, or aid a disbarred, suspended, or disability inactive lawyer to perform research, drafting, clerical, or similar activities, including but not limited to:

- (1) legal work of a preparatory nature for the lawyer’s review, such as legal research, the gathering of information, drafting of pleadings, briefs, and other similar documents;
- (2) direct communication with the client or third parties regarding matters such as scheduling, billing, updates, information gathering, confirmation of receipt or sending of correspondence and messages; or
- (3) accompanying an active lawyer in attending a deposition or other discovery procedure for the limited purpose of providing clerical assistance to the active lawyer who will appear as the representative of the client.

(d) Prior to or at the time of employing a person the lawyer knows or reasonably should know is a disbarred, suspended, or disability inactive lawyer, the lawyer shall serve upon the Office of Lawyers Professional Responsibility written notice of the employment, including a full description of such person’s current license status. The notice shall state that the suspended, disbarred, or disability inactive lawyer shall not be employed to perform any of the activities prohibited by paragraph (b).

(e) Upon termination of the employment of the disbarred, suspended, or disability inactive lawyer, the employing lawyer shall promptly serve upon the Office of Lawyers Professional Responsibility written notice of the termination.

RULE 6.1: VOLUNTARY PRO BONO PUBLICO SERVICE

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

- (a) provide a substantial majority of the 50 hours of legal services without fee or expectation of fee to:
 - (1) persons of limited means or
 - (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means;and
- (b) provide any additional services through:
 - (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
 - (2) delivery of legal services at a substantially reduced fee of persons of limited means;or
- (3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Comment

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The Minnesota State Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified but, during the course of his or her legal career, each lawyer should render on average per year the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi criminal matters for which there is no government obligation to provide funds for legal representation, such as post conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those

whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the

profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

RULE 6.2: ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

- (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
- (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
- (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Comment

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

RULE 6.3: MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or
- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

RULE 6.4: LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Comment

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.

RULE 6.5: PRO BONO LIMITED LEGAL SERVICES PROGRAMS

- (a) A lawyer who, under the auspices of a program offering pro bono legal services, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
- (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
 - (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.
- (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Comment

[1] Legal services organizations, courts and various organizations have established programs through which lawyers provide short-term limited legal services — such as advice or the completion of legal forms - that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

RULE 7.2: ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

- (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
- (2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service;
- (3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

- (i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name of at least one lawyer or law firm responsible for its content.

Comment

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the

public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit lawyer referral service.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a not-for-profit lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person or telephonic contacts that would violate Rule 7.3.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within a firm.

RULE 7.3: DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

- (1) is a lawyer; or
- (2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

- (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall clearly and conspicuously include the words "Advertising Material" on the outside envelope, if any, and within any written, recorded or electronic

communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person or live telephone solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person or telephone persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person or live telephone contact will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person or live telephone conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal- service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[7] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

- (1) the lawyer is certified as a specialist by an organization that is approved by an appropriate state authority or that is accredited by the American Bar Association; and
- (2) the name of the certifying organization is clearly identified in the communication.

Comment

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that is approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

RULE 7.5: FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Comment

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

RULE 8.1: BAR ADMISSION AND DISCIPLINARY MATTERS

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact, or
- (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Comment

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

RULE 8.2: JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender.

Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information that Rule 1.6 requires or allows a lawyer to keep confidential or information gained by a lawyer or judge while participating in a lawyers assistance program or other program providing assistance, support or counseling to lawyers who are chemically dependent or have mental disorders.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in a bona fide lawyers assistance program or other program that provides assistance, support or counseling to lawyers, including lawyers and judges who may be impaired due to chemical abuse or dependency, behavioral addictions, depression or other mental disorders. In that circumstance, providing for the confidentiality of information obtained by a lawyer-participant encourages lawyers and judges to participate and seek treatment through such programs. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance, which may then result in additional harm to themselves, their clients, and the public. The Rule therefore exempts lawyers participating in such programs from the reporting obligation of paragraphs (a) and (b) with respect to information they acquire while participating. A lawyer exempted from mandatory reporting under part (c) of the Rule may nevertheless report misconduct in the lawyer's discretion, particularly if the impaired lawyer or judge indicates an intent to engage in future illegal activity, for example, the conversion of client funds. See the comments to Rule 1.6.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
- (g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation or marital status in connection with a lawyer's professional activities;
- (h) commit a discriminatory act, prohibited by federal, state or local statute or ordinance, that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstance, including:
 - (1) the seriousness of the act,
 - (2) whether the lawyer knew that it was prohibited by statute or ordinance,
 - (3) whether it was part of a pattern of prohibited conduct, and
 - (4) whether it was committed in connection with the lawyer's professional activities; or

(i) refuse to honor a final and binding fee arbitration award after agreeing to arbitrate a fee dispute.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be

professionally answerable only for offenses that indicate lack of those characteristics relevant to the practice of law. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[4] Paragraph (g) specifies a particularly egregious type of discriminatory act - harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status. What constitutes harassment in this context may be determined with reference to antidiscrimination legislation and case law thereunder. This harassment ordinarily involves the active burdening of another, rather than mere passive failure to act properly.

[5] Harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status may violate either paragraph (g) or paragraph (h). The harassment violates paragraph (g) if the lawyer committed it in connection with the lawyer's professional activities. Harassment, even if not committed in connection with the lawyer's professional activities, violates paragraph (h) if the harassment (1) is prohibited by antidiscrimination legislation and (2) reflects adversely on the lawyer's fitness as a lawyer, determined as specified in paragraph (h).

[6] Paragraph (h) reflects the premise that the concept of human equality lies at the very heart of our legal system. A lawyer whose behavior demonstrates hostility toward or indifference to the policy of equal justice under the law may thereby manifest a lack of character required of members of the legal profession. Therefore, a lawyer's discriminatory act prohibited by statute or ordinance may reflect adversely on his or her fitness as a lawyer even if the unlawful discriminatory act was not committed in connection with the lawyer's professional activities.

[7] Whether an unlawful discriminatory act reflects adversely on fitness as a lawyer is determined after consideration of all relevant circumstances, including the four factors listed in paragraph (h). It is not required that the listed factors be considered equally, nor is the list intended to be exclusive. For example, it would also be relevant that the lawyer reasonably believed that his or her conduct was protected under the state or federal constitution or that the lawyer was acting in a capacity for which the law provides an exemption from civil liability. *See, e.g.*, Minn. Stat. Section 317A.257 (unpaid director or officer of nonprofit organization acting in good faith and not willfully or recklessly).

[8] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

RULE 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct

occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, *ABA Model Rules for Lawyer Disciplinary Enforcement*. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction

in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

Adopted by the MSBA General Assembly June 20, 2003

**MSBA TASK FORCE ON THE ABA MODEL RULES OF PROFESSIONAL
CONDUCT
REPORT AND RECOMMENDATIONS**

MSBA President Jon Duckstad formed the MSBA Task Force on the Model Rules of Professional Conduct in July 2002 to study recent amendments to the ABA Model Rules of Professional Conduct and recommend appropriate amendments to the Minnesota Rules of Professional Conduct. The Task Force is chaired by attorney William J. Wernz of Dorsey & Whitney LLP; its members are listed in Appendix A to this report.

The first section of this report provides background about the amendments to the ABA Model Rules. The second section explains the basic principles and foundational decisions adopted by the Task Force. The third section highlights the most important recommendations for amendments to specific Rules of Professional Conduct. Appendix B to this report sets forth the Rules of Professional Conduct and Comments that the Task Force recommends to the MSBA for presentation to the Minnesota Supreme Court. The Task Force seeks adoption of the report including the proposed rules and comments included in Appendix B.

I. ABA Background

Effective September 1, 1985, the Minnesota Supreme Court adopted the Minnesota Rules of Professional Conduct (“MRPC”). The MRPC were largely based on the ABA Model Rules of Professional Conduct, as was the predecessor Minnesota Code of Professional Responsibility based on the ABA Model Code of Professional Responsibility.

The ABA adopted the Model Rules on August 2, 1983. In 1997, the ABA created the Commission on the Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”) to comprehensively review the Model Rules and propose amendments. On February 5, 2002, the ABA House of Delegates adopted amendments that, for the most part, had been recommended by the Ethics 2000 Commission. Attached as Appendix C is an overview of the work of the Ethics 2000 Commission.

In 2000, the American Law Institute published the Restatement of the Law Third, The Law Governing Lawyers. The expected publication of the Restatement and the publication of tentative drafts were major influences on the Ethics 2000 Commission.

In 2000, the ABA created the Commission on Multijurisdictional Practice (“MJP Commission”) to recommend changes to the Model Rules and other regulations based on the increasingly multijurisdictional nature of the practice of law. On August 12, 2002, the ABA House of Delegates adopted amendments to Model Rules 5.5 and 8.5 based on the MJP Commission’s recommendations.

In 2002, the ABA created the Task Force on Corporate Responsibility. On March 31, 2003, the Task Force issued its final Report, including recommendations for amendments to ABA Model Rules 1.6 and 1.13. These recommendations are scheduled for consideration by the ABA House of Delegates at its August 2003 meeting.

Since September 1, 1985, the Minnesota Supreme Court has amended the MRPC from time to time. However, there has been no comprehensive review and amendment of the ABA Model Rules between 1983 and 2002, nor has there been any comprehensive review or series of amendments to the MRPC between 1985 and 2003.

II. Procedures and Principles

A. Procedures

The Task Force met every month except December from July 2002 through June 2003. The meetings normally lasted three or four hours. Members of the Task Force also met in committees to study particular sets of rules and make recommendations to the Task Force. The Task Force itself was a diverse group in every sense, including judges, lawyers and public members of highly various backgrounds.

The Task Force and some of the Task Force committees met with, or received comment from, a number of interested persons or groups. For example, the Task Force received presentations from the Chair of the Lawyers Professional Responsibility Board, the Director of the Office of Lawyers Professional Responsibility, and the Director of the Board of Law Examiners. The Task Force received written comment from the United States Attorney, the Minnesota County Attorneys Association, the Minnesota Trial Lawyers Association, the MSBA Paralegal Committee, and Professor Douglas Heidenreich. Several committees of the Lawyers Professional Responsibility Board and the staff of the Office of Lawyers Professional Responsibility also provided helpful comment. The Task Force's work product, including preliminary drafts of contemplated recommendations, was regularly posted and updated on an MSBA web site so that interested persons could review and comment on issues and proposals.

B. Principles

The Task Force adopted several guiding principles. First, the Task Force decided that the ABA Model Rules should be the baseline for amendments, rather than the current Minnesota Rules of Professional Conduct. Second, the Task Force decided that the ABA Model Rules should be adopted in Minnesota except for variations that were demonstrably supported by strong precedent or reasons for variation. Third, the Task Force decided that the Comments to the Model Rules should be recommended for adoption as guidelines by the Minnesota Supreme Court. The rationales for these decisions and principles are as follows.

The Task Force recognizes that the practice of law is increasingly multi-state, national and international. Achieving a high degree of uniformity in attorney regulation has therefore become more important. In addition, it has become more important to define rules that relate to multijurisdictional practice, such as rules governing licensure, unauthorized practice of law, discipline jurisdiction, and choice of law.

The process followed by the Ethics 2000 Commission justifies giving deference to the ABA. The Commission was a diverse group that operated with an unprecedented degree of openness, diligence, and expertise over a period of several years. The Commission held numerous public hearings and received many comments, including comments from the MSBA Standing Committee on the Rules of Professional Conduct. The MSBA comments in several instances resulted in changes to the Commission's proposals to the

ABA. The Commission took careful account of the Restatement of the Law Governing Lawyers, itself a new and magisterial work.

The Task Force adopted the ABA Model Rules as its baseline because making recommendations based on amendments to the MRPC would involve amendments so numerous that the process would be unwieldy.

In addition to recommending that the Court adopt, with certain variations, the ABA Model Rules, the Task Force recommends that the Court adopt, as “guides to interpretation,” the Comments to the Model Rules. Comment [21], Preamble and Scope, ABA Model Rules, describes the status of the Comments as follows: “The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”

In the past, the Court has declined to adopt Comments to the Minnesota Rules of Professional Conduct. Nonetheless, the Task Force strongly recommends that the Comments be adopted as guidelines, with the text of the Rules being “authoritative,” for several compelling reasons. First, the Comments are an integral and increasingly important part of the ABA Model Rules. The number of Comments has greatly increased, e.g., ABA Model Rule 1.7, as adopted in 2002, has 35 Comments, many of them restating important applications of the conflicts rules. Second, the ABA has informed the Task Force that all but a handful of states that have adopted the Model Rules have also adopted the Comments. Third, it has been the custom and practice of the Lawyers Board, the Office of Lawyers Professional Responsibility, the practicing bar, and many courts, including from time to time the Minnesota Supreme Court, to cite the Comments for their interpretative value. Fourth, in the Court’s decisions in *In re 99-42*, 621 N.W.2d 240 (Minn. 2001) and *In re Westby*, 639 N.W.2d 358 (Minn. 2002), the opinions of the Minnesota Lawyers Professional Responsibility Board were held to be merely the Board’s guidelines to interpreting the Rules. Several of the Board opinions have been recast by the Task Force, on the Board’s recommendation, as proposed Rules or proposed Comments. It is important for the guidance of the bench and bar that the Court adopt the Comments as guidelines for interpretation.

III. Explanation of Recommendations

The Task Force vigorously debated many proposed amendments. This section will not attempt to summarize every debate. Instead, the most important or controversial of the issues considered by the Task Force will be summarized here.

A. Retaining MRPC 1.6(b)(4), 1.8(e)(3), 1.8(k), 1.15, 1.17, 3.5, 3.6, 5.4(a)(2), 5.4(d)(2), 5.7, 8.3(c), 8.4(g) and 8.4(h).

The Task Force believes that several Rules adopted in Minnesota have so long stood the test of time and wisdom that they should not be amended or deleted to comport with the ABA Model Rules. Prominent among these Rules are current 1.6(b)(4) (permitting disclosure of confidential information "necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used"), 1.8(e)(3) (guaranteeing loan reasonably needed to enable client to withstand litigation delay that would put substantial pressure on client to settle case because of financial hardship rather than merits), 1.15 (safekeeping property), 3.6 (trial publicity), 5.4(a)(2) (paying estate for deceased lawyer's services), 5.4(d)(2) (nonlawyer with governance authority under Minnesota Professional Firms Act), 5.7 (employment of disbarred, suspended, or involuntarily inactive lawyers), and 8.4(g) and (h) (harassment and discrimination). These MRPC have no Model Rule counterparts, but the Task Force believes that they embody important principles of social justice and other values that are important standards of the Minnesota legal profession.

Similarly, the Task Force believes that several MRPC that the Minnesota Supreme Court recently adopted after very careful consideration should be retained in their current form even though they have Model Rule counterparts that are worded somewhat differently. These include MRPC 1.8(k) (sex with client), 1.17 (sale of a law practice), 3.5 (ex parte communications with judge or juror), 5.8 (previously numbered as 5.7 and covering employment of disbarred, suspended, or involuntarily inactive lawyers), and 8.3(c) (exemption from disclosure of attorney misconduct learned during participation in lawyer assistance program).

B. Preamble, Scope and Terminology

The Preamble, Scope and Terminology sections raise the underlying themes of the rules: a lawyer's duty to protect the client's trust and promote access to justice. The most important changes are found in the Rule 1.0 Terminology section, which defines new terms, including "informed consent," "writing," and "confirmed in writing." These terms are designed to improve clarity and completeness in the communication between the lawyer and the client.

C. Rule 1.6, Confidentiality of Information

In 1985, the Minnesota Supreme Court declined to adopt ABA Model Rule 1.6, but instead retained DR 4-101 of the Minnesota Code of Professional Responsibility. MRPC

1.6 remained based on the categories of “confidences” and “secrets,” while Model Rule 1.6 is based on “information relating to the representation of a client.” The Task Force proposal retains the substance of the “confidences and secrets” categories, but adopts the Model Rules format. The Task Force recommendation clarifies and simplifies the circumstances in which a lawyer is permitted to disclose confidential information, by listing all circumstances under one heading, rather than including some of them in indirect fashion. Although the list of exceptions appears lengthy, in fact all of the exceptions are either carried forward from current MRPC 1.6 or are relatively non-controversial provisions adopted from the Model Rules (e.g. disclosure to prevent death or great bodily harm).

D. Rules 1.7-1.12, Conflict of Interest

The Task Force recommends adoption of the Model Rules regarding conflicts with the following exceptions and observations:

The Task Force recommends adoption of the Model Rules standard for conflict waivers of “informed consent,” as opposed to the “consultation” standard found in the MRPC and the former Model Rules, including that waivers be “confirmed in writing.” The requirement of written waivers is perhaps the most importance change in the conflicts rules.

Rule 1.7, governing current client conflicts of interest, has been re-formatted but not substantively changed.

The Task Force recommends retaining current MRPC 1.8(c), which prohibits a lawyer from drafting instruments to the lawyer’s benefit, except for instruments for relatives. Model Rule 1.8(c) broadens the exception beyond relatives to any other “individual with whom the lawyer or the client maintains a close, familial relationship.” The Task Force concluded that the broader exception would created undue enforcement problems, because lawyers would claim such relationships with clients and evidence regarding whether a relationship was “familial” would be unduly complicated and uncertain.

The Task Force recommends retaining current MRPC 1.8(e)(3), which permits a lawyer to guarantee certain client loans to withstand litigation delays.

The Task Force recommends retaining language contained in MRPC 1.8(f), which permits a lawyer to accept compensation from one other than the client if “acceptance of compensation is impliedly authorized by the nature of the representation.” The Model Rule would require client consent in all cases. In certain insurance defense situations, such as where the insured could not be readily found or identified, the Model Rule could be difficult to apply.

The Task Force recommends retaining current MRPC 1.8(k)(1), which defines sexual relations for purposes of the prohibition on sexual relations with clients.

The Task Force recommends retaining current MRPC 1.10(b), to permit limited screening for lateral hires. Such screening is permitted by a number of states, is supported by the Restatement and many commentators, and the MRPC provision seems to have worked well in practice. The Task Force has not undertaken the “comprehensive reexamination” of the screening rule mentioned as a possible future undertaking in *Lennartson v. Anoka-Hennepin Independent School District No. 11*, (Minn. June 5, 2003).

The Task Force recommends adding Comment [1] to Rule 1.11 so as to incorporate the substance of Lawyers Board Opinions 2 and 6 relating to conflicts arising in defense of criminal cases by county and municipal attorneys.

Conflicts in pro bono representation are addressed in Proposed Rule 6.5. A petition filed with the Minnesota Supreme Court in March 2003 would address this matter by amending MRPC 1.10, which deals with imputation of conflicts. The Task Force believes it is better addressed in a separate rule, but the Task Force position does not differ in substance from the proposal before the Court.

Another important change to the Model Rules on conflicts is the deletion of Rule 2.2 (“Intermediary”). The substance of former Model Rule 2.2 has been adopted as part of the Comments to Model Rule 1.7.

E. Rule 1.13, Organization as Client

The Task Force recommends the adoption of the Model Rule with a changed paragraph (c). The change is necessary because of the substantial differences between the proposed Minnesota Rule 1.6 and the Model Rule version of Rule 1.6. The Report of the ABA Commission on Corporate Responsibility recommends significant changes in Rule 1.13 and the ABA House of Delegates is expected to consider those recommendations in August 2003. The Task Force believes that action on that report would be premature and that other provisions of Minnesota’s rules, such as Rule 1.6’s permission to disclose information necessary to rectify fraud, make the case for change in this rule less than urgent in Minnesota.

F. Rule 1.14, Client with Diminished Capacity

The ABA amended the terminology of Model Rule 1.14 and its Comments primarily to focus on and express the continuum of a client’s capacity, rather than a client’s status as disabled or not. The Task Force recommends approving the change in terminology and the addition to paragraph (b) of additional guidance for lawyers regarding “protective action” lawyers may take short of seeking a guardian, including consulting individuals or entities that have the ability to take action to protect the client.

G. Rule 1.15, Safekeeping Property

The Task Force recommends retaining the format and content of the Minnesota Rule and Comments with a few minor changes. The rule on Safekeeping Property is among the rules that vary most across the country, each jurisdiction knowing the requirements and restrictions that will achieve an appropriate level of confidence in lawyers' management of clients' and third persons' property in the jurisdiction. The Minnesota Rule includes details that the Court has adopted over the years as deemed necessary for disciplinary and guidance purposes; it has stood the test of time. The Task Force sees no reason to switch to the Model Rule format or contents.

The minor changes the Task Force recommends to paragraphs (c)(5), (i), and (j) incorporate recommendations from the Lawyers Professional Responsibility Board to retain the essential requirements of LPRB Opinions 15, 9, and 12, respectively. The first change is based on the requirement stated in *In re Lochow*, 469 N.W.2d 91 (Minn. 1991) that a lawyer must deposit into a trust account, and withdraw only as earned, all funds received from clients before the services are performed. The second change would authorize the LPRB to publish annually the books and records necessary for a lawyer to maintain and demonstrate compliance with Rule 1.15. The third change addresses lawyer accountability for the disbursement of funds from trust accounts.

H. Rule 1.16, Declining or Terminating Representation

The most important Task Force recommendations regarding Rule 1.16 incorporate into the MRPC the essence of LPRB Opinions 11 and 13, regarding duties with respect to client files on termination of representation. These recommendations would be accomplished by adopting a change to paragraph (d) and new paragraphs (e) through (g). The requirements of Opinion 13 have been recognized by the Court as properly characterizing the obligations imposed upon lawyers to "take steps to the extent reasonably practicable to protect a client's interests." See, e.g., *In re X.Y.*, 529 N.W.2d 688 (Minn. 1995).

I. Rule 1.17, Sale of Law Practice

When the Model Rules were amended, in 1990, to add Rule 1.17, which permits the sale of a law practice, the MSBA found serious shortcomings in the Model Rule and proposed an alternative rule, which was adopted by the Supreme Court. The Task Force did not believe that the Ethics 2000 revisions to the Model Rule strengthened it significantly and recommends that the existing MRPC Rule 1.17 be retained. A significant reason is that the Model Rule would, by its terms prohibit a common method of merging law practices, where a law firm purchases the assets of a practice and the selling lawyer then becomes an employee/shareholder of the merged firm. Although ABA Comment [14] indicates that Rule 1.17 does not apply to a sale-of-assets merger, the Task Force feels it is inappropriate to rely on a comment to authorize what the black letter law prohibits. The Task Force believes that this is an issue that does not require national uniformity and the adoption of the former Model Rule 1.17 involved significant state-by-state modifications.

J. Rule 1.18, Prospective Clients

ABA Model Rule 1.18, adopted in 2002, created a new rule regarding duties owed to prospective clients. Rule 1.18 fills a void in the prior and existing rules as to what duties are owed to persons who engage in initial discussions with an attorney regarding a representation, but who do not enter into an ongoing attorney-client relationship. The rule clarifies that prospective clients, as that term is defined in the rule and comment, are entitled to certain protections regarding conflicts of interest and the confidentiality of information disclosed to the attorney. The rule disqualifies the lawyer who has received disqualifying information, as that term is defined in the rule, from subsequent representation of a client adverse to the prospective client. That disqualification is imputed to other lawyers in the disqualified lawyer's firm unless the firm receives informed consent in writing from both the affected and the prospective clients and the disqualified lawyer is screened from participation. The Task Force recommends adoption of this rule.

K. Rules 2.1-2.4, Lawyer as Counselor

The Task Force recommends adoption of ABA Model Rules and Comments 2.1, 2.3 and 2.4 with the following observations:

Model Rule 2.1 is identical to MRPC 2.1.

The Task Force concurs with the ABA in recommending deletion of Rule 2.2. The substance of the rule on lawyer as intermediary is included in the Comment to Model Rule 1.7.

Model Rule 2.3 requires "informed consent" as defined in Rule 1.0 where a client's interests may be adversely affected by an evaluation.

Model Rule 2.4 is new. It clarifies the obligation of a lawyer who is serving in a neutral capacity (e.g. mediator, arbitrator, etc.).

L. Rule 3.3, Candor Toward the Tribunal

Model Rule 3.3 (a)(3) includes a new provision, underscored here: "a lawyer may refuse to offer evidence, other than the testimony of the defendant in a criminal matter, that the lawyer reasonably believes is false." The Task Force debated whether it was prudent to require a criminal defense lawyer to offer defendant's testimony where the lawyer "reasonably believes" (but does not actually "know") that the testimony is false. The Task Force understands that Model Rule 3.3 (a)(3) was not adopted based on a belief that it was constitutionally required. Rather, the Ethics 2000 Commission believed that the rule stated the proper role of the criminal defense lawyer. In addition, under Rule 1.2, decisions regarding fundamental aspects of the representation, such as whether to testify, are ultimately the client's decisions. A majority of the Task Force agreed; the Task Force

is recommending adoption of the rule in Minnesota. A minority of the Task Force believes that if the Constitution does not require a criminal defense lawyer to offer testimony reasonably believed to be false, then such conduct should not be required as a matter of ethics.

M. Rule 3.6, Trial Publicity

MRPC 3.6 applies only to statements that “have a substantial likelihood of materially prejudicing a pending criminal jury trial.” Model Rule 3.6 has a broader application, to statements that have “a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” Because the Task Force is concerned that the Model Rule might be challenged on a claim that it was unconstitutionally overbroad, the Task Force recommends retention of MRPC 3.6.

N. Rule 3.8, Special Responsibilities of a Prosecutor

There were two Model Rule 3.8 provisions that were controversial within the Task Force. One was approved and one was rejected.

The Task Force recommends adoption of ABA Model Rule 3.8(e), providing that a prosecutor shall not subpoena a lawyer in certain criminal proceedings to present evidence about a client except when the prosecutor reasonably believes that the testimony is not privileged and is otherwise not reasonably available. This Model Rule was adopted some years ago and was not one of the 2002 amendments, but it has not previously been proposed for adoption in Minnesota. The Task Force understands that the Model Rule was adopted in response to what were perceived as abuses by prosecutors in jurisdictions other than Minnesota, that the United States Attorney opposes its adoption (citing authority showing that part of the rule has been upheld and part of the rule, relating to grand jury proceedings, has been invalidated by one court), and that the Minnesota County Attorneys Association opposes only that part of the rule that requires there be “no feasible alternative” before a subpoena is issued to a lawyer. The Task Force also understands that criminal defense bar groups in the state support the Rule.

The Task Force does not recommend adoption of the provision in Model Rule 3.8(f) that would require prosecutors to “exercise reasonable care to prevent certain law enforcement personnel from making extra judicial statements that would be prohibited for the prosecutor.” Current MRPC 3.8 limits the law enforcement personnel subject to the rule to those over whom “the prosecutor has ‘direct control,’” while the Model Rule would extend to all persons assisting or associated with the prosecutor. A majority of the Task Force concluded that prosecutors should not have ethics responsibility regarding persons over whom they have no direct control.

O. Rule 4.1, Truthfulness in Statements to Others

The Task Force recommends adopting a modified version of Model Rule 4.1(a). Model Rule 4.1(a) would prohibit a lawyer, in the course of representing a client, from

knowingly making a false statement of *material* fact or law *to a third person*. The Task Force recommends deletion of the word “material” and the words “to a third person,” so that Rule 4.1(a) as recommended is identical to current MRPC 4.1. The Task Force concluded that it was important for the profession to take the position that knowingly false statements would not be tolerated.

The Task Force also recommends adopting a modified version of Model Rule 4.1(b), which has no counterpart in the current MRPC. The recommended version of Rule 4.1(b) states that, in the course of representing a client, a lawyer shall not knowingly “fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.” The Task Force concluded that, as indicated in the recommended comments, this is a specific application of recommended Rule 1.2(d), and it is important to include Rule 4.1(b) in light of recent corporate and accounting fraud.

P. Rule 5.4, Professional Independence

The Task Force recommendations regarding Rule 5.4 are not major or controversial. The Task Force recommends adopting a provision new to the Model Rules, 5.4(a)(4), and retaining two MRPC provisions, 5.4(a)(2) and 5.4(d)(2), which do not have Model Rule counterparts.

Model Rule 5.4(a)(4) allows a lawyer to share court-awarded fees with a non-profit organization that employed, retained or recommended employment of the lawyer in the matter. This provision codifies ABA Opinion 93-374, which has long endorsed the sharing of legal fees in this circumstance for the benefit of non-profit organizations.

MRPC 5.4(a)(2) limits the fees that can be shared by a lawyer who undertakes to complete the work of a deceased lawyer with the estate of the deceased lawyer to the amount that fairly represents the work done by the deceased lawyer. This provision is renumbered as 5.4(a)(5). It clearly states the long existing rule in Minnesota and was retained to prevent the inference that rules concerning fee sharing in this circumstance were being changed.

The other Minnesota provision retained by the Task Force, MRPC 5.4(d)(2), allows a law firm formed as a Professional Association to have a nonlawyer with governance authority but no ownership of the firm. This is consistent with the Minnesota Professional Firms Act. The Task Force adopted the Comments relating to the above rules with changes consistent with the Rule 1.8(f) language adopted by the Task Force.

Q. Rule 5.5, Unauthorized Practice of Law; Multi-Jurisdictional Practice

Model Rule 5.5(a) states the prohibition against engaging in the unauthorized practice of law (“UPL”) or assisting another to do so. The ABA MJP Commission recommends substantial additions to Rule 5.5. The additions would define circumstances under which lawyers admitted to practice in other jurisdictions may engage in practice in Minnesota.

The MSBA Task Force recommends adoption of Model Rule 5.5, with one exception and one additional amendment.

The Task Force recommends against adoption of Model Rule 5.5(d)(1), which would allow house counsel admitted elsewhere to practice in Minnesota without admission. The Task Force believes an exemption from admission requirements should not be created for lawyers who establish a continuous presence in Minnesota. However, the Task Force also recognizes that existing rules of the Minnesota Board of Law Examiners (“BLE”) sometimes make admission unnecessarily difficult for employed lawyers assigned to perform services for their employers in Minnesota. The BLE has indicated that it will address this concern, and the position of the Task Force is based on the expectation that the BLE will propose changes to its rules to facilitate the admission of employed lawyers who have been admitted elsewhere.

The Task Force recommends adding to Model Rule 5.5(a) the words “except that a lawyer admitted to practice in Minnesota does not violate this Rule by conduct in another jurisdiction that is permitted in Minnesota under Rule 5.5(c) or (d) for lawyers not admitted to practice in Minnesota.” This exception would create a limited degree of reciprocity. A Minnesota lawyer would not be subject to discipline in Minnesota for engaging in the practice of law in another jurisdiction if similar conduct in Minnesota by a lawyer admitted in another jurisdiction would not constitute unauthorized practice under the Minnesota rule. Of course, a Minnesota lawyer might be subject to discipline or other sanctions in the other jurisdiction if the lawyer’s conduct violates its law or rules.

In recommending adoption of ABA Model Rule 5.5, as modified, the Task Force is mindful that the subject of unauthorized practice of law is one on which the legislature has spoken as well as the Court. The ABA MJP Commission recognizes, as does the Task Force, that further amendments to other laws and rules may be necessary to implement fully the recommendations of the MJP Commission. The Task Force considered only recommended changes to the Model Rules, and understands that another committee of the MSBA will consider other recommendations of the MJP Commission.

R. Rule 5.6, Restrictions on Right to Practice

The Task Force recommends adoption of the ABA Model Rule version of this Rule and Comments which do not differ materially from the Minnesota Rule and Comments.

S. Rule 5.7, Law-Related Services

ABA Model Rule 5.7 has no analogous provision in the Minnesota Rules. It sets out the obligations of lawyers providing law-related services and requires that, unless the law-related services are provided in circumstances distinct from the legal services, or if the lawyer fails to take reasonable steps to insure that the client understands that the law-related services are not legal services, then all the Rules of Professional Conduct apply to the law-related services including avoidance conflicts of interest, protecting client confidences and limitations on advertising. It appears that law-related service

organizations are expanding in Minnesota and that the guidance of Rule 5.7 and accompanying Comments are now warranted.

Existing Minnesota Rule 5.7 dealing with the employment of disbarred, suspended or involuntarily inactive lawyers has no analogous provision in the ABA Rules. The Task Force recommends retaining this Rule renumbered as Rule 5.8. It provides helpful guidance to those employing such lawyers.

T. Rules 6.1-6.5, Lawyers' Public Service

The Task Force recommends adoption of Model Rules 6.1 to 6.5. Other than adding a sentence at the beginning of Rule 6.1 giving prominence to the proposition that every lawyer has a professional responsibility to provide legal services to persons unable to pay, Model Rules 6.1 to 6.4 are identical to the Minnesota Rules.

Model Rule 6.5 addresses the concern that a strict application of conflict-of-interest rules deters lawyers from serving as volunteers in programs in which clients are provided short-term limited legal services under a pro bono program. The Rule eliminates an impediment to participation by making it unnecessary for the lawyer to do a comprehensive conflicts check in a setting in which it is not feasible to do so. The Court may have already addressed this concern in a proposal, separate from the Task Force action, to amend Rule 1.10. The Court could consider putting its response to this concern back in Rule 6.5 for the sake of uniformity.

U. Rules 7.1-7.5, Advertising and Related Matters

In the interests of uniformity, although Model Rules 7.1 through 7.5 are somewhat different from the MRPC provisions, the Task Force recommends adoption of Model Rules 7.1 and 7.5 and substantial adoption (with very minor changes) of Model Rules 7.2 through 7.4.

Model Rule 7.1 no longer flatly prohibits a communication that "compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated," but Comment [3] specifies that "an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be [prohibited as] misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated."

The Task Force recommends adoption of Model Rule 7.2 with a couple of very minor changes that retain current MRPC features. The Task Force recommends against including the Model Rule's language that allows payments not only to a lawyer referral service that is not-for-profit, but also to one that is "qualified," defined as one that "has been approved by an appropriate regulatory authority." The Task Force also recommends against adding the Model Rules requirement that a communication pursuant to Rule 7.2 include the office address as well as the name of a lawyer or the firm responsible for its content.

With those small changes, the Task Force recommends adoption of Model Rule 7.2, which does not include a provision like MRPC 7.2(e) (communications about contingent fees must disclose that client will be liable for expenses regardless of outcome, if lawyer intends to hold client liable) and which includes a reciprocal referrals provision added in August 2002 that permits a lawyer to "refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and nature of the agreement."

Similarly, the Task Force recommends adoption of Model Rule 7.3 with several very minor changes. The Task Force recommends omitting references to "real-time electronic contact" on the view that including the phrase (which apparently refers to the idea of solicitation by chatroom) is unnecessary and could be challenged on First Amendment grounds. As to Rule 7.3(c), the Task Force recommends adding "written" to the description of communications that must bear the words "Advertising Material," adding "clearly and conspicuously" to modify how the words "Advertising Material" must be included, and specifying that it must be included "within" rather than "at the beginning and ending of" a communication. Model Rule 7.3 permits a lawyer to solicit employment from another lawyer or from a close personal friend.

As indicated above, for reasons of uniformity the Task Force recommends adoption of Model Rule 7.4 except for purely stylistic modification of paragraph (d)(1) (substituting "is" for "has been" at all three points). Model Rule 7.4 limits only statements that one is "certified as a specialist," whereas MRPC 7.4 limits statements that one "is a specialist." Also, Model Rule 7.4(d)(1) refers to ABA as well as state approval of certifying organizations.

The only difference between MRPC 7.5 and Model Rule 7.5, which the Task Force recommends, is that Model Rule 7.5(b) adds the words "or other professional designation." Comment [1] explains that this includes website addresses or comparable professional designations.

V. Rule 7.6, Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

The Task Force recommends against adoption of Model Rule 7.6, the rule that addresses the "pay-to-play" problem. Neither the Task Force nor the Office of Lawyers Professional Responsibility is aware of pay-to-play problems in Minnesota. The Task Force believes that only one state has adopted a version of Model Rule 7.6, so uniformity is not a consideration. Further, the Task Force believes that an adopted rule 7.6 may raise First Amendment constitutional problems, similar to those addressed in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

W. Rules 8.1 – 8.5, Maintaining the Integrity of the Profession

The Task Force recommends adoption of Model Rules 8.1 through 8.5 with the following exceptions:

(1) Retain the current Minnesota Rule 8.3(c) and related comments rather than the ABA Model Rule. This Rule and related comments was recently (April 2000) reviewed and adopted by the Court and is superior to the Model Rule in that it does not require “approval” of the lawyer assistance program and extends confidentiality to other groups providing assistance, support or counseling to lawyers who are chemically dependent or have mental disorders.

(2) Retain the current Minnesota Rules 8.4(g) and (h) and related comments regarding harassment and discrimination, except that “sexual preference” in 8.4 (g) would be changed to “sexual orientation.” There are no Model Rule counterparts to these provisions.

(3) Add Rule 8.4(i) regarding honoring a final and binding fee arbitration agreement when the attorney has agreed to submit the matter to arbitration. This provision incorporates a Lawyers Board Opinion No. 5 into the Rules of Professional Conduct and codifies an attorney’s obligation to honor agreements.

Rule 8.5 is recommended in the interest of uniformity. The ABA MJP Commission makes this recommendation in conjunction with the amendments to Rule 5.5 authorizing limited practice in this state by non-Minnesota licensed attorneys.

Respectfully submitted,

MSBA Task Force on the ABA Model Rules of Professional Conduct
William J. Wernz, Chair

June 12, 2003

This report has not been adopted by the MSBA. It will not reflect the official position of the Association unless and until it has been adopted by action of the MSBA General Assembly.

Appendix A

**MSBA Task Force on the ABA Model Rules of Professional Conduct
Task Force Members
May 2003**

William J. Wernz, Chair

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Appendix B

(Draft rules changes submitted to MSBA omitted from this copy of the report because it is largely duplicative of Attachment 1 to this petition.)

Appendix C

OVERVIEW OF ETHICS 2000 COMMISSION AND REPORT

Charlotte (Becky) Stretch

CREATION OF THE COMMISSION

1. Appointment in mid-1997 of the 13-member commission by then-incumbent ABA President Jerome J. Shestack, his immediate predecessor, N. Lee Cooper, and his successor, Philip S. Anderson, with approval by the Board of Governors.
2. The Commission was charged with undertaking a comprehensive evaluation of the Model Rules of Professional Conduct.
3. Members included a state supreme court chief justice, a federal circuit court judge, a state court trial judge, a retired judge who is also a former dean and law professor, two professors of legal ethics, one of whom was the principal drafter of the Model Rules, a lawyer formerly with the Department of Justice, several private practitioners, a former in-house counsel, and a nonlawyer member, who is a former college president and member of numerous corporate boards.
4. The Commission appointed two Reporters: Chief Reporter Nancy J. Moore, a professor of legal ethics at Boston University and an Adviser to the Restatement of the Law Governing Lawyers; and Carl Pierce, a professor of legal ethics at the University of Tennessee and also reporter to the committee in Tennessee proposing revisions to the Tennessee Rules of Professional Conduct. Professor Tom Morgan, a professor of legal ethics at George Washington University, also served as a Reporter for one year.

REASONS FOR UNDERTAKING THE PROJECT

1. Growing disparity in state ethics rules – 44 states use the Model Rules format but with some significant variations
2. Lack of clarity in some existing rules; some dissonance between rules and comments
3. New issues and questions raised by the influence that technological developments are having on the delivery of legal services
4. Continuing need to expand access to legal services to low and moderate income persons
5. Changing organization and structure of modern law practice
6. The Commission was also mindful of
 - a. the need to enhance public trust and confidence in the legal profession
 - b. special concerns of lawyers in nontraditional practice settings
 - c. increased public scrutiny of lawyers.

COMMISSION'S GOALS

1. Update the Model Rules in light of developments since the Rules were adopted in 1983.
2. Take a position of leadership in proposing rules the Commission thinks make the most sense and have the potential to bring greater uniformity among the states.

WHAT THE COMMISSION DID

1. The Commission examined and updated the Model Rules of Professional Conduct to assure the Rules continue to work in today's environment and to provide better guidance to the profession.
2. The Commission, through its open process, sought, received and acted upon viewpoints from throughout the legal community.
 - a. 250 member Advisory council – including representative from sections, bar associations, law schools, consumer groups, the judiciary
 - b. 50 days of meetings
 - c. 10 public hearings
 - d. Review of comments on the public discussion drafts
 - e. Use of the Internet to distribute information about the Commission's work
 - f. Issued a Report in November 2000 that was posted on the Commission's Website and included: an Executive Summary; a copy of the proposed Model Rules; a comparison between the proposed Model Rules and the current Model Rules; and a Reporters' Explanation of Changes
 - g. Revised the Report after considering comments on the November Report and submitted a Final Report in May 2001 for debate by the House of Delegates in August 2001 (Debate continued in February 2002.)
3. Examined state variations on the Model Rules, case law, and differences between the Model Rules and the new Restatement of the Law Governing Lawyers
4. The Commission concluded that fundamentally the Model Rules work
 - a. Retained the basic architecture of the Rules
 - b. Maintained core values
 - c. Did not proposed radical changes or overhaul the Rules
 - d. Decided not to add best practice or professionalism concepts to the Rules.

CHANGES THE COMMISSION MADE - SUMMARY

1. Clarified and strengthened a lawyer's duty to communicate with the client
2. Clarified and strengthened a lawyer's duty to clients in certain specific problem areas
3. Responded to the changing organization and structure of modern law practice
4. Responded to new issues and questions raised by the influence that technological developments are having on the delivery of legal services
5. Clarified existing rules to provide better guidance and explanation to lawyers
6. Clarified and strengthened a lawyer's obligations to the tribunal and to the justice system
7. Responded to the need for changes in the delivery of legal services to low and middle income persons
8. Increased protection of third parties

CHANGES THE COMMISSION MADE - DETAIL

- 1. Clarified and strengthened a lawyer's duty to communicate with the client**
 - a. Replaced "consents after consultation" with "informed consent" throughout the Rules
 - b. Added a writing requirement in key Rules (e.g., 1.7, 1.8, 1.9)
 - c. Rule 1.2: clarified allocation of authority between client and lawyer

- d. Rule 1.4: combined all aspects of a lawyer's duty to communicate with a client in Rule 1.4
- e. Rule 1.5: emphasized the lawyer's obligation not to charge an unreasonable fee
- f. Rule 1.5: added a requirement that a lawyer communicate fees, scope and expenses in writing

NOTE: This recommendation was not passed by the House of Delegates

2. Clarified and strengthened a lawyer's duty to clients in certain specific problem areas

- a. Rule 1.8(j): added prohibition on most client-lawyer sexual relationships
- b. Rule 1.14: added guidance regarding protective measures that may be taken short of requesting a guardian
- c. Rule 1.15: added a requirement that lawyers put advanced payment for fees and expenses in a client's trust account
- d. Rule 1.17: deleted provision that allowed the purchaser of a law practice to refuse to undertake a representation unless the client consented to pay the purchaser's normal fees

3. Responded to the changing organization and structure of modern law practice

- a. Rule 1.10: eliminated imputation of most personal interest conflicts
- b. Rule 1.10: added a provision for screening of lateral hires under certain circumstances

NOTE: This recommendation was not passed by the House of Delegates

- c. Rule 1.12: extended application of the Rule to mediators and other third-party neutrals
- d. Rule 1.17: permitted sale of a law practice to more than one person as long as the entire practice is sold, and permitted sale of an area of practice
- e. Rule 5.5: added a new paragraph that describes four "safe harbors" for lawyers rendering legal services in jurisdictions where they are not admitted to practice

NOTE: This recommendation was not debated due to the pending report of the Commission on Multijurisdictional Practice

- f. Rules 5.1 and 5.3: added lawyers who possess managerial authority to those responsible under these Rules
- g. Rule 2.4: created a new Rule on the lawyer's role as third-party neutral
- h. Rule 8.5: expanded disciplinary enforcement jurisdiction over lawyers not admitted in the jurisdiction if the lawyer renders or offers to render any legal services in the jurisdiction; created new choice of law provision

NOTE: This recommendation was not debated due to the pending report of the Commission on Multijurisdictional Practice

4. Responded to new issues and questions raised by the influence that technological developments are having on the delivery of legal services

- a. Rule 7.2: deleted specification of types of public media in paragraph (a) and added a reference to electronic communication
- b. Rule 7.2: permitted payments to for-profit lawyer referral services under certain circumstances
- c. Rule 7.3: extended prohibition to "real-time electronic contact"; exempted contact with lawyers and with person with whom the lawyer has a close personal relationship

5. Clarified existing rules and Comment to provide better guidance and explanation to lawyers

- a. Rule 1.0: added a new Rule on Terminology, and several new defined terms
 - b. Revised and expanded the Comment throughout to clarify the operation of the Rules
 - c. Pointed out in Scope [20] that a violation of the Rules may be evidence of breach of the applicable standard of conduct
 - d. Rule 1.3: clarified the lawyer's authority and duty to take certain actions on behalf of the client
 - e. Rule 1.6: clarified the lawyer's ability to disclose information to comply with law or court order
 - f. Rule 1.7: reorganized the text and Comments to clarify its meaning; added new Comments to respond to common questions regarding conflicts of interest; deleted Rule 2.2 incorporating it into Rule 1.7
 - g. Rule 1.8: clarified several subparagraphs
 - h. Rules 1.9 and 1.11: clarified the relationship between these Rules
 - i. Rule 1.16: clarified the circumstances under which the lawyer may withdraw
 - j. Rule 2.3: restructured the Rule to clarify its application in situations where the evaluation poses no significant risk to the client and in situations where there is a significant risk of material and adverse effect on the client's interest
 - k. Rule 3.6: conformed the scienter requirement to be consistent with Rule 1.0
 - l. Rule 4.2: clarified application of the Rule to organizational clients
 - m. Rule 7.1: deleted paragraphs (b) and (c) as overly broad, limiting Rule 7.1 to a prohibition against false and misleading communications; moved a portion of paragraph (b) to Rule 8.4 because the prohibition against stating or implying that the lawyer can achieve results by means the violate the Rules is applicable beyond advertising
 - n. Rule 8.3: conformed the scienter requirement to be consistent with Rule 1.0
 - o. Rule 8.4: added material in paragraph (e) that was deleted from Rule 7.1
 - p. Rule 8.5: expanded disciplinary enforcement jurisdiction over lawyers not admitted in the jurisdiction if the lawyer renders or offers to render any legal services in the jurisdiction; created new choice of law provision
- NOTE:** This recommendation was not debated due to the pending report of the Commission on Multijurisdictional Practice

6. Clarified and strengthened a lawyer's obligations to the tribunal and to the justice system

- a. Rule 1.6: added provision to permit a lawyer to disclose information to obtain legal advice regarding the lawyer's compliance with the Rules
- b. Rule 3.3: revised and reorganized this Rule to clarify and strengthen a lawyer's obligation of candor to the tribunal with respect to testimony given and actions taken by the client and other witnesses; clarified the lawyer's duties under the Rule
- c. Rule 3.5: created a new paragraph covering post-discharge communication with jurors
- d. Rule 4.2: added reference to "court order"

7. Responded to the need for changes in the delivery of legal services to low and middle income persons

- a. Rule 5.4: added a provision regarding sharing of court-awarded fees with a nonprofit organization
- b. Rule 6.1: added new first sentence regarding the professional responsibility of every lawyer to provide legal services to those unable to pay
- c. Rule 6.5: created a new Rule relaxing the conflict of interest and imputation rules in situations where a lawyer, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation that the lawyer will provide continuing representation in the matter

8. Increased protection of third parties

- a. Rule 1.6: proposed broadening the grounds for discretionary disclosure of client information, recognizing that many states have already moved in that direction; to permit disclosure to prevent, mitigate or rectify substantial financial injury resulting from a client's abuse of the lawyer's services

NOTE: This recommendation was not passed by the House of Delegates.

- b. Rule 1.6: broadened the grounds for discretionary disclosure to prevent reasonable certain death or substantial bodily harm
- c. Rule 1.15: clarified the lawyer's duties when in possession of property in which two or more persons claim an interest
- d. Rule 4.3: added prohibition on giving legal advice to an unrepresented person if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client
- e. Rule 4.4: added a new paragraph regarding obligations of a lawyer upon receipt of an inadvertently sent document
- f. Rule 1.18: created a new Rule outlining duties to prospective clients
- g. Rule 2.4: created a new Rule on the lawyer's role as third-party neutral
- h. Rule 1.12: extended application of the Rule to mediators and other third-party neutrals
- i. Rule 7.4: restructured Rule to separate the two subjects addressed; eliminated the provision that permits lawyers to claim certification as a specialist even though the certifying organization is not approved by an appropriate state authority or accredited by the ABA

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MINNESOTA RULES OF PROFESSIONAL CONDUCT

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90 **PREAMBLE: A LAWYER'S RESPONSIBILITIES**

91
92 [1] A lawyer, as a member of the legal profession, is a representative of clients, an
93 officer of the legal system and a public citizen having special responsibility for the
94 quality of justice.

95 [2] As a representative of clients, a lawyer performs various functions. As advisor, a
96 lawyer provides a client with an informed understanding of the client's legal rights and
97 obligations and explains their practical implications. As advocate, a lawyer zealously
98 asserts the client's position under the rules of the adversary system. As negotiator, a
99 lawyer seeks a result advantageous to the client but consistent with requirements of
100 honest ~~dealing~~dealings with others. As ~~intermediary between clients~~evaluator, a lawyer
101 ~~seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a~~
102 ~~spokesperson for each client. A lawyer acts as evaluator~~ by examining a client's legal
103 affairs and reporting about them to the client or to others.

104 [3] In addition to these representational functions, a lawyer may serve as a third-party
105 neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter.
106 Some of these Rules apply directly to lawyers who are or have served as third-party
107 neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers
108 who are not active in the practice of law or to practicing lawyers even when they are
109 acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the
110 conduct of a business is subject to discipline for engaging in conduct involving
111 dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

112 [4] In all professional functions a lawyer should be competent, prompt and diligent. A
113 lawyer should maintain communication with a client concerning the representation. A
114 lawyer should keep in confidence information relating to representation of a client except
115 so far as disclosure is required or permitted by the Rules of Professional Conduct or other
116 law.

117 [5] A lawyer's conduct should conform to the requirements of the law, both in
118 professional service to clients and in the lawyer's business and personal affairs. A lawyer
119 should use the law's procedures only for legitimate purposes and not to harass or
120 intimidate others. A lawyer should demonstrate respect for the legal system and for those
121 who serve it, including judges, other lawyers and public officials. While it is a lawyer's
122 duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's
123 duty to uphold legal process.

124 [6] As a public citizen, a lawyer should seek improvement of the law, access to the legal
125 system, the administration of justice and the quality of service rendered by the legal
126 profession. As a member of a learned profession, a lawyer should cultivate knowledge of
127 the law beyond its use for clients, employ that knowledge in reform of the law and work
128 to strengthen legal education. In addition, a lawyer should further the public's
129 understanding of and confidence in the rule of law and the justice system because legal
130 institutions in a constitutional democracy depend on popular participation and support to

131 maintain their authority. A lawyer should be mindful of deficiencies in the administration
132 of justice and of the fact that the poor, and sometimes persons who are not poor, cannot
133 afford adequate legal assistance. Therefore, and all lawyers should—therefore devote
134 professional time and resources and use civic influence in their behalf to ensure equal
135 access to our system of justice for all those who because of economic or social barriers
136 cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession
137 in pursuing these objectives and should help the bar regulate itself in the public interest.

138 [7] Many of the lawyer's professional responsibilities are prescribed in the Rules of
139 Professional Conduct, as well as substantive and procedural law. However, a lawyer is
140 also guided by personal conscience and the approbation of professional peers. A lawyer
141 should strive to attain the highest level of skill, to improve the law and the legal
142 profession and to exemplify the legal profession's ideals of public service.

143 [8] A lawyer's responsibilities as a representative of clients, an officer of the legal system
144 and a public citizen are usually harmonious. Thus, when an opposing party is well
145 represented, a lawyer can be a zealous advocate on behalf of a client and at the same time
146 assume that justice is being done. So also, a lawyer can be sure that preserving client
147 confidences ordinarily serves the public interest because people are more likely to seek
148 legal advice, and thereby heed their legal obligations, when they know their
149 communications will be private.

150 [9] In the nature of law practice, however, conflicting responsibilities are encountered.
151 Virtually all difficult ethical problems arise from conflict between a lawyer's
152 responsibilities to clients, to the legal system and to the lawyer's own interest in
153 remaining an upright ethical person while earning a satisfactory living. The Rules of
154 Professional Conduct often prescribe terms for resolving such conflicts. Within the
155 framework of these Rules, however, many difficult issues of professional discretion can
156 arise. Such issues must be resolved through the exercise of sensitive professional and
157 moral judgment guided by the basic principles underlying the Rules. These principles
158 include the lawyer's obligation zealously to protect and pursue a client's legitimate
159 interests, within the bounds of the law, while maintaining a professional, courteous and
160 civil attitude toward all persons involved in the legal system.

161 [10] The legal profession is largely self-governing. Although other professions also have
162 been granted powers of self-government, the legal profession is unique in this respect
163 because of the close relationship between the profession and the processes of government
164 and law enforcement. This connection is manifested in the fact that ultimate authority
165 over the legal profession is vested largely in the courts.

166 [11] To the extent that lawyers meet the obligations of their professional calling, the
167 occasion for government regulation is obviated. Self-regulation also helps maintain the
168 legal profession's independence from government domination. An independent legal
169 profession is an important force in preserving government under law, for abuse of legal
170 authority is more readily challenged by a profession whose members are not dependent
171 on government for the right to practice.

172 [12] The legal profession's relative autonomy carries with it special responsibilities of
173 self-government. The profession has a responsibility to assure that its regulations are
174 conceived in the public interest and not in furtherance of parochial or self-interested
175 concerns of the bar. Every lawyer is responsible for observance of the Rules of
176 Professional Conduct. A lawyer should also aid in securing their observance by other
177 lawyers. Neglect of these responsibilities compromises the independence of the
178 profession and the public interest which it serves.

179 [13] Lawyers play a vital role in the preservation of society. The fulfillment of this role
180 requires an understanding by lawyers of their relationship to our legal system. The Rules
181 of Professional Conduct, when properly applied, serve to define that relationship.

182 **SCOPE**
183

184 [14] The Rules of Professional Conduct are rules of reason. They should be interpreted
185 with reference to the purposes of legal representation and of the law itself. Some of the
186 Rules are imperatives, cast in the terms “shall” or “shall not.” These define proper
187 conduct for purposes of professional discipline. Others, generally cast in the term “may,”
188 are permissive and define areas under the Rules in which the lawyer has discretion to
189 exercise professional discretion judgment. No disciplinary action should be taken when
190 the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules
191 define the nature of relationships between the lawyer and others. The Rules are thus
192 partly obligatory and disciplinary and partly constitutive and descriptive in that they
193 define a lawyer’s professional role. Many of the Comments use the term “should.”
194 Comments do not add obligations to the ~~rules~~ Rules but provide guidance for practicing in
195 compliance with the Rules.

196 [15] The Rules presuppose a larger legal context shaping the ~~law~~ lawyer’s role. That
197 context includes court rules and statutes relating to matters of licensure, laws defining
198 specific obligations of lawyers and substantive and procedural law in general. The
199 Comments are sometimes used to alert lawyers to their responsibilities under such other
200 law.

201 [16] Compliance with the Rules, as with all law in an open society, depends primarily
202 upon understanding and voluntary compliance, secondarily upon reinforcement by peer
203 and public opinion and finally, when necessary, upon enforcement through disciplinary
204 proceedings. The Rules do not, however, exhaust the moral and ethical considerations
205 that should inform a lawyer, for no worthwhile human activity can be completely defined
206 by legal rules. For example, Minnesota’s Professionalism Aspirations provide guidance
207 on best practices in situations typical in the practice of law. The Rules simply provide a
208 framework for the ethical practice of law.

209 [17] Furthermore, for purposes of determining the lawyer’s authority and responsibility,
210 principles of substantive law external to these Rules determine whether a client-lawyer
211 relationship exists. Most of the duties flowing from the client-lawyer relationship attach
212 only after the client has requested the lawyer to render legal services and the lawyer has
213 agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6,
214 that ~~may~~ attach when the lawyer agrees to consider whether a client-lawyer relationship
215 shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any
216 specific purpose can depend on the circumstances and may be a question of fact.

217 [18] Under various legal provisions, including constitutional, statutory and common law,
218 the responsibilities of government lawyers may include authority concerning legal
219 matters that ordinarily repose s in the client in private client-lawyer relationships. For
220 example, a lawyer for a government agency may have authority on behalf of the
221 government to decide upon settlement or whether to appeal from an adverse judgment.
222 Such authority in various respects is generally vested in the attorney general and

223 ~~prosecutors~~ the state's attorney in state government, and their federal counterparts, and the
224 same may be true of other government law officers. Also, lawyers under the supervision
225 of these officers may be authorized to represent several government agencies in
226 intragovernmental legal controversies in circumstances where a private lawyer could not
227 represent multiple private clients. ~~They also may have authority to represent the “public~~
228 ~~interest” in circumstances where a private lawyer would not be authorized to do so.~~ These
229 Rules do not abrogate any such authority.

230 [19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for
231 invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a
232 lawyer's conduct will be made on the basis of the facts and circumstances as they existed
233 at the time of the conduct in question and in recognition of the fact that a lawyer often has
234 to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules
235 presuppose that whether or not discipline should be imposed for a violation, and the
236 severity of a sanction, depend on all the circumstances, such as the willfulness and
237 seriousness of the violation, extenuating factors and whether there have been previous
238 violations.

239 [20] Violation of a Rule should not itself give rise to a cause of action against a lawyer
240 nor should it create any presumption in such a case that a legal duty has been breached. In
241 addition, violation of a Rule does not necessarily warrant any other nondisciplinary
242 remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed
243 to provide guidance to lawyers and to provide a structure for regulating conduct through
244 disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore,
245 the purpose of the Rules can be subverted when they are invoked by opposing parties as
246 procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or
247 for sanctioning a lawyer under the administration of a disciplinary authority, does not
248 imply that an antagonist in a collateral proceeding or transaction has standing to seek
249 enforcement of the Rule. ~~Accordingly~~ Nevertheless, nothing in ~~since~~ the Rules should be
250 ~~deemed to augment any substantive legal duty~~ do establish standards of conduct by
251 ~~lawyers or, a lawyer's violation of a Rule may be evidence of breach of the~~
252 ~~extradisciplinary consequences of violating such a duty.~~ applicable standard of conduct.

253 ~~Moreover, these Rules are not intended to govern or affect judicial application of either~~
254 ~~the attorney-client or work product privilege. Those privileges were developed to~~
255 ~~promote compliance with law and fairness in litigation. In reliance on the attorney-client~~
256 ~~privilege, clients are entitled to expect that communications within the scope of the~~
257 ~~privilege will be protected against compelled disclosure. The attorney-client privilege is~~
258 ~~that of the client and not of the lawyer. The fact that in exceptional situations the lawyer~~
259 ~~under the Rules has a limited discretion to disclose a client confidence does not vitiate the~~
260 ~~proposition that, as a general matter, the client has a reasonable expectation that~~
261 ~~information relating to the client will not be voluntarily disclosed and that disclosure of~~
262 ~~such information may be judicially compelled only in accordance with recognized~~
263 ~~exceptions to the attorney-client and work product privileges.~~

264 ~~The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not~~
265 ~~be subject to reexamination. Permitting such reexamination would be incompatible with~~
266 ~~the general policy of promoting compliance with law through assurances that~~
267 ~~communications will be protected against disclosure.~~

268 [21] The Comment accompanying each Rule explains and illustrates the meaning and
269 purpose of the Rule. The Preamble and this note on Scope provide general orientation.
270 The Comments are intended as guides to interpretation, but the text of each Rule is
271 authoritative.

272

272 **RULE 1.0: TERMINOLOGY**

273
274
275 (a) “Belief” or “Believesbelieves” denotes that the person involved actually supposed the
276 fact in question to be true. A person’s belief may be inferred from circumstances.

277
278 (b) “Confirmed in writing,” when used in reference to the informed consent of a person,
279 denotes informed consent that is given in writing by the person or a writing that a lawyer
280 promptly transmits to the person confirming an oral informed consent. See paragraph (f)
281 for the definition of “informed consent.” If it is not feasible to obtain or transmit the
282 writing at the time the person gives informed consent, then the lawyer must obtain or
283 transmit it within a reasonable time thereafter.

284
285 “(c) “Consult” or “Consultation” denotes communication of information reasonably
286 sufficient to permit the client to appreciate the significance of the matter in question.

287
288 (d) “Firm” or “Law Firmlaw firm” denotes a lawyer or lawyers in a ~~private firm~~law
289 partnership, professional corporation, sole proprietorship or other association authorized
290 to practice law; or lawyers employed in a legal services organization or the legal
291 department of a corporation or other organization~~and lawyers employed in a legal~~
292 ~~services organization. See Comment, Rule 1.10.~~

293
294 (e) “Fraud” or “Fraudulentfraudulent” denotes conduct ~~having~~that is fraudulent under the
295 substantive or procedural law of the applicable jurisdiction and has a purpose to deceive
296 ~~and not merely negligent misrepresentation or failure to apprise another of relevant~~
297 ~~information.~~

298
299 (f) “Informed consent” denotes the agreement by a person to a proposed course of
300 conduct after the lawyer has communicated adequate information and explanation about
301 the material risks of and reasonably available alternatives to the proposed course of
302 conduct.

303
304 (g) “Knowingly,” “Knownknown,” or “Knowsknows” denotes actual knowledge of the
305 fact in question. A person’s knowledge may be inferred from circumstances.

306
307 (h) “Partner” denotes a member of a partnership~~and,~~ a shareholder in a law firm
308 organized as a professional corporation, or a member of an association authorized to
309 practice law.

310
311 (i) “Reasonable” or “Reasonablyreasonably” when used in relation to conduct by a
312 lawyer denotes the conduct of a reasonably prudent and competent lawyer.

313
314 (j) “Reasonable belief” or “Reasonablyreasonably believes” when used in reference to a
315 lawyer denotes that the lawyer believes the matter in question and that the circumstances
316 are such that the belief is reasonable.

318 (k) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer
319 of reasonable prudence and competence would ascertain the matter in question.

320
321 (l) “Screened” denotes the isolation of a lawyer from any participation in a matter
322 through the timely imposition of procedures within a firm that are reasonably adequate
323 under the circumstances to protect information that the isolated lawyer is obligated to
324 protect under these Rules or other law.

325
326 (m) “Substantial” when used in reference to degree or extent denotes a material matter of
327 clear and weighty importance.

328 ~~“Tribunal” includes all courts and all other adjudicatory bodies.~~

329
330 (n) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a
331 legislative body, administrative agency or other body acting in an adjudicative capacity.
332 A legislative body, administrative agency or other body acts in an adjudicative capacity
333 when a neutral official, after the presentation of evidence or legal argument by a party or
334 parties, will render a binding legal judgment directly affecting a party’s interests in a
335 particular matter.

336
337 (o) “Writing” or “written” denotes a tangible or electronic record of a communication or
338 representation, including handwriting, typewriting, printing, photostating, photography,
339 audio or videorecording and e-mail. A “signed” writing includes an electronic sound,
340 symbol or process attached to or logically associated with a writing and executed or
341 adopted by a person with the intent to sign the writing.

342
343 **Comment**

344 **Confirmed in Writing**

345 [1] If it is not feasible to obtain or transmit a written confirmation at the time the client
346 gives informed consent, then the lawyer must obtain or transmit it within a reasonable
347 time thereafter. If a lawyer has obtained a client’s informed consent, the lawyer may act
348 in reliance on that consent so long as it is confirmed in writing within a reasonable time
349 thereafter.

350 **Firm**

351 [2] Whether two or more lawyers constitute a firm within paragraph (d) can depend on
352 the specific facts. For example, two practitioners who share office space and occasionally
353 consult or assist each other ordinarily would not be regarded as constituting a firm.
354 However, if they present themselves to the public in a way that suggests that they are a
355 firm or conduct themselves as a firm, they should be regarded as a firm for purposes of
356 the Rules. The terms of any formal agreement between associated lawyers are relevant in
357 determining whether they are a firm, as is the fact that they have mutual access to
358 information concerning the clients they serve. Furthermore, it is relevant in doubtful
359 cases to consider the underlying purpose of the Rule that is involved. A group of lawyers
360 could be regarded as a firm for purposes of the Rule that the same lawyer should not
361 represent opposing parties in litigation, while it might not be so regarded for purposes of
362 the Rule that information acquired by one lawyer is attributed to another.

363 [3] With respect to the law department of an organization there is ordinarily no question
364 that the members of the department constitute a firm within the meaning of the Rules of
365 Professional Conduct. There can be uncertainty, however, as to the identity of the client.
366 For example, it may not be clear whether the law department of a corporation represents
367 a subsidiary or an affiliated corporation, as well as the corporation by which the
368 members of the department are directly employed. A similar question can arise
369 concerning an unincorporated association and its local affiliates.

370 [4] Similar questions can also arise with respect to lawyers in legal aid and legal
371 services organizations. Depending upon the structure of the organization, the entire
372 organization or different components of it may constitute a firm or firms for purposes of
373 these Rules.

374 **Fraud**

375 [5] When used in these Rules, the terms “fraud” or “fraudulent” refer to conduct that is
376 characterized as such under the substantive or procedural law of the applicable
377 jurisdiction and has a purpose to deceive. This does not include merely negligent
378 misrepresentation or negligent failure to apprise another of relevant information. For
379 purposes of these Rules, it is not necessary that anyone has suffered damages or relied
380 on the misrepresentation or failure to inform.

381 **Informed Consent**

382 [6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed
383 consent of a client or other person (e.g., a former client or, under certain circumstances,
384 a prospective client) before accepting or continuing representation or pursuing a course
385 of conduct. See, e.g., Rules 1.2(c), 1.6(b) and 1.7(b). The communication necessary to
386 obtain such consent will vary according to the Rule involved and the circumstances
387 giving rise to the need to obtain informed consent. The lawyer must make reasonable
388 efforts to ensure that the client or other person possesses information reasonably
389 adequate to make an informed decision. Ordinarily, this will require communication that
390 includes a disclosure of the facts and circumstances giving rise to the situation, any
391 explanation reasonably necessary to inform the client or other person of the material
392 advantages and disadvantages of the proposed course of conduct and a discussion of the
393 client’s or other person’s options and alternatives. In some circumstances it may be
394 appropriate for a lawyer to advise a client or other person to seek the advice of other
395 counsel. A lawyer need not inform a client or other person of facts or implications
396 already known to the client or other person; nevertheless, a lawyer who does not
397 personally inform the client or other person assumes the risk that the client or other
398 person is inadequately informed and the consent is invalid. In determining whether the
399 information and explanation provided are reasonably adequate, relevant factors include
400 whether the client or other person is experienced in legal matters generally and in
401 making decisions of the type involved, and whether the client or other person is
402 independently represented by other counsel in giving the consent. Normally, such
403 persons need less information and explanation than others, and generally a client or
404 other person who is independently represented by other counsel in giving the consent
405 should be assumed to have given informed consent.

406 [7] Obtaining informed consent will usually require an affirmative response by the client
407 or other person. In general, a lawyer may not assume consent from a client’s or other
408 person’s silence. Consent may be inferred, however, from the conduct of a client or
409 other person who has reasonably adequate information about the matter. A number of
410 Rules require that a person’s consent be confirmed in writing. See Rules 1.7(b) and
411 1.9(a). For a definition of “writing” and “confirmed in writing,” see paragraphs (o) and

412 (b). Other Rules require that a client’s consent be obtained in a writing signed by the
413 client. See, e.g., Rules 1.8(a) and (g). For a definition of “signed,” see paragraph (o).

414 **Screened**

415 [8] This definition applies to situations where screening of a personally disqualified
416 lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11,
417 1.12 or 1.18.

418 [9] The purpose of screening is to assure the affected parties that confidential
419 information known by the personally disqualified lawyer remains protected. The
420 personally disqualified lawyer should acknowledge the obligation not to communicate
421 with any of the other lawyers in the firm with respect to the matter. Similarly, other
422 lawyers in the firm who are working on the matter should be informed that the screening
423 is in place and that they may not communicate with the personally disqualified lawyer
424 with respect to the matter. Additional screening measures that are appropriate for the
425 particular matter will depend on the circumstances. To implement, reinforce and remind
426 all affected lawyers of the presence of the screening, it may be appropriate for the firm
427 to undertake such procedures as a written undertaking by the screened lawyer to avoid
428 any communication with other firm personnel and any contact with any firm files or
429 other materials relating to the matter, written notice and instructions to all other firm
430 personnel forbidding any communication with the screened lawyer relating to the
431 matter, denial of access by the screened lawyer to firm files or other materials relating to
432 the matter and periodic reminders of the screen to the screened lawyer and all other firm
433 personnel.

434 [10] In order to be effective, screening measures must be implemented as soon as
435 practical after a lawyer or law firm knows or reasonably should know that there is a
436 need for screening.

437

438 **CLIENT LAWYER RELATIONSHIP**

439

440 **RULE 1.1: COMPETENCE**

441

442 A lawyer shall provide competent representation to a client. Competent representation
443 requires the legal knowledge, skill, thoroughness and preparation reasonably necessary
444 for the representation.

445

446

Comment

447

Legal Knowledge and Skill

448 [1] In determining whether a lawyer employs the requisite knowledge and skill in a
449 particular matter, relevant factors include the relative complexity and specialized nature
450 of the matter, the lawyer's general experience, the lawyer's training and
451 expertise~~experience~~ in the field in question, the preparation and study the lawyer is able
452 to give the matter and whether it is feasible to refer the matter to, or associate or consult
453 with, a lawyer of established competence in the field in question. In many instances, the
454 required proficiency is that of a general practitioner. Expertise in a particular field of law
455 may be required in some circumstances.

456 [2] A lawyer need not necessarily have special training or prior experience to handle legal
457 problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be
458 as competent as a practitioner with long experience. Some important legal skills, such as
459 the analysis of precedent, the evaluation of evidence and legal drafting, are required in all
460 legal problems. Perhaps the most fundamental legal skill consists of determining what
461 kind of legal problems a situation may involve, a skill that necessarily transcends any
462 particular specialized knowledge. A lawyer can provide adequate representation in a
463 wholly novel field through necessary study. Competent representation can also be
464 provided through the association of a lawyer of established competence in the field in
465 question.

466 [3] In an emergency a lawyer may give advice or assistance in a matter in which the
467 lawyer does not have the skill ordinarily required where referral to or consultation or
468 association with another lawyer would be impractical. Even in an emergency, however,
469 assistance should be limited to that reasonably necessary in the circumstances, for ill-
470 considered action under emergency conditions can jeopardize the client's interest.

471 [4] A lawyer may accept representation where the requisite level of competence can be
472 achieved by reasonable preparation. This applies as well to a lawyer who is appointed as
473 counsel for an unrepresented person. See also Rule 6.2.

474 **Thoroughness and Preparation**

475
476 [5] Competent handling of a particular matter includes inquiry into and analysis of the
477 factual and legal elements of the problem, and use of methods and procedures meeting
478 the standards of competent practitioners. It also includes adequate preparation. The
479 required attention and preparation are determined in part by what is at stake; major
480 litigation and complex transactions ordinarily require more ~~elaborate~~ extensive treatment
481 than matters of lesser complexity and consequence. An agreement between the lawyer
482 and the client regarding the scope of the representation may limit the matters for which
483 the lawyer is responsible. See Rule 1.2(c).

484 **Maintaining Competence**

485
486 [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of
487 changes in the law and its practice, engage in continuing study and education. ~~If a system~~
488 ~~of peer review has been established, and comply with all continuing legal education~~
489 ~~requirements to which~~ the lawyer ~~should consider making use of it in appropriate~~
490 ~~circumstances is subject.~~

494 **RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF** 495 **AUTHORITY BETWEEN CLIENT AND LAWYER**

496
497 (a) ~~Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions~~
498 ~~concerning the objectives of representation and, subject to paragraphs (b), (c) and (d),~~
499 ~~and as required by Rule 1.4, shall consult with the client as to the means by which they~~
500 ~~are to be pursued. A lawyer may take such action on behalf of the client as is impliedly~~
501 ~~authorized to carry out the representation. A lawyer shall abide by a client's decision~~
502 ~~whether to accept an offer of settlement or settle a matter. In a criminal case, the lawyer~~
503 ~~shall abide by the client's decision, after consultation with the lawyer, as to a plea to be~~
504 ~~entered, whether to waive jury trial and whether the client will testify.~~

505

506 (b) A lawyer's representation of a client, including representation by appointment, does
507 not constitute an endorsement of the client's political, economic, social or moral views or
508 activities.

509

510 (c) A lawyer may limit the objectivescope of the representation if the limitation is
511 reasonable under the circumstances and the client consents after consultationgives
512 informed consent.

513

514 (ed) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the
515 lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences
516 of any proposed course of conduct with a client and may counsel or assist a client to
517 make a good faith effort to determine the validity, scope, meaning or application of the
518 law.

519 (d) ~~When a lawyer knows that a client expects assistance not permitted by the Rules of~~
520 ~~Professional Conduct or other law, the lawyer shall consult with the client regarding the~~
521 ~~relevant limitations on the lawyer's conduct.~~

522

523

Comment

524

Scope of Representation

525

Allocation of Authority between Client and Lawyer

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530

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535

~~Both lawyer and client have authority and responsibility in~~[1] Paragraph (a) confers upon
~~the objectives and means of representation. The client has~~the ultimate authority to
~~determine the purposes to be served by legal representation, within the limits imposed by~~
~~law and the lawyer's professional obligations. Within those limits~~The decisions specified
~~in paragraph (a), a client~~such as whether to settle a civil matter, must also has a right
~~made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the~~
~~client about such decisions. With respect to the means by which the client's objectives~~
~~are to be pursued, the lawyer shall consult with the lawyer about client as required by~~
~~Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the~~
~~representation.~~

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[2] On occasion, however, a lawyer and a client may disagree about the means to be used
in pursuing these to accomplish the client's objectives. At the same time, a lawyer is not
required to pursue objectives or employ means simply because a client may wish that the
Clients normally defer to the special knowledge and skill of their lawyer do so. A clear
distinction between objectives and means sometimes cannot be drawn, and in many cases
the client-lawyer relationship partakes of a joint undertaking. In questions of with respect
to the means to be used to accomplish their objectives, the lawyer should assume
responsibility for particularly with respect to technical and legal and tactical
issues matters. Conversely, but lawyers should usually defer to the client regarding such
questions as the expense to be incurred and concern for third persons who might be
adversely affected. LawBecause defining of the varied nature of the matters about which a
lawyer's scope and client might disagree and because the actions in question may
implicate the interests of authority in litigation varies among jurisdictions, a tribunal or
other persons, this Rule does not prescribe how such disagreements are to be resolved.
Other law, however, may be applicable and should be consulted by the lawyer. The
lawyer should also consult with the client and seek a mutually acceptable resolution of
the disagreement. If such efforts are unavailing and the lawyer has a fundamental
disagreement with the client, the lawyer may withdraw from the representation. See Rule

554 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the
555 lawyer. See Rule 1.16(a)(3).

556 [3] At the outset of a representation, the client may authorize the lawyer to take specific
557 action on the client's behalf without further consultation. Absent a material change in
558 circumstances and subject to Rule 1.4, a lawyer may rely on such an advance
559 authorization. The client may, however, revoke such authority at any time.

560 [4] In a case in which the client appears to be suffering ~~mental disability~~ from diminished
561 capacity, the lawyer's duty to abide by the client's ~~decision~~ decisions is to be guided by
562 reference to Rule 1.14.

563 **Independence ~~From~~ Client's Views or Attitudes ~~Activities~~**

564 [5] Legal representation should not be denied to people who are unable to afford legal
565 services, or whose cause is controversial or the subject of popular disapproval. A
566 lawyer's representation of ~~By the same token, representing~~ a client, ~~including~~
567 representation by appointment, does not constitute an endorsement ~~approval~~ of the client's
568 political, economic, social or moral views or activities.

569 **Services Limited in Objectives or Means**

570 **Agreements Limiting Scope of Representation**

571
572 [6] The objectives or scope of services to be provided by a lawyer may be limited by
573 agreement with the client or by the terms under which the lawyer's services are made
574 available to the client. ~~For example, a retainer may be for a specifically defined purpose.~~
575 Representation provided through a legal aid agency may be subject to limitations on the
576 types of cases the agency handles. ~~When a lawyer has been retained by an insurer to~~
577 represent an insured, ~~the representation may be limited to matters by an insurer to~~
578 represent an insured ~~for example, the representation may be limited to matters related to~~
579 the insurance coverage. ~~The~~ A limited representation may be appropriate because the
580 client has limited objectives for the representation. In addition, the terms upon which
581 representation is undertaken may exclude specific means that might otherwise be used to
582 accomplish the client's objectives ~~or means~~. Such limitations may exclude
583 objectives ~~actions that the client thinks are too costly~~ or ~~means~~ that the lawyer regards as
584 repugnant or imprudent.

585
586 [7] Although this Rule affords the lawyer and client substantial latitude to limit the
587 representation, the limitation must be reasonable under the circumstances. If, for
588 example, a client's objective is limited to securing general information about the law the
589 client needs in order to handle a common and typically uncomplicated legal problem, the
590 lawyer and client may agree that the lawyer's services will be limited to a brief telephone
591 consultation. Such a limitation, however, would not be reasonable if the time allotted was
592 not sufficient to yield advice upon which the client could rely. Although an agreement for
593 a limited representation does not exempt a lawyer from the duty to provide competent
594 representation, the limitation is a factor to be considered when determining the legal
595 knowledge, skill, thoroughness and preparation reasonably necessary for the
596 representation. See Rule 1.1.

597 An agreement [8] All agreements concerning the scope of a lawyer's representation of a
598 client must accord with the Rules of Professional Conduct and other law. ~~Thus~~ See, the
599 client may not be asked to agree to representation so limited in scope as to violate

600 ~~Rule, g., Rules 1.1, or to surrender the right to terminate the lawyer's services or the right~~
601 ~~to settle litigation that the lawyer might wish to continue.~~ 1.8 and 5.6.

602 **Criminal, Fraudulent and Prohibited Transactions**

603 ~~A lawyer is required to give~~[9] Paragraph (d) prohibits a lawyer from knowingly
604 counseling or assisting a client to commit a crime or fraud. This prohibition, however,
605 does not preclude the lawyer from giving an honest opinion about the actual
606 consequences that appear likely to result from a client's conduct. ~~The~~ Nor does the fact
607 that a client uses advice in a course of action that is criminal or fraudulent ~~does not, of~~
608 itself, make a lawyer a party to the course of action. ~~However, a lawyer may not~~
609 ~~knowingly assist a client in criminal or fraudulent conduct.~~ There is a critical distinction
610 between presenting an analysis of legal aspects of questionable conduct and
611 recommending the means by which a crime or fraud might be committed with impunity.

612 [10] When the client's course of action has already begun and is continuing, the lawyer's
613 responsibility is especially delicate. The lawyer is ~~not permitted to reveal the client's~~
614 ~~wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to~~
615 ~~avoid furthering~~assisting the purposeclient, for example, by drafting or delivering
616 documents that the lawyer knows are fraudulent or by suggesting how ~~the wrongdoing~~
617 might be concealed. A lawyer may not continue assisting a client in conduct that the
618 lawyer originally ~~supposes~~supposed iswas legally proper but then discovers is criminal or
619 fraudulent. ~~Withdrawal~~The lawyer must, therefore, withdraw from the representation of
620 the client in the matter. See Rule 1.16(a). In some cases, therefore, withdrawal alone
621 might be insufficient. It may be requirednecessary for the lawyer to give notice of the fact
622 of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule
623 4.1.

624 [11] Where the client is a fiduciary, the lawyer may be charged with special obligations
625 in dealings with a beneficiary.

626 [12] Paragraph (ed) applies whether or not the defrauded party is a party to the
627 transaction. Hence, a lawyer ~~should~~must not participate in a ~~sham transaction; for~~
628 ~~example, a transaction to effectuate criminal or fraudulent~~ escapeavoidance of tax
629 liability. Paragraph (ed) does not preclude undertaking a criminal defense incident to a
630 general retainer for legal services to a lawful enterprise. The last clause of paragraph (ed)
631 recognizes that determining the validity or interpretation of a statute or regulation may
632 require a course of action involving disobedience of the statute or regulation or of the
633 interpretation placed upon it by governmental authorities.

634 [13] If a lawyer comes to know or reasonably should know that a client expects
635 assistance not permitted by the Rules of Professional Conduct or other law or if the
636 lawyer intends to act contrary to the client's instructions, the lawyer must consult with
637 the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

638
639 **RULE 1.3: DILIGENCE**

640
641
642 A lawyer shall act with reasonable diligence and promptness in representing a client.
643

Comment

644

645 [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction
646 or personal inconvenience to the lawyer, and ~~may~~ take whatever lawful and ethical
647 measures are required to vindicate a client's cause or endeavor. A lawyer ~~should~~ must also
648 act with commitment and dedication to the interests of the client and with zeal in
649 advocacy upon the client's behalf. ~~However, a~~ lawyer is not bound, however, to press
650 for every advantage that might be realized for a client. ~~A~~ For example, a lawyer ~~has~~ may
651 have authority to exercise professional discretion in determining the means by which a
652 matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable
653 diligence does not require the use of offensive tactics or preclude the treating of all
654 persons involved in the legal process with courtesy and respect.

655 [2] A lawyer's ~~workload should~~ work load must be controlled so that each matter can be
656 handled ~~adequately~~ competently.

657 [3] Perhaps no professional shortcoming is more widely resented than procrastination. A
658 client's interests often can be adversely affected by the passage of time or the change of
659 conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the
660 client's legal position may be destroyed. Even when the client's interests are not affected
661 in substance, however, unreasonable delay can cause a client needless anxiety and
662 undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with
663 reasonable promptness, however, does not preclude the lawyer from agreeing to a
664 reasonable request for a postponement that will not prejudice the lawyer's client.

665 [4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry
666 through to conclusion all matters undertaken for a client. If a lawyer's employment is
667 limited to a specific matter, the relationship terminates when the matter has been
668 resolved. If a lawyer has served a client over a substantial period in a variety of matters,
669 the client sometimes may assume that the lawyer will continue to serve on a continuing
670 basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer
671 relationship still exists should be clarified by the lawyer, preferably in writing, so that the
672 client will not mistakenly suppose the lawyer is looking after the client's affairs when the
673 lawyer has ceased to do so. For example, if a lawyer has handled a judicial or
674 administrative proceeding that produced a result adverse to the client ~~but has~~ and the
675 lawyer and the client have not been specifically instructed concerning pursuit of an ~~agreed~~
676 that the lawyer will handle the matter on appeal, the lawyer ~~should advise~~ must consult
677 with the client ~~of~~ about the possibility of appeal before relinquishing responsibility for the
678 matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for
679 the client depends on the scope of the representation the lawyer has agreed to provide to
680 the client. See Rule 1.2.

681 [5] To prevent neglect of client matters in the event of a sole practitioner's death or
682 disability, the duty of diligence may require that each sole practitioner prepare a plan, in
683 conformity with applicable rules, that designates another competent lawyer to review
684 client files, notify each client of the lawyer's death or disability, and determine whether
685 there is a need for immediate protective action. Cf. Rule 28 of the American Bar
686 Association Model Rules for Lawyer Disciplinary Enforcement (providing for court
687 appointment of a lawyer to inventory files and take other protective action in absence of a
688 plan providing for another lawyer to protect the interests of the clients of a deceased or
689 disabled lawyer).

691

692

693 **RULE 1.4: COMMUNICATION**

694
695 (a) A lawyer shall

696 (1) promptly inform the client of any decision or circumstance with respect to which the
697 client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

698 (2) reasonably consult with the client about the means by which the client's objectives are
699 to be accomplished;

700 (3) keep the client reasonably informed about the status of the matter; and

701 (4) promptly comply with reasonable requests for information; and

702 (5) consult with the client about any relevant limitation on the lawyer's conduct when the
703 lawyer knows that the client expects assistance not permitted by the Rules of Professional

704 Conduct or other law.

705
706 (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client
707 to make informed decisions regarding the representation.

708
709 **Comment**

710
711 [1] Reasonable communication between the lawyer and the client is necessary for the
712 client effectively to participate in the representation.

713
714 **Communicating with Client**

715
716 ~~The client should have sufficient information to participate intelligently in decisions~~
717 ~~concerning the objectives of the representation and the means by which they are to be~~
718 ~~pursued, to the extent the client is willing and able to do so. For example, a lawyer~~
719 ~~negotiating on behalf of a client should provide the client~~

720
721 [2] If these Rules require that a particular decision about the representation be made by
722 the client, paragraph (a)(1) requires that the lawyer promptly consult with facts
723 relevant and secure the client's consent prior to the matter, inform the taking action unless
724 prior discussions with the client of communications from another party and take other
725 reasonable steps that permit the have resolved what action the client wants the lawyer to
726 make a decision regarding a serious offer from another party take. AFor example, a
727 lawyer who receives from opposing counsel an offer of settlement in a civil controversy
728 or a proffered plea bargain in a criminal case should must promptly inform the client of its
729 substance unless prior discussions with the client have left it clear has previously
730 indicated that the proposal will be acceptable or unacceptable or has authorized the
731 lawyer to accept or to reject the offer. See Rule 1.2(a). Even when a client delegates
732 authority to the lawyer, the

733
734 [3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the
735 means to be used to accomplish the client should be kept advised's objectives. In some
736 situations - depending on both the importance of the action under consideration and the
737 feasibility of consulting with the client - this duty will require consultation prior to taking
738 action. In other circumstances, such as during a trial when an immediate decision must be
739 made, the exigency of the situation may require the lawyer to act without prior
740 consultation. In such cases the lawyer must nonetheless act reasonably to inform the
741 client of actions the lawyer has taken on the client's behalf. Additionally, paragraph
742 (a)(3) requires that the lawyer keep the client reasonably informed about the status of the
743 matter, such as significant developments affecting the timing or the substance of the
744 representation.

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[4] A lawyer’s regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer’s staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, in negotiations where when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might be likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily cannot will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(f).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental diminished disability capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer’s own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

794 **RULE 1.5: FEES**

795
796 (a) ~~A lawyer's fee shall be reasonable~~not make an agreement for, charge, or collect an
797 unreasonable fee or an unreasonable amount for expenses. The factors to be considered in
798 determining the reasonableness of a fee include the following:

- 799 (1) the time and labor required, the novelty and difficulty of the questions involved, and
800 the skill requisite to perform the legal service properly;
801 (2) the likelihood, if apparent to the client, that the acceptance of the particular
802 employment will preclude other employment by the lawyer;
803 (3) the fee customarily charged in the locality for similar legal services;
804 (4) the amount involved and the results obtained;
805 (5) the time limitations imposed by the client or by the circumstances;
806 (6) the nature and length of the professional relationship with the client;
807 (7) the experience, reputation, and ability of the lawyer or lawyers performing the
808 services; and
809 (8) whether the fee is fixed or contingent.

810
811 (b) ~~When the lawyer has not regularly represented the client,~~The scope of the
812 representation and the basis or rate of the fee and expenses for which the client will be
813 responsible shall be communicated to the client, preferably in writing, before or within a
814 reasonable time after commencing the representation, except when the lawyer will charge
815 a regularly represented client on the same basis or rate. Any changes in the basis or rate
816 of the fee or expenses shall also be communicated to the client. All agreements for the
817 advance payment of nonrefundable fees to secure a lawyer's availability for a specific
818 period of time or a specific service shall be reasonable in amount and clearly
819 communicated in a writing signed by the client.

820
821 (c) A fee may be contingent on the outcome of the matter for which the service is
822 rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or
823 other law. A contingent fee agreement shall be in a writing signed by the client and shall
824 state the method by which the fee is to be determined, including the percentage or
825 percentages that shall accrue to the lawyer in the event of settlement, trial or appeal;
826 litigation and other expenses to be deducted from the recovery;
827 and whether such expenses are to be deducted before or after the contingent fee is calculated. The
828 agreement must clearly notify the client of any expenses for which the client will be
829 liable whether or not the client is the prevailing party. Upon conclusion of a contingent
830 fee matter, the lawyer shall provide the client with a written statement stating the
831 outcome of the matter and, if there is a recovery, showing the remittance to the client and
832 the method of its determination.

833
834 (d) A lawyer shall not enter into an arrangement for, charge, or collect:
835 (1) any fee in a domestic relations matter, the payment or amount of which is contingent
836 upon the securing of a divorce or upon the amount of alimony or support, or property
837 settlement in lieu thereof; or
838 (2) a contingent fee for representing a defendant in a criminal case.

840 (e) A division of a fee between lawyers who are not in the same firm may be made only
841 if:
842 (1) the division is in proportion to the services performed by each lawyer or, by written
843 agreement with the client, each lawyer assumes joint responsibility for the
844 representation;
845 (2) the client is advised of and agrees to the arrangement, including the share that each lawyer
846 is will to receive, and does not object to the participation of all the lawyers
847 involved agreement is confirmed in writing; and
848 (3) the total fee is reasonable.
849 ~~(f) This Rule does not prohibit payment to a former partner or associate pursuant to a~~
850 ~~separation agreement.~~

851
852 **Comment**

853 **General**

854 **Rule 1.5(a) and (e)'s requirement**

855 **Reasonableness of Fee and Expenses**

856 [1] Paragraph (a) requires that a fee be “lawyers charge fees that are reasonable” is not
857 intended to restrict attorneys from under the circumstances. The factors specified in (1)
858 through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph
859 (a) also requires that expenses for which the client will be charged must be reasonable. A
860 lawyer may seek reimbursement for the cost of services performed in-house, such as
861 copying, or for other expenses incurred in-house, such as telephone charges, either by
862 charging less than normal fees or charging no fee at all, a reasonable amount to which the
863 client has agreed in advance or by charging an amount that reasonably reflects the cost
864 incurred by the lawyer.

865 **Basis or Rate of Fee**

866 [2] When the lawyer has regularly represented a client, they ordinarily will have evolved
867 an understanding concerning the basis or rate of the fee and the expenses for which the
868 client will be responsible. In a new client-lawyer relationship, however, an understanding
869 as to the fee should fees and expenses must be promptly established. ~~It~~ Generally, it is not
870 necessary desirable to recite all furnish the factors that underlie the basis client with at least
871 a simple memorandum or copy of the lawyer’s customary fee arrangements that
872 states the general nature of the fee, but only those that are directly involved in its
873 computation. It is sufficient, for example, legal services to state that the basis be provided,
874 the basis, rate is an hourly charge or a fixed or total amount or an estimated amount, or of
875 the fee and whether and to identify the factors that may be taken into account in finally
876 fixing what extent the fee. When developments occur during client will be responsible for
877 any costs, expenses or disbursements in the course of the representation that render an
878 earlier estimate substantially inaccurate, a revised estimate should be provided to the
879 client. A written statement concerning the fee terms of the engagement reduces the
880 possibility of misunderstanding. ~~Furnishing the client with a simple memorandum or a~~
881 copy of the lawyer’s customary fee schedule is sufficient if the basis or rate of the fee is
882 set forth.

883 [3] Contingent fees, like any other fees, are subject to the reasonableness standard of
884 paragraph (a) of this Rule. In determining whether a particular contingent fee is
885 reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer
886 must consider the factors that are relevant under the circumstances. Applicable law may

887 impose limitations on contingent fees, such as a ceiling on the percentage allowable, or
888 may require a lawyer to offer clients an alternative basis for the fee. Applicable law also
889 may apply to situations other than a contingent fee, for example, government regulations
890 regarding fees in certain tax matters.

891 **Terms of Payment**

892 [4] A lawyer may require advance payment of a fee, but is obliged to return any unearned
893 portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as
894 an ownership interest in an enterprise, providing this does not involve acquisition of a
895 proprietary interest in the cause of action or subject matter of the litigation contrary to
896 Rule 1.8 (j). However, a fee paid in property instead of money may be subject to special
897 scrutiny~~the requirements of Rule 1.8(a) because it involves questions concerning~~
898 both such fees often have the value essential qualities of a business transaction with the
899 services and the lawyer's special knowledge of the value of the property client.

900 [5] An agreement may not be made whose terms might induce the lawyer improperly to
901 curtail services for the client or perform them in a way contrary to the client's interest.
902 For example, a lawyer should not enter into an agreement whereby services are to be
903 provided only up to a stated amount when it is foreseeable that more extensive services
904 probably will be required, unless the situation is adequately explained to the client.
905 Otherwise, the client might have to bargain for further assistance in the midst of a
906 proceeding or transaction. However, it is proper to define the extent of services in light of
907 the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily
908 on hourly charges by using wasteful procedures.~~When there is doubt whether a~~
909 ~~contingent fee is consistent with the client's best interest, the lawyer should offer the~~
910 ~~client alternative bases for the fee and explain their implications. Applicable law may~~
911 ~~impose limitations on contingent fees, such as a ceiling on the percentage.~~

912 **Prohibited Contingent Fees**

913 [6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic
914 relations matter when payment is contingent upon the securing of a divorce or upon the
915 amount of alimony or support or property settlement to be obtained. This provision does
916 not preclude a contract for a contingent fee for legal representation in connection with the
917 recovery of post-judgment balances due under support, alimony or other financial orders
918 because such contracts do not implicate the same policy concerns.

919 **Division of Fee**

920 [7] A division of fee is a single billing to a client covering the fee of two or more lawyers
921 who are not in the same firm. A division of fee facilitates association of more than one
922 lawyer in a matter in which neither alone could serve the client as well, and most often is
923 used when the fee is contingent and the division is between a referring lawyer and a trial
924 specialist. Paragraph (e) permits the lawyers to divide a fee on either on the basis of the
925 proportion of services they render or by agreement between the participating lawyers if
926 all assume each lawyer assumes responsibility for the representation as a whole and. In
927 addition, the client must agree to the arrangement, including the share that each lawyer is
928 advised to receive, and does not object the agreement must be confirmed in writing.
929 Contingent fee agreements must be in a writing signed by the client and must otherwise
930 comply with paragraph (c) of this Rule. Joint responsibility for the representation entails
931 financial and ethical responsibility for the obligations stated representation as if the
932 lawyers were associated in Rule 5.1 for purposes of the a partnership. A lawyer should

933 only refer a matter involved to a lawyer whom the referring lawyer reasonably believes is
934 competent to handle the matter. See Rule 1.1.

935 [8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future
936 for work done when lawyers were previously associated in a law firm.

937 **Disputes ~~Over~~ Fees**

938 [9] If a procedure has been established for resolution of fee disputes, such as an
939 arbitration or mediation procedure established by the bar, the lawyer must comply with
940 the procedure when it is mandatory, and, even when it is voluntary, the lawyer should
941 conscientiously consider submitting to it. Law may prescribe a procedure for determining
942 a lawyer's fee, for example, in representation of an executor or administrator, a class or a
943 person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled
944 to such a fee and a lawyer representing another party concerned with the fee should
945 comply with the prescribed procedure.

946

947 **RULE 1.6: CONFIDENTIALITY OF INFORMATION**

948

949 (a) Except when permitted under paragraph (b), a lawyer shall not
950 knowingly:~~(1) reveal a confidence or secret of a client;(2) use a~~
951 ~~confidence or secret of a client to the disadvantage~~information
952 relating to the representation of the client;(3) use a confidence or
953 secret of a client for the advantage of the lawyer or a third person,
954 unless the client consents after consultation.

955

956 (b) A lawyer may reveal information relating to the representation of a
957 client if:

958 (1) the client gives informed consent;

959 (2) the information is not protected by the attorney-client privilege under applicable law,
960 the client has not requested that the information be held inviolate, and the lawyer
961 reasonably believes the disclosure would not be embarrassing or likely detrimental to the
962 client;

963 (3) the lawyer reasonably believes the disclosure is impliedly authorized in order to carry
964 out the representation;

965 (4) the lawyer reasonably believes the disclosure is necessary to prevent the commission
966 of a crime;

967 ~~(b) A.5) the lawyer may reveal:(1) confidences or secrets with the consent of the client or~~
968 ~~clients affected, but only after consultation with them;(2) confidences or secrets when~~
969 ~~permitted under the Rules of Professional Conduct or required by law or court order;(3)~~
970 ~~the intention of a client to commit a crime and the information necessary to prevent a~~
971 ~~crime;(4) confidences and secrets;reasonably believes the disclosure is necessary to rectify~~
972 ~~the consequences of a client's criminal or fraudulent act in the furtherance of which the~~
973 ~~lawyer's services were used;(5) confidences or secrets~~

974 (6) the lawyer reasonably believes the disclosure is necessary to prevent reasonably
975 certain death or substantial bodily harm;

976 (7) the lawyer reasonably believes the disclosure is necessary to secure legal advice
977 about the lawyer's compliance with these Rules;

978 (8) the lawyer reasonably believes the disclosure is necessary to establish or collect a fee
979 or to defend the lawyer or employees or associates against a claim or defense on behalf of
980 the lawyer in an accusation of wrongful conduct;(6) secrets actual or potential
981 controversy between the lawyer and the client, to establish a defense in a civil, criminal
982 or disciplinary proceeding against the lawyer based upon conduct in which the client was
983 involved, or to respond in any proceeding to allegations by the client concerning the
984 lawyer's representation of the client;

985 (9) the lawyer reasonably believes the disclosure is necessary to comply with other law
986 or a court order; or

987 (10) the lawyer reasonably believes the disclosure is necessary to inform the Office of
988 Lawyers Professional Responsibility of knowledge of another lawyer's violation of the
989 Rules of Professional Conduct that raises a substantial question as to that lawyer's
990 honesty, trustworthiness or fitness as a lawyer in other respects. See Rule 8.3.

991 ~~(e) A lawyer shall exercise reasonable care to prevent employees, associates and others~~
992 ~~whose services the lawyer utilizes from disclosing or using confidences or secrets of a~~
993 ~~client, except that a lawyer may reveal the information allowed by paragraph (b) through~~
994 ~~an employee.~~

995 ~~(d) "Confidence" refers to information protected by the attorney-client privilege under~~
996 ~~applicable law, and "secret" refers to other information gained in the professional~~
997 ~~relationship that the client has requested be held inviolate or the disclosure of which~~
998 ~~would be embarrassing or would be likely to be detrimental to the client.~~

1000 Comment

1001 General

1002 Both the fiduciary relationship existing between lawyer and

1003 [1] This Rule governs the disclosure by a lawyer of information relating to the
1004 representation of a client and the proper functioning of during the legal system require
1005 lawyer's representation of the lawyer to preserve confidences and secrets of one who
1006 has employed or sought to employ the lawyer. A client must feel free. See Rule 1.18 for
1007 the lawyer's duties with respect to information provided to discuss whatever the lawyer
1008 by a prospective client wishes with. Rule 1.9(c)(2) for the lawyer and a lawyer must be
1009 equally free's duty not to obtain information beyond what reveal information relating to
1010 the lawyer's prior representation of a former client volunteers. A lawyer should be fully
1011 informed of all and Rules 1.8(b) and 1.9(c)(1) for the facts of lawyer's duties with
1012 respect to the matter use of such information to the lawyer is handling disadvantage of
1013 clients and former clients.

1014 [2] A fundamental principle in order for the client to obtain the full advantage of our
1015 legal system. It is for the lawyer in the exercise-lawyer relationship is that, in the
1016 absence of independent professional judgment to separate the client's informed consent,
1017 the lawyer must not reveal information relating to the representation. See Rule 1.0(f) for
1018 the relevant definition of informed consent. This contributes to the trust that is the
1019 hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal
1020 assistance and to communicate fully and important frankly with the lawyer even as to
1021 embarrassing or legally damaging subject matter. The lawyer needs this information to
1022 represent the client effectively and, if necessary, to advise the client to refrain from the
1023 irrelevant and unimportant.

1024 Observance of the lawyer's ethical obligation to hold inviolate the client's
1025 confidences wrongful conduct. Almost without exception, clients come to lawyers in

1026 order to determine their rights and secrets not only facilitates the full development of
1027 facts essential to proper representation of what is, in the complex of laws and
1028 regulations, deemed to be legal and correct. Based upon experience, lawyers know that
1029 almost all clients follow the advice given, and the law is upheld.

1030 [3] The principle of client-lawyer confidentiality is given effect by related bodies of law:
1031 the attorney-client privilege, the work product doctrine and the rule of confidentiality
1032 established in professional ethics. The attorney-client privilege and work-product
1033 doctrine apply in judicial and other proceedings in which a lawyer may be called as a
1034 witness or otherwise required to produce evidence concerning a client. The rule of
1035 client-lawyer confidentiality applies in situations other than those where evidence is
1036 sought from the lawyer through compulsion of law. The confidentiality rule, for
1037 example, applies not only to matters communicated in confidence by the client but also
1038 encourages people to seek early legal assistance, to all information relating to the
1039 representation, whatever its source. A lawyer may not disclose such information except
1040 as authorized or required by the Rules of Professional Conduct or other law. See also
1041 Scope.

1042 [4] Paragraph (a) prohibits a lawyer from revealing information relating to the
1043 representation of a client. This prohibition also applies to disclosures by a lawyer that do
1044 not in themselves reveal protected information but could reasonably lead to the
1045 discovery of such information by a third person. A lawyer's use of a hypothetical to
1046 discuss issues relating to the representation is permissible so long as there is no
1047 reasonable likelihood that the listener will be able to ascertain the identity of the client
1048 or the situation involved.

1049 **Authorized Disclosure**

1050 [5] Except to the extent that the client's instructions or special circumstances limit that
1051 authority, a lawyer is impliedly authorized to make disclosures about a client when
1052 appropriate in carrying out the representation. In some situations, for example, a lawyer
1053 may be impliedly authorized to admit a fact that cannot properly be disputed or to make
1054 a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may,
1055 in the course of the firm's practice, disclose to each other information relating to a client
1056 of the firm, unless the client has instructed that particular information be confined to
1057 specified lawyers.

1058 **Disclosure Adverse to Client**

1059 [6] Although the public interest is usually best served by a strict rule requiring lawyers
1060 to preserve the confidentiality of information relating to the representation of their
1061 clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(6)
1062 recognizes the overriding value of life and physical integrity and permits disclosure
1063 reasonably necessary to prevent reasonably certain death or substantial bodily harm.
1064 Such harm is reasonably certain to occur if it will be suffered imminently or if there is a
1065 present and substantial threat that a person will suffer such harm at a later date if the
1066 lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows
1067 that a client has accidentally discharged toxic waste into a town's water supply may
1068 reveal this information to the authorities if there is a present and substantial risk that a
1069 person who drinks the water will contract a life-threatening or debilitating disease and
1070 the lawyer's disclosure is necessary to eliminate the threat or reduce the number of
1071 victims.

1072 ~~The obligation to protect confidences and secrets obviously does~~ [7] A lawyer's
1073 confidentiality obligations do not preclude a lawyer from revealing ~~securing confidential~~
1074 legal advice about the lawyer's personal responsibility to comply with these Rules. In
1075 most situations, disclosing information when the client consents after consultation, when
1076 necessary to perform professional employment, ~~secure such advice will be impliedly~~
1077 authorized for the lawyer to carry out the representation. Even when permitted by the
1078 disclosure is not impliedly authorized, paragraph (b)(7) permits such disclosure because
1079 of the importance of a lawyer's compliance with the Rules of Professional Conduct ~~or~~
1080 when required by law.

1081 ~~The confidentiality required under this rule should not allow a client to utilize the~~
1082 ~~lawyer's services in committing a criminal or fraudulent act. A lawyer is permitted to~~
1083 ~~reveal the intention of a client to commit a crime and the information necessary to~~
1084 ~~prevent the crime. In addition, where~~

1085 [8] Where a legal claim or disciplinary charge alleges complicity of the lawyer finds
1086 out, after in a client's conduct or other misconduct of the fact, that the lawyer's services
1087 were used by the client to commit a criminal or fraudulent act, lawyer involving
1088 representation of the client, the lawyer has discretion to reveal information necessary to
1089 rectify may respond to the consequences of extent the lawyer reasonably believes
1090 necessary to establish a defense. The same is true with respect to a claim involving the
1091 conduct or representation of a former client. Such a charge can arise in a civil, criminal,
1092 disciplinary or other proceeding and can be based on a wrong allegedly committed by
1093 the lawyer against the client or on a wrong alleged by a third person, for example, a
1094 person claiming to have been defrauded by the lawyer and client's crime or fraud. A
1095 lawyer is not permitted, however, to acting together. The lawyer's right to respond
1096 arises when an assertion of such complicity has been made. Paragraph (b)(8) does not
1097 require the lawyer to await the commencement of an action or proceeding that charges
1098 such complicity, so that the defense may be established by responding directly to a third
1099 party who has made such an assertion. The right to defend also applies, of course, where
1100 a proceeding has been commenced.

1101 [9] A lawyer entitled to a fee is permitted by paragraph (b)(8) to prove the services
1102 rendered in an action to collect it. This aspect of the rule expresses the principle that the
1103 beneficiary of a fiduciary relationship may not exploit it to the detriment of the
1104 fiduciary.

1105 [10] Other law may require that a lawyer disclose a information about a client's criminal
1106 or fraudulent act committed prior to the client's retention of the lawyer's services.

1107 ~~Unless the client otherwise directs, a lawyer may disclose the client's affairs to partners~~
1108 ~~or associates.~~

1109 ~~It is a.~~ Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of
1110 these Rules. When disclosure of information relating to the representation appears to be
1111 required by other law, the lawyer must discuss the matter of common knowledge that
1112 the normal operation of a law office exposes confidential professional information to
1113 non-lawyer employees of the office, particularly secretaries with the client to the extent
1114 required by Rule 1.4. If, however, the other law supersedes this Rule and those having
1115 access to the files; and this obligates a lawyer to exercise care in selecting and training
1116 employees so that the sanctity of all confidences and secrets of clients may be preserved.

1117 ~~If the obligation extends to two or more clients as to the same information, a lawyer~~
1118 ~~should obtain the permission of all before revealing the information.~~

1119 ~~A lawyer must always be sensitive to the client's rights and wishes and act scrupulously~~
1120 ~~in making decisions which may involve disclosure of information obtained in the~~
1121 ~~professional relationship. Thus, in the absence of the client's consent after consultation,~~
1122 ~~a lawyer should not associate~~requires disclosure, paragraph (b)(9) permits the lawyer to
1123 make such disclosures as are necessary to comply with the law.

1124 [11] A lawyer may be ordered to reveal information relating to the representation of a
1125 client by a court or by another lawyer in handling a matter; nor, in the absence of
1126 consent, seek counsel from another lawyer if there is a reasonable possibility that the
1127 client's identity or confidences or secrets would be revealed to tribunal or governmental
1128 entity claiming authority pursuant to other law to compel the disclosure. Absent
1129 informed consent of the client to do otherwise, the lawyer should assert on behalf of the
1130 client all nonfrivolous claims that lawyer. Both social amenities and professional duty
1131 should cause a lawyer to shun indiscreet conversations concerning clients.

1132 ~~Unless the client otherwise directs, it~~the order is not improper for a lawyer to give
1133 ~~limited information from the lawyer's files to an outside agency necessary for statistical,~~
1134 ~~bookkeeping, accounting, data processing, banking, printing, or other legitimate~~
1135 ~~purposes, provided the lawyer exercises due care in selecting the agency and warns the~~
1136 ~~agency~~authorized by other law or that the information must be kept confidential.

1137 **Protecting Confidences**

1138 ~~The information sought is protected against disclosure by the attorney-client~~client
1139 ~~privilege is more limited than the lawyer's ethical obligation to guard the client's~~
1140 ~~confidences and secrets. The ethical obligation, unlike the evidentiary privilege, exists~~
1141 ~~without regard to the nature or source of information or the fact that others share the~~
1142 ~~knowledge.~~

1143 ~~A lawyer should endeavor to act in a manner which preserves the evidentiary privilege;~~
1144 ~~for example, the lawyer should avoid professional discussions in the presence of persons~~
1145 ~~to whom the privilege does not extend. A lawyer owes an obligation to advise the client~~
1146 ~~of the attorney-client privilege and timely to assert the privilege unless it is waived by~~
1147 ~~the client.~~

1148 **Using Confidences or Secrets**

1149 ~~A lawyer should not use information acquired in the course of the representation of a~~
1150 ~~client to the~~or other applicable law. In the event of an adverse ruling, the lawyer must
1151 consult with the client about the possibility of appeal to the extent required by Rule 1.4.
1152 Unless review is sought, however, paragraph (b)(9) permits the lawyer to comply with
1153 the court's order.

1154 [12] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes
1155 the disclosure is necessary to accomplish one of the purposes specified. Where
1156 practicable, the lawyer should first seek to persuade the client to take suitable action to
1157 obviate the need for disclosure. In any case, a disclosure adverse to the client's interest
1158 should be no greater than the lawyer reasonably believes necessary to accomplish the
1159 purpose. If the disclosure will be made in connection with a judicial proceeding, the
1160 disclosure should be made in a manner that limits access to the information to the
1161 tribunal or other persons having a need to know it and appropriate protective orders or
1162 other arrangements should be sought by the lawyer to the fullest extent practicable.

1163 [13] Paragraph (b) permits but does not require the disclosure of information relating to
1164 a client's representation to accomplish the purposes specified in paragraphs (b)(1)
1165 through (b)(10). In exercising the discretion conferred by this Rule, the lawyer may
1166 consider such factors as the nature of the lawyer's relationship with the client and with
1167 those who might be injured by the client, the lawyer's own involvement in the
1168 transaction and factors that may extenuate the conduct in question. A lawyer's decision
1169 not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may
1170 be required, however, by other Rules. Some Rules require disclosure only if such
1171 disclosure would be permitted by paragraph (b). See Rules 4.1(b), 8.1 and 8.3. Rule 3.3,
1172 on the other hand, requires disclosure in some circumstances regardless of whether such
1173 disclosure is permitted by this Rule. See Rule 3.3(c).

1174 **Withdrawal**

1175 [14] If the lawyer's services will be used by the client in materially furthering a course
1176 of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule
1177 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of
1178 the client's confidences, except as otherwise permitted in Rule 1.6. Neither this Rule nor
1179 Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of
1180 withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document,
1181 affirmation, or the like. Where the client is an organization, the lawyer may be in doubt
1182 whether contemplated conduct will actually be carried out by the organization. Where
1183 necessary to guide conduct in connection with this Rule, the lawyer may make inquiry
1184 within the organization as indicated in Rule 1.13(b).

1185 **Acting Competently to Preserve Confidentiality**

1186 [15] A lawyer must act competently to safeguard information relating to the
1187 representation of a client's disadvantage and a lawyer should not use, except with the
1188 against inadvertent or unauthorized disclosure by the lawyer or other persons who are
1189 participating in the representation of the client's consent after full disclosure, such
1190 information for the lawyer's own purposes.

1191 Likewise, a lawyer should be diligent in efforts to prevent misuse of such information
1192 by employees and associates.

1193 A lawyer should exercise care to prevent disclosure of confidences and secrets of one
1194 client to another and should accept no employment that might require such disclosure, or
1195 who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

1196 [16] When transmitting a communication that includes information relating to the
1197 representation of a client, the lawyer must take reasonable precautions to prevent the
1198 information from coming into the hands of unintended recipients. This duty, however,
1199 does not require that the lawyer use special security measures if the method of
1200 communication affords a reasonable expectation of privacy. Special circumstances,
1201 however, may warrant special precautions. Factors to be considered in determining the
1202 reasonableness of the lawyer's expectation of confidentiality include the sensitivity of
1203 the information and the extent to which the privacy of the communication is protected
1204 by law or by a confidentiality agreement. A client may require the lawyer to implement
1205 special security measures not required by this Rule or may give informed consent to the
1206 use of a means of communication that would otherwise be prohibited by this Rule.

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Former Client

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The lawyer's obligation to preserve the client's confidences and secrets continues after termination

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~~[17] The duty of the employment. Thus, a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve disclosure of confidences and secrets.~~

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~~A lawyer should also provide for the protection of the client's confidences and secrets following the termination of the practice of the lawyer, whether termination is due to death, disability or retirement. For example, a lawyer might provide for the client's personal papers to be returned to the client and for the lawyer's papers to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the client's instructions and wishes should be a dominant consideration.~~

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Reporting Obligation

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~~In the course of representation a lawyer may acquire knowledge of another lawyer's violations of the Rules of Professional Conduct. In that instance, a lawyer's obligation to protect client confidences and secrets under Rule 1.6 may appear to conflict with that lawyer's obligations under Rule 8.3 to report professional misconduct by another lawyer. Where "confidences" are involved, the importance of the fiduciary relationship between lawyer and client and the proper functioning of the legal system require that the client retain the veto power over the lawyer's ability to divulge knowledge of another lawyer's violations of the Rules of Professional Conduct.~~

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~~Until the Rules of Professional Conduct superseded the Code of Professional Responsibility in 1985, Minnesota lawyers were required to report professional misconduct only if their knowledge of the misconduct was "unprivileged." Until 1985, if a lawyer's knowledge of misconduct was a "secret," reporting was required; if the knowledge acquired involved a "confidence," reporting was not allowed, unless some other exception to the confidentiality rule applied. Since September 1, 1985, reporting of misconduct has been forbidden without client consent, if either a confidence or secret is involved.~~

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~~Under subsection 1.6(b)(6) continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2), a lawyer now has the discretion to reveal "secrets," but not client confidences, when necessary to report the lawyer's knowledge of another lawyer's misconduct. This subsection incorporates the language of Rule 8.3 as to the type of reportable misconduct, requiring that the misconduct "raise a substantial question" about the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.~~

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~~This discretion to report a lawyer's misconduct balances the policy of confidentiality with the legal profession's obligation to enforce high ethical standards. If the client consents to the lawyer reporting another lawyer's misconduct, no conflict exists between these two policies. Therefore, the lawyer with knowledge of another lawyer's misconduct should seek the client's permission to report the misconduct to the disciplinary authority.~~

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~~When the client opposes, See Rule 1.9(c)(1) for the prohibition against using such disclosure, the lawyer then must determine whether knowledge of the misconduct stemmed from a client confidence. If so, the confidentiality rule prevails: disclosure is prohibited. If the knowledge stemmed from a secret, however, the lawyer faces the~~

1252 discretionary decision whether to report the misconduct. Factors pertinent to the
1253 discretionary decision include the nature of the lawyer's misconduct, the likelihood that
1254 such misconduct will recur if not reported, the possible emotional harm to the client if
1255 required to testify in a disciplinary proceeding and/or the likelihood of recovery of
1256 embezzled funds.

1257 Other factors that may merit consideration would be the ability to recover funds, such as
1258 through frozen assets or a client security fund, in which case, the client's preference
1259 might be given less weight.information to the disadvantage of the former client.

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1261 **RULE 1.7: CONFLICT OF INTEREST: GENERAL RULE CURRENT CLIENTS**

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1263 (a) ~~A~~Except as provided in paragraph (b), a lawyer shall not represent a client if the
1264 representation involves a concurrent conflict of that interest. A concurrent conflict of
1265 interest exists if:

1266 (1) the representation of one client will be directly adverse to another client, unless: (1)
1267 the lawyer reasonably believes the representation will not — adversely affect the
1268 relationship with the other client; and (2) each client consents after consultation.or

1269 ~~(b) A lawyer shall not represent a client if~~(2) there is a significant risk that the
1270 representation of that client may one or more clients will be materially limited by the
1271 lawyer's responsibilities to another client, a former client or to a third person; or by a
1272 personal interest of the lawyer's own interests, unless:

1273

1274 (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a),
1275 a lawyer may represent a client if:

1276 (1) the lawyer reasonably believes ~~the~~ that the lawyer will be able to provide competent
1277 and diligent representation will not be — adversely to each affected; and (2) the client
1278 consents after consultation. When representation of multiple clients in a single matter is
1279 undertaken, the consultation shall — include explanation of the implications of the
1280 common representation and the advantages and risks involved;

1281 (2) the representation is not prohibited by law;

1282 (3) the representation does not involve the assertion of a claim by one client against
1283 another client represented by the lawyer in the same litigation or other proceeding before
1284 a tribunal; and

1285 (4) each affected client gives informed consent, confirmed in writing.

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Comment

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Loyalty to a Client

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General Principles

1290 Loyalty is an essential element^[1] Loyalty and independent judgment are essential
1291 elements in the lawyer's relationship with to a client. An impermissibleConcurrent
1292 conflicts of interest can arise from the lawyer's responsibilities to another client, a former
1293 client or a third person or from the lawyer's own interests. For specific Rules regarding
1294 certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of
1295 interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule

1296 1.18. For definitions of “informed consent” and “confirmed in writing,” see Rule 1.0(f)
1297 and (b).

1298 [2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1)
1299 clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3)
1300 decide whether the representation may be undertaken despite the existence of a conflict,
1301 i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected
1302 under paragraph (a) and obtain their informed consent, confirmed in writing. The clients
1303 affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and
1304 the one or more clients whose representation might be materially limited under paragraph
1305 (a)(2).

1306 [3] A conflict of interest may exist before representation is undertaken, in which event
1307 the representation ~~should~~ must be declined. ~~If such,~~ unless the lawyer obtains the
1308 informed consent of each client under the conditions of paragraph (b). To determine
1309 whether a conflict arises after representation has been undertaken of interest exists, the
1310 lawyer should withdraw from the representation. See Rule 1.16. Where more than one
1311 client is adopt reasonable procedures, appropriate for the size and type of firm and
1312 practice, to determine in both litigation and non-litigation matters the persons and issues
1313 involved and the lawyer withdraws because a conflict arises after representation, whether
1314 the lawyer may continue to represent any of the clients is determined by Rule 1.9. See
1315 also Comment to Rule 2.2(e)5.1. Ignorance caused by a failure to institute such
1316 procedures will not excuse a lawyer’s violation of this Rule. As to whether a client-
1317 lawyer relationship exists or, having once been established, is continuing, see Comment
1318 to Rule 1.3 and Scope.

1319 [4] If a conflict arises after representation has been undertaken, the lawyer ordinarily
1320 must withdraw from the representation, unless the lawyer has obtained the informed
1321 consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more
1322 than one client is involved, whether the lawyer may continue to represent any of the
1323 clients is determined both by the lawyer’s ability to comply with duties owed to the
1324 former client and by the lawyer’s ability to represent adequately the remaining client or
1325 clients, given the lawyer’s duties to the former client. See Rule 1.9. See also Comments
1326 [5] and [29].

1327 [5] Unforeseeable developments, such as changes in corporate and other organizational
1328 affiliations or the addition or realignment of parties in litigation, might create conflicts in
1329 the midst of a representation, as when a company sued by the lawyer on behalf of one
1330 client is bought by another client represented by the lawyer in an unrelated matter.
1331 Depending on the circumstances, the lawyer may have the option to withdraw from one
1332 of the representations in order to avoid the conflict. The lawyer must seek court approval
1333 where necessary and take steps to minimize harm to the clients. See Rule 1.16. The
1334 lawyer must continue to protect the confidences of the client from whose representation
1335 the lawyer has withdrawn. See Rule 1.9(c).

1336 **Identifying Conflicts of Interest: Directly Adverse**

1337 As a general proposition, loyalty [6] Loyalty to a a current client prohibits undertaking
1338 representation directly adverse to that client without ~~the~~ that client’s informed consent.
1339 Paragraph (a) expresses that general rule. Thus, absent consent, a lawyer ordinarily
1340 not act as an advocate in one matter against a person the lawyer represents in some other
1341 matter, even if it is when the matters are wholly unrelated. The client as to whom the
1342 representation is directly adverse is likely to feel betrayed, and the resulting damage to
1343 the client-lawyer relationship is likely to impair the lawyer’s ability to represent the client
1344 effectively. In addition, the client on whose behalf the adverse representation is

1345 undertaken reasonably may fear that the lawyer will pursue that client's case less
1346 effectively out of deference to the other client, i.e., that the representation may be
1347 materially limited by the lawyer's interest in retaining the current client. Similarly, a
1348 directly adverse conflict may arise when a lawyer is required to cross-examine a client
1349 who appears as a witness in a lawsuit involving another client, as when the testimony will
1350 be damaging to the client who is represented in the lawsuit. On the other hand,
1351 simultaneous representation in unrelated matters of clients whose interests are only
1352 generally economically adverse, such as representation of competing economic
1353 enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and
1354 thus may not require consent of the respective clients. Paragraph (a) applies only when
1355 the representation of one client would be directly adverse to the other.

1356 [7] Directly adverse conflicts can also arise in transactional matters. For example, if a
1357 lawyer is asked to represent the seller of a business in negotiations with a buyer
1358 represented by the lawyer, not in the same transaction but in another, unrelated matter,
1359 the lawyer could not undertake the representation without the informed consent of each
1360 client.

1361 Identifying Conflicts of Interest: Material Limitation

1362 Loyalty to a client is also impaired when [8] Even where there is no direct adverseness, a
1363 conflict of interest exists if there is a significant risk that a lawyer cannot's ability to
1364 consider, recommend or carry out an appropriate course of action for the client
1365 because will be materially limited as a result of the lawyer's other responsibilities or
1366 interests. For example, a lawyer asked to represent several individuals seeking to form a
1367 joint venture is likely to be materially limited in the lawyer's ability to recommend or
1368 advocate all possible positions that each might take because of the lawyer's duty of
1369 loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be
1370 available to the client. Paragraph (b) addresses such situations. A possible conflict
1371 mere possibility of subsequent harm does not itself preclude the representation require
1372 disclosure and consent. The critical questions are the likelihood that a conflict
1373 in interests will eventuate and, if it does, whether it will materially interfere with the
1374 lawyer's independent professional judgment in considering alternatives or foreclose
1375 courses of action that reasonably should be pursued on behalf of the client. Consideration
1376 should be given to whether the client wishes to accommodate the other interest involved.

1377 Consultation and Consent

1378 Lawyer's Responsibilities to Former Clients and Other Third Persons

1379 [9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and
1380 independence may be materially limited by responsibilities to former clients under Rule
1381 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising
1382 from a lawyer's service as a trustee, executor or corporate director.

1383 Personal Interest Conflicts

1384 [10] The lawyer's own interests should not be permitted to have an adverse effect on
1385 representation of a client. For example, if the probity of a lawyer's own conduct in a
1386 transaction is in serious question, it may be difficult or impossible for the lawyer to give a
1387 client detached advice. Similarly, when a lawyer has discussions concerning possible
1388 employment with an opponent of the lawyer's client, or with a law firm representing the
1389 opponent, such discussions could materially limit the lawyer's representation of the
1390 client. In addition, a lawyer may not allow related business interests to affect

1391 representation, for example, by referring clients to an enterprise in which the lawyer has
1392 an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number
1393 of personal interest conflicts, including business transactions with clients. See also Rule
1394 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other
1395 lawyers in a law firm).

1396 [11] When lawyers representing different clients in the same matter or in substantially
1397 related matters are closely related by blood or marriage, there may be a significant risk
1398 that client confidences will be revealed and that the lawyer's family relationship will
1399 interfere with both loyalty and independent professional judgment. As a result, each
1400 client is entitled to know of the existence and implications of the relationship between the
1401 lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related
1402 to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a
1403 client in a matter where that lawyer is representing another party, unless each client gives
1404 informed consent. The disqualification arising from a close family relationship is
1405 personal and ordinarily is not imputed to members of firms with whom the lawyers are
1406 associated. See Rule 1.10.

1407 [12] A lawyer is prohibited from engaging in sexual relationships with a client unless the
1408 sexual relationship predates the formation of the client-lawyer relationship. See Rule
1409 1.8(j).

1410 Interest of Person Paying for a Lawyer's Service

1411 [13] A lawyer may be paid from a source other than the client, including a co-client, if
1412 the client is informed of that fact and consents and the arrangement does not compromise
1413 the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If
1414 acceptance of the payment from any other source presents a significant risk that the
1415 lawyer's representation of the client will be materially limited by the lawyer's own
1416 interest in accommodating the person paying the lawyer's fee or by the lawyer's
1417 responsibilities to a payer who is also a co-client, then the lawyer must comply with the
1418 requirements of paragraph (b) before accepting the representation, including determining
1419 whether the conflict is consentable and, if so, that the client has adequate information
1420 about the material risks of the representation.

1421 Prohibited Representations

1422 ~~A client~~ [14] Ordinarily, clients may consent to representation notwithstanding a conflict.
1423 ~~However, as indicated in paragraph (a)(1) with respect to representation directly adverse~~
1424 ~~to a client, and paragraph (b)(1) with respect to material limitations on representation of a~~
1425 ~~client, when a disinterested lawyer would conclude some conflicts are nonconsentable,~~
1426 ~~meaning that the client should not agree to the representation under the circumstances,~~
1427 ~~the lawyer involved cannot properly ask for such agreement or provide representation on~~
1428 ~~the basis of the client's consent. When the lawyer is representing more than one client is~~
1429 ~~involved, the question of conflict consentability must be resolved as to each client.~~
1430 ~~Moreover, there may be~~

1431 [15] Consentability is typically determined by considering whether the interests of the
1432 clients will be adequately protected if the clients are permitted to give their informed
1433 consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1),
1434 representation is prohibited if in the circumstances the lawyer cannot reasonably
1435 conclude that the lawyer will be able to provide competent and diligent representation.
1436 See Rule 1.1 (competence) and Rule 1.3 (diligence).

1437 [16] Paragraph (b)(2) describes conflicts that are nonconsentable because the
1438 representation is prohibited by applicable law.

1439 [17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the
1440 institutional interest in vigorous development of each client's position when the clients
1441 are aligned directly against each other in the same litigation or other proceeding before a
1442 tribunal. Whether clients are aligned directly against each other within the meaning of
1443 this paragraph requires examination of the context of the proceeding. Although this
1444 paragraph does not preclude a lawyer's multiple representation of adverse parties to a
1445 mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(n)),
1446 such representation may be precluded by paragraph (b)(1).

1447 **Informed Consent**

1448 [18] Informed consent requires that each affected client be aware of the relevant
1449 circumstances ~~where~~ and of the material and reasonably foreseeable ways that the conflict
1450 could have adverse effects on the interests of that client. See Rule 1.0(f) (informed
1451 consent). The information required depends on the nature of the conflict and the nature of
1452 the risks involved. When representation of multiple clients in a single matter is
1453 undertaken, the information must include the implications of the common representation,
1454 including possible effects on loyalty, confidentiality and the attorney-client privilege and
1455 the advantages and risks involved. See Comments [30] and [31] (effect of common
1456 representation on confidentiality).

1457 [19] Under some circumstances it ~~is~~ may be impossible to make the disclosure necessary
1458 to obtain consent. For example, when the lawyer represents different clients in related
1459 matters and one of the clients refuses to consent to the disclosure necessary to permit the
1460 other client to make an informed decision, the lawyer cannot properly ask the latter to
1461 consent. In some cases the alternative to common representation can be that each party
1462 may have to obtain separate representation with the possibility of incurring additional
1463 costs. These costs, along with the benefits of securing separate representation, are factors
1464 that may be considered by the affected client in determining whether common
1465 representation is in the client's interests.

1466 **Lawyer's Interests**

1467 The lawyer's own interest should not be permitted to have an adverse effect on
1468 representation of a client. For example, a lawyer's need for income should not lead the
1469 lawyer to undertake matters that cannot be handled competently and

1470 **Consent Confirmed in Writing**

1471 [20] Paragraph (b) requires the lawyer to obtain the informed consent of the client,
1472 confirmed in writing. Such a writing may consist of a document executed by the client or
1473 one that the lawyer promptly records and transmits to the client following an oral
1474 consent. See Rule 1.0(b). See also Rule 1.0(o) (writing includes electronic transmission).
1475 If it is not feasible to obtain or transmit the writing at the time the client gives informed
1476 consent, then the lawyer must obtain or transmit it within a reasonable fee. See Rules 1.1
1477 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it
1478 may be difficult or impossible for the lawyer to give a client detached advice. A lawyer
1479 may not allow related business interests to affect representation, for example, by referring
1480 clients to an enterprise in which the lawyer has an undisclosed interest time thereafter.
1481 See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases
1482 for the lawyer to talk with the client, to explain the risks and advantages, if any, of

1483 representation burdened with a conflict of interest, as well as reasonably available
1484 alternatives, and to afford the client a reasonable opportunity to consider the risks and
1485 alternatives and to raise questions and concerns. Rather, the writing is required in order to
1486 impress upon clients the seriousness of the decision the client is being asked to make and
1487 to avoid disputes or ambiguities that might later occur in the absence of a writing.

1488 **Revoking Consent**

1489 [21] A client who has given consent to a conflict may revoke the consent to the client's
1490 own representation and, like any other client, may terminate the lawyer's representation
1491 at any time. Whether revoking consent to the client's own representation precludes the
1492 lawyer from continuing to represent other clients depends on the circumstances, including
1493 the nature of the conflict, whether the client revoked consent because of a material
1494 change in circumstances, the reasonable expectations of the other client and whether
1495 material detriment to the other clients or the lawyer would result.

1496 **Consent to Future Conflict**

1497 [22] Whether a lawyer may properly request a client to waive conflicts that might arise in
1498 the future is subject to the test of paragraph (b). The effectiveness of such waivers is
1499 generally determined by the extent to which the client reasonably understands the
1500 material risks that the waiver entails. The more comprehensive the explanation of the
1501 types of future representations that might arise and the actual and reasonably foreseeable
1502 adverse consequences of those representations, the greater the likelihood that the client
1503 will have the requisite understanding. Thus, if the client agrees to consent to a particular
1504 type of conflict with which the client is already familiar, then the consent ordinarily will
1505 be effective with regard to that type of conflict. If the consent is general and open-ended,
1506 then the consent ordinarily will be ineffective, because it is not reasonably likely that the
1507 client will have understood the material risks involved. On the other hand, if the client is
1508 an experienced user of the legal services involved and is reasonably informed regarding
1509 the risk that a conflict may arise, such consent is more likely to be effective, particularly
1510 if, e.g., the client is independently represented by other counsel in giving consent and the
1511 consent is limited to future conflicts unrelated to the subject of the representation. In any
1512 case, advance consent cannot be effective if the circumstances that materialize in the
1513 future are such as would make the conflict nonconsentable under paragraph (b).

1514 **Conflicts in Litigation**

1515 [23] Paragraph (ab)(3) prohibits representation of opposing parties in the same litigation,
1516 regardless of the clients' consent. Simultaneous~~On the other hand, simultaneous~~
1517 representation of parties whose interests in litigation may conflict, such as eo-
1518 plaintiffs~~complaintiffs~~ or eo-~~defendants~~ codefendants, is governed by paragraph (ba)(2). An
1519 impermissible~~A~~ conflict may exist by reason of substantial discrepancy in the parties'
1520 testimony, incompatibility in positions in relation to an opposing party or the fact that
1521 there are substantially different possibilities of settlement of the claims or liabilities in
1522 question. Such conflicts can arise in criminal cases as well as civil. The potential for
1523 conflict of interest in representing multiple defendants in a criminal case is so grave that
1524 ordinarily a lawyer should decline to represent more than one eo-~~defendant~~ codefendant.
1525 On the other hand, common representation of persons having similar interest is proper if
1526 the risk of adverse effect is minimal and the requirements of paragraph (b) are met.
1527 Compare Rule 2.2 involving intermediation between clients.

1528 Ordinarily,

1529 ~~[24] Ordinarily a lawyer may not act as advocate against~~ take inconsistent legal positions
1530 in different tribunals at different times on behalf of different clients. The mere fact that
1531 advocating a legal position on behalf of one client the lawyer represents in some other
1532 might create precedent adverse to the interests of a client represented by the lawyer in an
1533 unrelated matter, even does not create a conflict of interest. A conflict of interest exists,
1534 however, if the other matter there is wholly unrelated. However, there are circumstances
1535 in which a lawyer may act as advocate against a client. For example, a significant risk
1536 that a lawyer's action on behalf of one client will materially limit under Rule 1.7 (a)(2)
1537 the lawyer's effectiveness in representing an enterprise with diverse operations may
1538 accept employment as an advocate against the enterprise in an unrelated matter if doing
1539 so will not adversely affect the lawyer's relationship with the enterprise or conduct of the
1540 suit and if both clients consent upon consultation. Similarly, government lawyers in some
1541 circumstances may another client in a different case.

1542 ~~[25] When a lawyer represents or seeks to represent government employees in~~
1543 ~~proceedings a class of plaintiffs or defendants in which a government agency is a class-~~
1544 ~~action lawsuit, unnamed members of the opposing party. The propriety of concurrent~~
1545 ~~representation can depend on class are ordinarily not considered to be clients of the~~
1546 ~~nature of the litigation. For example, a suit charging fraud entails conflict to a degree not~~
1547 ~~involved in a suit for a declaratory judgment concerning statutory interpretation.~~

1548 ~~A lawyer may represent parties having antagonistic positions on a legal question that has~~
1549 ~~arisen in different cases, unless representation of either client would be adversely~~
1550 ~~affected. Thus, it is ordinarily not improper to assert such positions in cases pending in~~
1551 ~~different trial courts, but it may be improper to do so in cases pending at the same time in~~
1552 ~~an appellate court.~~

1553 Interest of Person Paying for a Lawyer's Service

1554 ~~A for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer may be paid~~
1555 ~~from a source other than does not typically need to get the consent of such a person before~~
1556 ~~representing a client suing the client, if person in an unrelated matter. Similarly, a lawyer~~
1557 ~~seeking to represent an opponent in a class action does not typically need the client is~~
1558 ~~informed of that fact and consents and consent of an unnamed member of the arrangement~~
1559 ~~does not compromise class whom the lawyer's duty of loyalty to the client. See Rule~~
1560 ~~1.8(f). For example, when an insurer and its insured have conflicting interests in a matter~~
1561 ~~arising from a liability insurance agreement, and the insurer is required to provide special~~
1562 ~~counsel for the insured, the arrangement should assure the special counsel's professional~~
1563 ~~independence. So also, when a corporation and its directors or employees are involved in~~
1564 ~~a controversy in which they have conflicting interests, the corporation may provide funds~~
1565 ~~for separate legal representation of the directors or employees, if the clients consent after~~
1566 ~~consultation and the arrangement ensures the lawyer's professional independence.~~

1567 ~~**Other Conflict Situations**~~ represents in an unrelated matter.

1568 Nonlitigation Conflicts

1569 ~~[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than~~
1570 ~~litigation sometimes may be difficult to assess. For a discussion of directly adverse~~
1571 ~~conflicts in transactional matters, see Comment [7]. Relevant factors in determining~~
1572 ~~whether there is significant potential for adverse material effect limitation include the~~
1573 ~~duration and intimacy of the lawyer's relationship with the client or clients involved, the~~
1574 ~~functions being performed by the lawyer, the likelihood that actual conflict disagreements~~

1575 will arise and the likely prejudice to the client from the conflict ~~if it does arise~~. The
1576 question is often one of proximity and degree. See Comment [8].

1577 [27] For example, conflict questions may arise in estate planning and estate
1578 administration. A lawyer may be called upon to prepare wills for several family
1579 members, such as husband and wife, and, depending upon the circumstances, a conflict of
1580 interest may be present. In estate administration the identity of the client may be unclear
1581 to the parties involved. In order to comply with conflict of interest rules, the lawyer
1582 should make clear the lawyer's relationship to the parties involved.

1583 [28] Whether a conflict is consentable depends on the circumstances. For example, a
1584 lawyer may not represent multiple parties to a negotiation whose interests are
1585 fundamentally antagonistic to each other, but common representation is permissible
1586 where the clients are generally aligned in interest even though there is some difference
1587 of interest among them. Thus, a lawyer may seek to establish or adjust a relationship
1588 between clients on an amicable and mutually advantageous basis; for example, in helping
1589 to organize a business in which two or more clients are entrepreneurs, working out the
1590 financial reorganization of an enterprise in which two or more clients have an interest or
1591 arranging a property distribution in settlement of an estate. The lawyer seeks to resolve
1592 potentially adverse interests by developing the parties' mutual interests. Otherwise, each
1593 party might have to obtain separate representation, with the possibility of incurring
1594 additional cost, complication or even litigation. Given these and other relevant factors,
1595 the clients may prefer that the lawyer act for all of them.

1596 **Special Considerations in Common Representation**

1597 [29] In considering whether to represent multiple clients in the same matter, a lawyer
1598 should be mindful that if the common representation fails because the potentially adverse
1599 interests cannot be reconciled, the result can be additional cost, embarrassment and
1600 recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of
1601 the clients if the common representation fails. In some situations, the risk of failure is so
1602 great that multiple representation is plainly impossible. For example, a lawyer cannot
1603 undertake common representation of clients where contentious litigation or negotiations
1604 between them are imminent or contemplated. Moreover, because the lawyer is required to
1605 be impartial between commonly represented clients, representation of multiple clients is
1606 improper when it is unlikely that impartiality can be maintained. Generally, if the
1607 relationship between the parties has already assumed antagonism, the possibility that the
1608 clients' interests can be adequately served by common representation is not very good.
1609 Other relevant factors are whether the lawyer subsequently will represent both parties on
1610 a continuing basis and whether the situation involves creating or terminating a
1611 relationship between the parties.

1612 [30] A particularly important factor in determining the appropriateness of common
1613 representation is the effect on client-lawyer confidentiality and the attorney-client
1614 privilege. With regard to the attorney-client privilege, the prevailing rule is that, as
1615 between commonly represented clients, the privilege does not attach. Hence, it must be
1616 assumed that if litigation eventuates between the clients, the privilege will not protect any
1617 such communications, and the clients should be so advised.

1618 [31] As to the duty of confidentiality, continued common representation will almost
1619 certainly be inadequate if one client asks the lawyer not to disclose to the other client
1620 information relevant to the common representation. This is so because the lawyer has an
1621 equal duty of loyalty to each client, and each client has the right to be informed of
1622 anything bearing on the representation that might affect that client's interests and the
1623 right to expect that the lawyer will use that information to that client's benefit. See Rule

1624 1.4. The lawyer should, at the outset of the common representation and as part of the
1625 process of obtaining each client's informed consent, advise each client that information
1626 will be shared and that the lawyer will have to withdraw if one client decides that some
1627 matter material to the representation should be kept from the other. In limited
1628 circumstances, it may be appropriate for the lawyer to proceed with the representation
1629 when the clients have agreed, after being properly informed, that the lawyer will keep
1630 certain information confidential. For example, the lawyer may reasonably conclude that
1631 failure to disclose one client's trade secrets to another client will not adversely affect
1632 representation involving a joint venture between the clients and agree to keep that
1633 information confidential with the informed consent of both clients.

1634 Conflict questions may also arise in estate planning and estate administration. A lawyer
1635 may be called upon to prepare wills for several family members, such as husband and
1636 wife, and, depending upon the circumstances, a conflict of interest may arise. The^[32]
1637 When seeking to establish or adjust a relationship between clients, the lawyer should
1638 make clear the relationship to that the parties involved lawyer's role is not that of
1639 partisanship normally expected in other circumstances and, thus, that the clients may be
1640 required to assume greater responsibility for decisions than when each client is separately
1641 represented. Any limitations on the scope of the representation made necessary as a result
1642 of the common representation should be fully explained to the clients at the outset of the
1643 representation. See Rule 1.2(c).

1644 [33] Subject to the above limitations, each client in the common representation has the
1645 right to loyal and diligent representation and the protection of Rule 1.9 concerning the
1646 obligations to a former client. The client also has the right to discharge the lawyer as
1647 stated in Rule 1.16.

1648 **Organizational Clients**

1649 [34] A lawyer who represents a corporation or other organization does not, by virtue of
1650 that representation, necessarily represent any constituent or affiliated organization, such
1651 as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not
1652 barred from accepting representation adverse to an affiliate in an unrelated matter, unless
1653 the circumstances are such that the affiliate should also be considered a client of the
1654 lawyer, there is an understanding between the lawyer and the organizational client that
1655 the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's
1656 obligations to either the organizational client or the new client are likely to limit
1657 materially the lawyer's representation of the other client.

1658 [35] A lawyer for a corporation or other organization who is also a member of its board
1659 of directors should determine whether the responsibilities of the two roles may conflict.
1660 The lawyer may be called on to advise the corporation in matters involving actions of the
1661 directors. Consideration should be given to the frequency with which such situations may
1662 arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the
1663 board and the possibility of the corporation's obtaining legal advice from another lawyer
1664 in such situations. If there is material risk that the dual role will compromise the lawyer's
1665 independence of professional judgment, the lawyer should not serve as a director or
1666 should cease to act as the corporation's lawyer when conflicts of interest arise. The
1667 lawyer should advise the other members of the board that in some circumstances matters
1668 discussed at board meetings while the lawyer is present in the capacity of director might
1669 not be protected by the attorney-client privilege and that conflict of interest
1670 considerations might require the lawyer's recusal as a director or might require the
1671 lawyer and the lawyer's firm to decline representation of the corporation in a matter.

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Conflict Charged by an Opposing Party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

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**RULE 1.8: CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS
CURRENT CLIENTS: SPECIFIC RULES**

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(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
~~(1) the client is notified in writing by the lawyer that independent counsel should be considered and is given a reasonable opportunity to seek the advice of independent counsel in the transaction;~~(2) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner ~~which~~that can be ~~reasonably~~reasonable understood by the client; and(3) the client consents to
(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
(3) the client gives informed consent, in a document signed by the client separate from the transaction documents that specifies:(i), to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing or otherwise looking out for the client's interests in the transaction; (ii) the nature of the lawyer's conflicting interests, if any; and (iii) the reasonably foreseeable risks for the client from any conflict.

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(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client ~~consents after consultation~~gives informed consent, except as permitted or required by these Rules.

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(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

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(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

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

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

1718 (2) a lawyer representing an indigent client may pay court costs and expenses of
1719 litigation on behalf of the client; and

1720 (3) a lawyer may guarantee a loan reasonably needed to enable the client to withstand
1721 delay in litigation that would otherwise put substantial pressure on the client to settle a
1722 case because of financial hardship rather than on the merits, provided the client remains
1723 ultimately liable for repayment of the loan without regard to the outcome of the
1724 litigation and, further provided, that no promise of such financial assistance was made to
1725 the client by the lawyer, or by another in the lawyer's behalf, prior to the employment
1726 of that lawyer by that client.

1727

1728 (f) A lawyer shall not accept compensation for representing a client from one other than
1729 the client unless:

1730 (1) the client ~~consents after consultation or~~ gives informed consent or the
1731 acceptance of compensation from another is impliedly authorized by the nature of the
1732 representation;

1733 (2) there is no interference with the lawyer's independence of professional judgment or
1734 with the client-lawyer relationship; and

1735 (3) information relating to representation of a client is protected as required by Rule 1.6.

1736

1737 (g) A lawyer who represents two or more clients shall not participate in making an
1738 aggregate settlement of the claims of or against the clients; unless each client ~~consents~~
1739 after consultation, including gives informed consent in a writing signed by the client. The
1740 lawyer's disclosure of shall include the existence and nature of all the claims involved and
1741 of the participation of each person in the settlement.

1742

1743 (h) A lawyer shall not:

1744 (1) make an agreement prospectively limiting the lawyer's liability to a client for
1745 malpractice unless ~~permitted by law and~~ the client is independently represented in
1746 making the agreement; or

1747 (2) settle a claim or potential claim for such liability with an unrepresented client or
1748 former client ~~without first advising~~ unless that person is advised in writing ~~that of the~~
1749 desirability of seeking and is given a reasonable opportunity to seek the advice of
1750 independent representation is appropriate legal counsel in connection therewith.

1751 ~~(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not~~
1752 ~~represent a client in a representation directly adverse to a person who the lawyer knows is~~
1753 ~~represented by the other lawyer except upon consent by the client after consultation~~
1754 ~~regarding the relationship.~~

1755

1756 ~~(j)~~ (i) A lawyer shall not acquire a proprietary interest in the cause of action or subject
1757 matter of litigation the lawyer is conducting for a client, except that the lawyer may:

1758 (1) acquire a lien ~~granted~~ authorized by law to secure the lawyer's fee or expenses; and

1759 (2) contract with a client for a reasonable contingent fee in a civil case.

1760

1761 ~~(k)~~ (j) A lawyer shall not have sexual relations with a ~~current~~ client unless a consensual
1762 sexual relationship existed between them when the ~~lawyer-client~~ lawyer relationship
1763 commenced. For purposes of this paragraph:

1764 (1) ““Sexual relations”” means sexual intercourse or any other intentional touching of
1765 the intimate parts of a person or causing the person to touch the intimate parts of the
1766 lawyer.

1767 (2) if the client is an organization, any individual who oversees the representation and
1768 gives instructions to the lawyer on behalf of the organization shall be deemed to be the
1769 client. In-house attorneys while representing governmental or corporate entities are
1770 governed by Rule 1.7(b) rather than by this rule with respect to sexual relations with
1771 other employees of the entity they represent.

1772 (3) this paragraph does not prohibit a lawyer from engaging in sexual relations with a
1773 client of the lawyer’s firm provided that the lawyer has no involvement in the
1774 performance of the legal work for the client.

1775 (4) if a party other than the client alleges violation of this paragraph, and the complaint
1776 is not summarily dismissed, the Director, in determining whether to investigate the
1777 allegation and whether to charge any violation based on the allegations, shall consider
1778 the client’s statement regarding whether the client would be unduly burdened by the
1779 investigation or charge.

1780
1781 (k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a)
1782 through (i) that applies to any one of them shall apply to all of them.

1783

1784 **Comment**

1785 **Business Transactions Between Client and Lawyer**

1786 As a general principle, all transactions[1] A lawyer’s legal skill and training, together
1787 with the relationship of trust and confidence between client and lawyer should be fair and
1788 reasonable to the client. In such transactions a review by independent counsel, create the
1789 possibility of overreaching when the lawyer participates in a business, property or
1790 financial transaction with a client, for example, a loan or sales transaction or a lawyer
1791 investment on behalf of the client. The requirements of paragraph (a) must be met even
1792 when the transaction is often advisable. Furthermore, a lawyer may not exploit
1793 information relating closely related to the subject matter of the representation to the, as
1794 when a lawyer drafting a will for a client’s disadvantage. For example, a lawyer who has
1795 learned learns that the client is investing in specific real estate may not, without the needs
1796 money for unrelated expenses and offers to make a loan to the client’s consent, seek. The
1797 Rule applies to acquire nearby property where doing so would adversely affect the
1798 client’s plan for lawyers engaged in the sale of goods or services related to the practice of
1799 law, for example, the sale of title insurance or investment services to existing clients of
1800 the lawyer’s legal practice. Paragraph (See Rule 5.7. It also applies to lawyers purchasing
1801 property from estates they represent. It does not apply to ordinary fee arrangements
1802 between client and lawyer, which are governed by Rule 1.5, although its requirements
1803 must be met when the lawyer accepts an interest in the client’s business or other
1804 nonmonetary property as payment of all or part of a fee. In addition, the Rule does not,
1805 however, apply to standard commercial transactions between the lawyer and the client for
1806 products or services that the client generally markets to others, for example, banking or
1807 brokerage services, medical services, products manufactured or distributed by the client,
1808 and utilities’ services. In such transactions, the lawyer has no advantage in dealing with
1809 the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

1810 [2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its
1811 essential terms be communicated to the client, in writing, in a manner that can be
1812 reasonably understood. Paragraph (a)(2) requires that the client also be advised, in
1813 writing, of the desirability of seeking the advice of independent legal counsel. It also
1814 requires that the client be given a reasonable opportunity to obtain such advice. Paragraph
1815 (a)(3) requires that the lawyer obtain the client's informed consent, in a document signed
1816 by the client separate from the transaction documents, both to the essential terms of the
1817 transaction and to the lawyer's role. When necessary, the lawyer should discuss both the
1818 material risks of the proposed transaction, including any risk presented by the lawyer's
1819 involvement, and the existence of reasonably available alternatives and should explain
1820 why the advice of independent legal counsel is desirable. See Rule 1.0(f) (definition of
1821 informed consent).

1822 [3] The risk to a client is greatest when the client expects the lawyer to represent the
1823 client in the transaction itself or when the lawyer's financial interest otherwise poses a
1824 significant risk that the lawyer's representation of the client will be materially limited by
1825 the lawyer's financial interest in the transaction. Here the lawyer's role requires that the
1826 lawyer must comply, not only with the requirements of paragraph (a), but also with the
1827 requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated
1828 with the lawyer's dual role as both legal adviser and participant in the transaction, such as
1829 the risk that the lawyer will structure the transaction or give legal advice in a way that
1830 favors the lawyer's interests at the expense of the client. Moreover, the lawyer must
1831 obtain the client's informed consent. In some cases, the lawyer's interest may be such
1832 that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

1833 [4] If the client is independently represented in the transaction, paragraph (a)(2) of this
1834 Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied
1835 either by a written disclosure by the lawyer involved in the transaction or by the client's
1836 independent counsel. The fact that the client was independently represented in the
1837 transaction is relevant in determining whether the agreement was fair and reasonable to
1838 the client as paragraph (a)(1) further requires.

1839 **Use of Information Related to Representation**

1840 [5] Use of information relating to the representation to the disadvantage of the client
1841 violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used
1842 to benefit either the lawyer or a third person, such as another client or business associate
1843 of the lawyer. For example, if a lawyer learns that a client intends to purchase and
1844 develop several parcels of land, the lawyer may not use that information to purchase one
1845 of the parcels in competition with the client or to recommend that another client make
1846 such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For
1847 example, a lawyer who learns a government agency's interpretation of trade legislation
1848 during the representation of one client may properly use that information to benefit other
1849 clients. Paragraph (b) prohibits disadvantageous use of client information unless the
1850 client gives informed consent, except as permitted or required by these Rules. See Rules
1851 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

1852 **Gifts to Lawyers**

1853 [6] A lawyer may accept a gift from a client, if the transaction meets general standards of
1854 fairness. For example, a simple gift such as a present given at a holiday or as a token of
1855 appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph
1856 (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable
1857 by the client under the doctrine of undue influence. In any event, due to concerns about
1858 overreaching and imposition on clients, a lawyer may not suggest that a substantial gift

1859 be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to
1860 the client as set forth in paragraph (c).

1861 [7] If effectuation of a substantial gift requires preparing a legal instrument such as a will
1862 or conveyance, however, the client should have the detached advice that another lawyer
1863 can provide. ~~Paragraph (c) recognizes an~~ The sole exception to this Rule is where the
1864 client is a relative of the donee or the gift is not substantial.

1865 **Confidential Information**

1866 Rule 1.8(b) is not intended to limit the circumstances in which confidential information
1867 may or must be revealed under Rule 1.6 or other applicable disclosure rules. Its purpose
1868 is merely to make clear that in a

1869 [8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or
1870 associate of the lawyer named as executor of the client's estate or to another potentially
1871 lucrative fiduciary position. Nevertheless, such appointments will be subject to the
1872 general conflict of interest setting, a lawyer may not use confidential information to the
1873 disadvantage of the client for purposes of furthering either the lawyer's or other's
1874 interests. ~~provision in Rule 1.7 when there is a significant risk that the lawyer's interest in~~
1875 obtaining the appointment will materially limit the lawyer's independent professional
1876 judgment in advising the client concerning the choice of an executor or other fiduciary. In
1877 obtaining the client's informed consent to the conflict, the lawyer should advise the client
1878 concerning the nature and extent of the lawyer's financial interest in the appointment, as
1879 well as the availability of alternative candidates for the position.

1880 **Literary Rights**

1881 [9] An agreement by which a lawyer acquires literary or media rights concerning the
1882 conduct of the representation creates a conflict between the interests of the client and the
1883 personal interests of the lawyer. Measures suitable in the representation of the client may
1884 detract from the publication value of an account of the representation. Paragraph (d) does
1885 not prohibit a lawyer representing a client in a transaction concerning literary property
1886 from agreeing that the lawyer's fee shall consist of a share in ownership in the property,
1887 if the arrangement conforms to Rule 1.5 and ~~paragraph~~ paragraphs (j) and (i).

1888 **Financial Assistance**

1889 [10] Lawyers may not subsidize lawsuits brought on behalf of their clients, such as by
1890 making loans to their clients for living expenses, because to do so would encourage
1891 clients to pursue lawsuits that might not otherwise be brought and because such
1892 assistance gives lawyers too great a financial stake in the litigation. These dangers do not
1893 warrant a prohibition on a lawyer lending a client court costs and litigation expenses,
1894 including the expenses of medical examination and the costs of obtaining and presenting
1895 evidence, because these advances are virtually indistinguishable from contingent fees and
1896 help ensure access to the courts. Similarly, an exception allowing lawyers representing
1897 indigent clients to pay court costs and litigation expenses regardless of whether these
1898 funds will be repaid is warranted. A lawyer may guarantee a loan to enable the client to
1899 withstand delay in litigation under the circumstances stated in Rule 1.8 (e)(3).

1900 **Person Paying for a Lawyer's Services**

1901 [11] Lawyers are frequently asked to represent a client under circumstances in which a
1902 third person will compensate the lawyer, in whole or in part. The third person might be a

1903 relative or friend, an indemnitor (such as a liability insurance company) or a co-client
1904 (such as a corporation sued along with one or more of its employees). Because third-party
1905 payers frequently have interests that differ from those of the client, including interests in
1906 minimizing the amount spent on the representation and in learning how the representation
1907 is progressing, lawyers are prohibited from accepting or continuing such representations
1908 unless the lawyer determines that there will be no interference with the lawyer's
1909 independent professional judgment and there is informed consent from the client, or
1910 acceptance of compensation from another is impliedly authorized by the nature of the
1911 representation. See also Rule 5.4(c) (prohibiting interference with a lawyer's
1912 professional judgment by one who recommends, employs or pays the lawyer to render
1913 legal services for another).

1914 Rule 1.8(f) requires disclosure of the fact that [12] Sometimes, it will be sufficient for the
1915 lawyer to obtain the client's services are being paid for by a informed consent regarding
1916 the fact of the payment and the identity of the third party payer. Such as If, however, the
1917 fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply
1918 with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning
1919 confidentiality, and Under Rule 1.7(a), concerning a conflict of interest. Where the client
1920 exists if there is significant risk that the lawyer's representation of the client will be
1921 materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's
1922 responsibilities to the third-party payer (for example, when the third-party payer is a
1923 class, consent co-client). Under Rule 1.7(b), the lawyer may accept or continue the
1924 representation with the informed consent of each affected client, unless the conflict is
1925 nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be
1926 obtained on behalf of the class by court supervised procedure, confirmed in writing.

1927 **Family Relationships Between Lawyers**

1928 Rule 1.8(i) applies to related lawyers who are in different firms. Related lawyers in the
1929 same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in Rule
1930 1.8(i) is personal and is not imputed to members of firms with whom the lawyers

1931 **Aggregate Settlements**

1932 [13] Differences in willingness to make or accept an offer of settlement are among the
1933 risks of common representation of multiple clients by a single lawyer. Under Rule 1.7,
1934 this is one of the risks that should be discussed before undertaking the representation, as
1935 part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a)
1936 protects each client's right to have the final say in deciding whether to accept or reject an
1937 offer of settlement. The rule stated in this paragraph is a corollary of both these Rules and
1938 provides that, before any settlement offer is made or accepted on behalf of multiple
1939 clients, the lawyer must inform each of them about all the material terms of the
1940 settlement, including what the other clients will receive or pay if the settlement is
1941 accepted. See also Rule 1.0(f) (definition of informed consent). Lawyers representing a
1942 class of plaintiffs or defendants, or those proceeding derivatively, may not have a full
1943 client-lawyer relationship with each member of the class; nevertheless, such lawyers must
1944 comply with applicable rules regulating notification of class members and other
1945 procedural requirements designed to ensure adequate protection of the entire class.

1946 **Limiting Liability and Settling Malpractice Claims**

1947 [14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited
1948 unless the client is independently represented in making the agreement because they are
1949 likely to undermine competent and diligent representation. Also, many clients are

1950 ~~associated~~ unable to evaluate the desirability of making such an agreement before a
1951 dispute has arisen, particularly if they are then represented by the lawyer seeking the
1952 agreement. This paragraph does not, however, prohibit a lawyer from entering into an
1953 agreement with the client to arbitrate legal malpractice claims, provided such agreements
1954 are enforceable and the client is fully informed of the scope and effect of the agreement.
1955 Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-
1956 liability entity, where permitted by law, provided that each lawyer remains personally
1957 liable to the client for his or her own conduct and the firm complies with any conditions
1958 required by law, such as provisions requiring client notification or maintenance of
1959 adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule
1960 1.2 that defines the scope of the representation, although a definition of scope that makes
1961 the obligations of representation illusory will amount to an attempt to limit liability.

1962 [15] Agreements settling a claim or a potential claim for malpractice are not prohibited
1963 by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage
1964 of an unrepresented client or former client, the lawyer must first advise such a person in
1965 writing of the appropriateness of independent representation in connection with such a
1966 settlement. In addition, the lawyer must give the client or former client a reasonable
1967 opportunity to find and consult independent counsel.

1968 Acquisition of Acquiring Proprietary Interest in Litigation

1969 [16] Paragraph (j) states the traditional general rule that lawyers are prohibited from
1970 acquiring a proprietary interest in litigation. ~~This~~ Like paragraph (e), the general rule has
1971 its basis in common law champerty and maintenance and is designed to avoid giving the
1972 lawyer too great an interest in the representation. In addition, when the lawyer acquires
1973 an ownership interest in the subject of the representation, it will be more difficult for a
1974 client to discharge the lawyer if the client so desires. The Rule is subject to specific
1975 exceptions developed in decisional law and continued in these Rules, ~~such as the~~
1976 exception for reasonable contingent fees set forth in Rule 1.5 and the. The exception for
1977 certain advances of the costs of litigation is set forth in paragraph (e). In addition,
1978 paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees
1979 or expenses and contracts for reasonable contingent fees. The law of each jurisdiction
1980 determines which liens are authorized by law. These may include liens granted by statute,
1981 liens originating in common law and liens acquired by contract with the client. When a
1982 lawyer acquires by contract a security interest in property other than that recovered
1983 through the lawyer's efforts in the litigation, such an acquisition is a business or financial
1984 transaction with a client and is governed by the requirements of paragraph (a). Contracts
1985 for contingent fees in civil cases are governed by Rule 1.5.

1986 ~~This Rule is not intended to apply to customary qualification and limitations in legal~~
1987 ~~opinions and memoranda.~~

1988 Client-Lawyer Sexual Relationships

1989 [17] The relationship between lawyer and client is a fiduciary one in which the lawyer
1990 occupies the highest position of trust and confidence. The relationship is almost always
1991 unequal; thus, a sexual relationship between lawyer and client can involve unfair
1992 exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical
1993 obligation not to use the trust of the client to the client's disadvantage. In addition, such a
1994 relationship presents a significant danger that, because of the lawyer's emotional
1995 involvement, the lawyer will be unable to represent the client without impairment of the
1996 exercise of independent professional judgment. Moreover, a blurred line between the
1997 professional and personal relationships may make it difficult to predict to what extent
1998 client confidences will be protected by the attorney-client evidentiary privilege, since

1999 client confidences are protected by privilege only when they are imparted in the context
2000 of the client-lawyer relationship. Because of the significant danger of harm to client
2001 interests and because the client’s own emotional involvement renders it unlikely that the
2002 client could give adequate informed consent, this Rule prohibits the lawyer from having
2003 sexual relations with a client regardless of whether the relationship is consensual and
2004 regardless of the absence of prejudice to the client.

2005 [18] Sexual relationships that predate the client-lawyer relationship are not prohibited.
2006 Issues relating to the exploitation of the fiduciary relationship and client dependency are
2007 diminished when the sexual relationship existed prior to the commencement of the client-
2008 lawyer relationship. However, before proceeding with the representation in these
2009 circumstances, the lawyer should consider whether the lawyer’s ability to represent the
2010 client will be materially limited by the relationship. See Rule 1.7(a)(2).

2011 [19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for
2012 the organization from having a sexual relationship with a person who oversees the
2013 representation and gives instructions to the lawyer on behalf of the organization.

2014 **Imputation of Prohibitions**

2015 [20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs
2016 (a) through (i) also applies to all lawyers associated in a firm with the personally
2017 prohibited lawyer. For example, one lawyer in a firm may not enter into a business
2018 transaction with a client of another member of the firm without complying with
2019 paragraph (a), even if the first lawyer is not personally involved in the representation of
2020 the client. The prohibition set forth in paragraph (j) is personal and is not applied to
2021 associated lawyers.

2022

2023 **RULE 1.9: CONFLICT OF INTEREST: FORMER CLIENT DUTIES TO**
2024 **FORMER CLIENTS**

2025 A lawyer who has formerly represented a client in a matter shall not thereafter:

2026 (a) A lawyer who has formerly represented a client in a matter shall not thereafter
2027 represent another person in the same or a substantially related matter in which that
2028 person’s interests are materially adverse to the interests of the former client unless the
2029 former client ~~consents after consultation;~~ gives informed consent, confirmed in writing.

2030 (b) A lawyer shall not knowingly represent a person in the same or a substantially related
2031 matter in which a firm with which the lawyer formerly was associated had previously
2032 represented a client whose interests are materially adverse to that person and about whom
2033 the lawyer had acquired information protected by rules 1.6 and 1.9 (c) unless the former
2034 client gives informed consent, confirmed in writing.

2035

2036 (c) A lawyer who has formerly represented a client in a matter or whose present or former
2037 firm has formerly represented a client in a matter shall not thereafter:

2038 ~~(b1)~~ use information relating to the representation to the disadvantage of the former client
2039 except as ~~Rule~~these 1.6Rules would permit or require with respect to a client, or when the
2040 information has become generally known; or
2041 (2) reveal information relating to the representation except as these Rules would permit
2042 or require with respect to a client.

2043

Comment

2044 [1] After termination of a client-lawyer relationship, a lawyer has certain continuing
2045 duties with respect to confidentiality and conflicts of interest and thus may not represent
2046 another client except in conformity with this Rule. ~~The principles in~~Under this Rule 1.7
2047 determine whether the interest of the present and former client are adverse. Thus, for
2048 example, a lawyer could not properly seek to rescind on behalf of a new client a contract
2049 drafted on behalf of the former client. So also a lawyer who has prosecuted an accused
2050 person could not properly represent the accused in a subsequent civil action against the
2051 government concerning the same transaction. Nor could a lawyer who has represented
2052 multiple clients in a matter represent one of the clients against the others in the same or a
2053 substantially related matter after a dispute arose among the clients in that matter, unless
2054 all affected clients give informed consent. See Comment [9]. Current and former
2055 government lawyers must comply with this Rule to the extent required by Rule 1.11.

2056 [2] The scope of a “matter” for purposes of ~~this Rule 1.9(a) may depend~~depends on the
2057 facts of a particular situation or transaction. The lawyer’s involvement in a matter can
2058 also be a question of degree. When a lawyer has been directly involved in a specific
2059 transaction, subsequent representation of other clients with materially adverse interests in
2060 that transaction clearly is prohibited. On the other hand, a lawyer who recurrently
2061 handled a type of problem for a former client is not precluded from later representing
2062 another client in a ~~wholly~~factually distinct problem of that type even though the
2063 subsequent representation involves a position adverse to the prior client. Similar
2064 considerations can apply to the reassignment of military lawyers between defense and
2065 prosecution functions within the same military ~~jurisdiction~~jurisdictions. The underlying
2066 question is whether the lawyer was so involved in the matter that the subsequent
2067 representation can be justly regarded as a changing of sides in the matter in question.

2068 [3] Matters are “substantially related” for purposes of this Rule if they involve the same
2069 transaction or legal dispute or if there otherwise is a substantial risk that confidential
2070 factual information as would normally have been obtained in the prior representation
2071 would materially advance the client’s position in the subsequent matter. For example, a
2072 lawyer who has represented a businessperson and learned extensive private financial
2073 information about that person may not then represent that person’s spouse in seeking a
2074 divorce. Similarly, a lawyer who has previously represented a client in securing
2075 environmental permits to build a shopping center would be precluded from representing
2076 neighbors seeking to oppose rezoning of the property on the basis of environmental
2077 considerations; however, the lawyer would not be precluded, on the grounds of
2078 substantial relationship, from defending a tenant of the completed shopping center in
2079 resisting eviction for nonpayment of rent. Information that has been disclosed to the
2080 public or to other parties adverse to the former client ordinarily will not be disqualifying.
2081 Information acquired in a prior representation may have been rendered obsolete by the
2082 passage of time, a circumstance that may be relevant in determining whether two
2083 representations are substantially related. In the case of an organizational client, general
2084 knowledge of the client’s policies and practices ordinarily will not preclude a subsequent
2085 representation; on the other hand, knowledge of specific facts gained in a prior
2086 representation that are relevant to the matter in question ordinarily will preclude such a
2087 representation. A former client is not required to reveal the confidential information

2088 learned by the lawyer in order to establish a substantial risk that the lawyer has
2089 confidential information to use in the subsequent matter. A conclusion about the
2090 possession of such information may be based on the nature of the services the lawyer
2091 provided the former client and information that would in ordinary practice be learned by
2092 a lawyer providing such services.

2093 Lawyers Moving Between Firms

2094 [4] When lawyers have been associated within a firm but then end their association, the
2095 question of whether a lawyer should undertake representation is more complicated. There
2096 are several competing considerations. First, the client previously represented by the
2097 former firm must be reasonably assured that the principle of loyalty to the client is not
2098 compromised. Second, the rule should not be so broadly cast as to preclude other persons
2099 from having reasonable choice of legal counsel. Third, the rule should not unreasonably
2100 hamper lawyers from forming new associations and taking on new clients after having
2101 left a previous association. In this connection, it should be recognized that today many
2102 lawyers practice in firms, that many lawyers to some degree limit their practice to one
2103 field or another, and that many move from one association to another several times in
2104 their careers. If the concept of imputation were applied with unqualified rigor, the result
2105 would be radical curtailment of the opportunity of lawyers to move from one practice
2106 setting to another and of the opportunity of clients to change counsel.

2107 [5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has
2108 actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer
2109 while with one firm acquired no knowledge or information relating to a particular client
2110 of the firm, and that lawyer later joined another firm, neither the lawyer individually nor
2111 the second firm is disqualified from representing another client in the same or a related
2112 matter even though the interests of the two clients conflict. See Rule 1.10(b) for the
2113 restrictions on a firm once a lawyer has terminated association with the firm.

2114 [6] Application of paragraph (b) depends on a situation's particular facts, aided by
2115 inferences, deductions or working presumptions that reasonably may be made about the
2116 way in which lawyers work together. A lawyer may have general access to files of all
2117 clients of a law firm and may regularly participate in discussions of their affairs; it should
2118 be inferred that such a lawyer in fact is privy to all information about all the firm's
2119 clients. In contrast, another lawyer may have access to the files of only a limited number
2120 of clients and participate in discussions of the affairs of no other clients; in the absence of
2121 information to the contrary, it should be inferred that such a lawyer in fact is privy to
2122 information about the clients actually served but not those of other clients. In such an
2123 inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

2124 [7] Independent of the question of disqualification of a firm, a lawyer changing
2125 professional association has a continuing duty to preserve confidentiality of information
2126 about a client formerly represented. See Rules 1.6 and 1.9(c).

2127 [8] Paragraph (c) provides that information acquired by the lawyer in the course of
2128 representing a client may not subsequently be used or revealed by the lawyer to the
2129 disadvantage of the client. However, the fact that a lawyer has once served a client does
2130 not preclude the lawyer from using generally known information about that client when
2131 later representing another client.

2132 Disqualification from subsequent representation is^[9] The provisions of this Rule are for
2133 the protection of former clients and can be waived by them. A waiver is effective only if
2134 there is disclosure of the circumstances, including client gives informed consent, which

2135 consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(f). With
2136 regard to the lawyer's intended role in behalfeffectiveness of the new client.With regard
2137 to an opposing party's raising a question of conflict of interestan advance waiver, see
2138 Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer
2139 is or was formerly associated, see Rule 1.10.

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2141 **RULE 1.10: IMPUTED DISQUALIFICATION/IMPUTATION OF CONFLICTS**
2142 **OF INTEREST: GENERAL RULE**

2143

2144 (a) ~~Except as provided in this rule, while~~While lawyers are associated in a firm, none of
2145 them shall knowingly represent a client when any one of them practicing alone would be
2146 prohibited from doing so by Rules ~~1.7, 1.8(e), 1.9~~1.7 or 2.2.1.9, unless the prohibition is
2147 based on a personal interest of the prohibited lawyer and does not present a significant
2148 risk of materially limiting the representation of the client by the remaining lawyers in the
2149 firm.

2150

2151 (b) When a lawyer becomes associated with a firm, and the lawyer is prohibited from
2152 representing a client pursuant to Rule 1.9 (b), other lawyers in the firm may not
2153 ~~knowingly represent a person in the same or a substantially related matter in which that~~
2154 ~~lawyer, or a firm with which the lawyer was associated, had previously represented a~~
2155 ~~client whose interests are materially adverse to that person and about whom the lawyer~~
2156 ~~had acquired information protected by Rules 1.6 and 1.9(b) unless~~if there is no
2157 reasonably apparent risk that confidential information of the previously represented client
2158 will be used with material adverse effect on that client because:

2159 (1) any confidential information communicated to the lawyer is unlikely to be significant
2160 in the subsequent matter;

2161 (2) the lawyer is subject to screening measures adequate to prevent disclosure of the
2162 confidential information and to prevent involvement by that lawyer in the representation;
2163 and

2164 (3) timely and adequate notice of the screening has been provided to all affected clients.

2165

2166 (c) When a lawyer has terminated an association with a firm, the firm is not prohibited
2167 from thereafter representing a person with interests materially adverse to those of a client
2168 represented by the formerly associated lawyer and not currently represented by the firm,
2169 unless:

2170 (1) the matter is the same or substantially related to that in which the formerly
2171 associated lawyer represented the client; and

2172 (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(~~b~~c)
2173 that is material to the matter.

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2175 (d) A disqualification prescribed by this ~~Rule~~rule may be waived by the affected client
2176 under the conditions stated in Rule 1.7.

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2178 (e) The disqualification of lawyers associated in a firm with former or current
2179 government lawyers is governed by Rule 1.11.

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Comment

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Definition of “Firm”

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~~[1] For purposes of the Rules of Professional Conduct, the term “firm” includes~~ denotes ~~lawyers in a private law firm partnership, and professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization, or in a legal services organization. See Rule 1.0(d).~~ Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. ~~For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules.~~ See Rule 1.0, Comments [2] - [4]. ~~The terms of any former agreement between associated lawyers are relevant in determining whether they are a firm as is the fact that they have mutual access to confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.~~

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~~With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.~~

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~~Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.~~

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~~Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(e)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7, and 1.9.~~

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~~Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 1.6, 1.9, and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government’s recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the~~

2226 ~~government. On balance, therefore the government is better served in the long run by the~~
2227 ~~protections stated in Rule 1.11.~~

2228 **Principles of Imputed Disqualification**

2229 [2] The rule of imputed disqualification stated in paragraph (a) gives effect to the
2230 principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such
2231 situations can be considered from the premise that a firm of lawyers is essentially one
2232 lawyer for purposes of the rules governing loyalty to the client, or from the premise that
2233 each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with
2234 whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently
2235 associated in a firm. When a lawyer moves from one firm to another, the situation is
2236 governed by ~~paragraphs~~ Rules 1.9(b) and 1.10(b) and (c).

2237 ~~Lawyers Moving Between Firms~~

2238 ~~When lawyers have been associated in a firm but then end their association, however, the~~
2239 ~~problem is more complicated. The fiction~~

2240 [3] ~~The rule in paragraph (a) does not prohibit representation where neither questions of~~
2241 ~~client loyalty nor protection of confidential information are presented. Where one lawyer~~
2242 ~~in a firm could not effectively represent a given client because of strong political beliefs,~~
2243 ~~for example, but that lawyer will do no work on the case and the personal beliefs of the~~
2244 ~~lawyer will not materially limit the representation by others in the firm, the firm should~~
2245 ~~not be disqualified. On the other hand, if an opposing party in a case were owned by a~~
2246 ~~lawyer in the law firm is the same as a single lawyer is no longer wholly realistic. There~~
2247 ~~are several competing considerations. First, the client previously represented must be~~
2248 ~~reasonably assured that the principle of loyalty to the client is not compromised. Second,~~
2249 ~~the rule of , and others in the firm would be materially limited in pursuing the matter~~
2250 ~~because of loyalty to that lawyer, the personal disqualification should not be so broadly~~
2251 ~~cast as to preclude other persons from having reasonable choice of legal counsel. Third,~~
2252 ~~the rule of disqualification should not unreasonably hamper lawyers from reforming new~~
2253 ~~associations and taking on new clients after having left a previous association. In this~~
2254 ~~connection, it should be recognized that today many lawyers practice in firms, that many~~
2255 ~~to some degree limit their practice to one field or another, and that many move from one~~
2256 ~~association to another several times in their careers. If the concept of of the lawyer would~~
2257 ~~be imputed disqualification were defined with unqualified rigor, the result would be~~
2258 ~~radical curtailment of the opportunity of lawyers to move from one practice setting to~~
2259 ~~another and of the opportunity of clients to change counsel.~~

2260 ~~Reconciliation of these competing principles in the past has been attempted under two~~
2261 ~~rubrics. One approach has been to seek per se rules of disqualification. For example, it~~
2262 ~~has been held that a partner in a law firm is conclusively presumed to have access to all~~
2263 ~~confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a~~
2264 ~~partner in one law firm and then becomes a partner in another law firm, there is a~~
2265 ~~presumption that all confidences known by a partner in the first firm are known to all~~
2266 ~~partners in the second others in the firm. This presumption might properly be applied in~~
2267 ~~some circumstances, especially where the client has been extensively represented, but~~
2268 ~~may be unrealistic where the client was represented only for limited purposes.~~
2269 ~~Furthermore, such a rigid rule exaggerates the difference between a partner and an~~
2270 ~~associate in modern law firms.~~

2271 ~~The other rubric formerly used for dealing with vicarious disqualification is the~~
2272 ~~appearance of impropriety proscribed in Canon 9.~~

2273 [4] The rule in paragraph (a) also does not prohibit representation by others in the law
2274 firm where the person prohibited from involvement in a matter is a nonlawyer, such as a
2275 paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer
2276 is prohibited from acting because of the ABA Model Code of Professional
2277 Responsibility. This rubric has events before the person became a two-fold problem.
2278 First lawyer, the appearance of impropriety can be taken to include any new client lawyer
2279 relationship that might make a former client feel anxious. If that meaning were adopted,
2280 disqualification would become little more than a question of subjective judgment by the
2281 former client. Second for example, work that the person did while a law student. Such
2282 persons, since “impropriety” is undefined however, the term “appearance of impropriety”
2283 is question-begging. It therefore has to ordinarily must be recognized that the problem of
2284 imputed disqualification cannot be properly resolved either by simple analogy to a lawyer
2285 practicing alone or by the very general concept of appearance of impropriety.

2286 A rule based on a functional analysis is more appropriate for determining the question of
2287 vicarious disqualification. Two functions are involved: preserving confidentiality and
2288 avoiding positions adverse to a client.

2289 **Confidentiality**

2290 Preserving confidentiality is a question of access to information. Access to information,
2291 in turn, is essentially a question of facts screened from any personal participation in
2292 particular circumstances, aided by inferences, deductions or working presumptions that
2293 reasonably may be made about the way in which lawyers work together. A lawyer may
2294 have general access to files of clients of a law firm and may regularly participate in
2295 discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all
2296 information about all the firm’s clients. In contrast, another lawyer may have access to
2297 the files of only a limited number of clients and participate in discussion of the affairs of
2298 no other clients; in the absence of information to the contrary, it should be inferred that
2299 such a lawyer in fact is privy to information about the clients actually served but not
2300 those of other clients.

2301 Application of paragraphs (b) the matter to avoid communication to others in the firm of
2302 confidential information that both the nonlawyers and (c) depends on a situation’s
2303 particular facts. In any such inquiry, the burden of proof should rest upon the firm whose
2304 disqualification is sought. the firm have a legal duty to protect. See Rules 1.0(1) and 5.3.

2305 Paragraphs (b) and (c) operate [5] Rule 1.10(c) operates to disqualify permit a law firm,
2306 under certain circumstances, to represent a person with interests directly adverse to those
2307 of a client represented by a lawyer who formerly was associated with the firm only. The
2308 Rule applies regardless of when the lawyer involved formerly associated lawyer
2309 represented the client. However, the law firm may not represent a person with interests
2310 adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover,
2311 the firm may not represent the person where the matter is the same or substantially
2312 related to that in which the formerly associated lawyer represented the client and any
2313 other lawyer currently in the firm has actual knowledge of material information protected
2314 by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge of
2315 information relating to a particular client of the firm, and that lawyer later joined another
2316 firm, neither the lawyer individually nor the second firm is disqualified from representing
2317 another client in the same or a related matter even though the interests of the two clients
2318 conflict. c.)

2319 Independent of the question of disqualification of a firm, a lawyer changing professional
2320 association has a continuing duty to preserve confidentiality of information about a client
2321 formerly represented. See Rules 1.6 and 1.9.

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Adverse Positions

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~~The second aspect of loyalty to client is the lawyer's obligation to decline subsequent representations involving positions adverse to a~~

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[6] Rule 1.10(d) removes imputation with the informed consent of the affected client or former client arising in substantially related matters. This obligation requires abstention from adverse under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(f).

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[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.9(a). Thus, if Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interest in the same or related matters, so long as the conditions of Rule 1.10(b) and (c) concerning confidentiality have been met. represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

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[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

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RULE 1.11: SUCCESSIVE; SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND PRIVATE EMPLOYMENT EMPLOYEES

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(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
(1) is subject to Rule 1.9(c); and
(2) shall not otherwise represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation gives its informed consent, confirmed in writing, to the representation. ~~No~~

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(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

2365 (2) written notice is promptly given to the appropriate government agency to enable it to
2366 ascertain compliance with the provisions of this ~~Rule~~rule.

2367 ~~(bc)~~ Except as law may otherwise expressly permit, a lawyer having information that the
2368 lawyer knows is confidential government information about a person acquired when the
2369 lawyer was a public officer or employee, may not represent a private client whose
2370 interests are adverse to that person in a matter in which the information could be used to
2371 the material disadvantage of that person. As used in this Rule, the term “confidential
2372 government information” means information that has been obtained under governmental
2373 authority and which, at the time this Rule is applied, the government is prohibited by law
2374 from disclosing to the public or has a legal privilege not to disclose and which is not
2375 otherwise available to the public. A firm with which that lawyer is associated may
2376 undertake or continue representation in the matter only if the disqualified lawyer is timely
2377 screened from any participation in the matter and is apportioned no part of the fee
2378 therefrom.

2379 ~~(ed)~~ Except as law may otherwise expressly permit, a lawyer currently serving as a public
2380 officer or employee;

2381 (1) is subject to Rules 1.7 and 1.9; and

2382 (2) shall not:~~(1~~

2383 (i) participate in a matter in which the lawyer participated personally and substantially
2384 while in private practice or non-governmental—nongovernmental employment, unless
2385 under applicable law no one is the appropriate government agency gives its informed
2386 consent, or by lawful delegation may be, authorized to act confirmed in the lawyer’s
2387 stead in the matter; or~~(2) writing; or~~

2388 (ii) negotiate for private employment with any person who is involved as a party or as
2389 attorney lawyer for a party in a matter in which the lawyer is participating personally and
2390 substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative
2391 officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b)
2392 and subject to the conditions stated in Rule 1.12(b).

2393

2394 ~~(de)~~ As used in this Rule, the term “matter” includes:

2395 (1) any judicial or other proceeding, application, request for a ruling or other
2396 determination, contract, claim, controversy, investigation, charge, accusation, arrest or
2397 other particular matter involving a specific party or parties; and

2398 (2) any other matter covered by the conflict of interest rules of the appropriate
2399 government agency.

2400 ~~(e)~~ ~~As used in this Rule, the term “confidential government information” means~~
2401 ~~information which has been obtained under governmental authority and which, at the~~
2402 ~~time this Rule is applied, the government is prohibited by law from disclosing to the~~
2403 ~~public or has a legal privilege not to disclose, and which is not otherwise available to the~~
2404 ~~public.~~

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Comment

2406 This Rule prevents a lawyer from exploiting public office for the advantage of a private
2407 client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm
2408 to another.

2409

2410 [1] A lawyer representing a government agency, whether employed who has served or
2411 specialty retained by the government, is currently serving as a public officer or employee
2412 is personally subject to the Rules of Professional Conduct, including the prohibition
2413 against representing adverse interests concurrent conflicts of interest stated in Rule 1.7
2414 and the protections afforded former clients in Rule 1.9.1.7. In addition, such a lawyer
2415 is may be subject to Rule 1.11 and to statutes and government regulations regarding
2416 conflict of interest. Such statutes and regulations may circumscribe the extent to which
2417 the government agency may give consent under this Rule. See Rule 1.0(f) for the
2418 definition of informed consent. It is generally improper for a county attorney to accept
2419 the defense of a criminal case in another county, and for a city attorney to accept a
2420 criminal case that arises within the boundaries of the city or municipality that he or she
2421 represents. In extraordinary circumstances, where the accused would otherwise be
2422 deprived of competent counsel, a county attorney may seek to represent a client accused
2423 of a crime in another county by obtaining permission from the court before which the
2424 matter will be tried. The disqualification of county and city attorneys is only imputed to
2425 those lawyers in the county or city attorney's law firm who actually participate in
2426 representing the county or the city.

2427 [2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who
2428 has served or is currently serving as an officer or employee of the government toward a
2429 former government or private client. Rule 1.10 is not applicable to the conflicts of interest
2430 addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for
2431 former government lawyers that provides for screening and notice. Because of the special
2432 problems raised by imputation within a government agency, paragraph (d) does not
2433 impute the conflicts of a lawyer currently serving as an officer or employee of the
2434 government to other associated government officers or employees, although ordinarily it
2435 will be prudent to screen such lawyers.

2436 [3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a
2437 former client and are thus designed not only to protect the former client, but also to
2438 prevent a lawyer from exploiting public office for the advantage of another client. For
2439 example, a lawyer who has pursued a claim on behalf of the government may not pursue
2440 the same claim on behalf of a later private client after the lawyer has left government
2441 service, except when authorized to do so by the government agency under paragraph (a).
2442 Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue
2443 the claim on behalf of the government, except when authorized to do so by paragraph (d).
2444 As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of
2445 interest addressed by these paragraphs.

2446 Where^[4] This Rule represents a balancing of interests. On the one hand, where the
2447 successive clients are a public government agency and another client, public or private
2448 client, the risk exists that power or discretion vested in public that authority agency might
2449 be used for the special benefit of a the private other client. A lawyer should not be in a
2450 position where benefit to a the private other client might affect performance of the
2451 lawyer's professional functions on behalf of public the authority government. Also, unfair
2452 advantage could accrue to the private other client by reason of access to confidential
2453 government information about the client's adversary obtainable only through the lawyer's
2454 government service service. However On the other hand, the rules governing lawyers
2455 presently or formerly employed by a government agency should not be so restrictive as to
2456 inhibit transfer of employment to and from the government. The government has a
2457 legitimate need to attract qualified lawyers as well as to maintain high ethical standards.
2458 Thus a former government lawyer is disqualified only from particular matters in which
2459 the lawyer participated personally and substantially. The provisions for screening and
2460 waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing
2461 too severe a deterrent against entering public service. The limitation of disqualification in

2462 paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than
2463 extending disqualification to all substantive issues on which the lawyer worked, serves a
2464 similar function.

2465 ~~When the client is an agency of~~^[5] When a lawyer has been employed by one government
2466 agency and then moves to a second government agency, it may be appropriate to treat
2467 that second agency should be treated as a private another client for purposes of this Rule if
2468 the lawyer thereafter represents an agency of another government, as when a lawyer
2469 represents is employed by a city and subsequently is employed by a federal agency.
2470 However, because the conflict of interest is governed by paragraph (d), the latter agency
2471 is not required to screen the lawyer as paragraph (b) requires a law firm to do. The
2472 question of whether two government agencies should be regarded as the same or different
2473 clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13
2474 Comment [6].

2475 [6] Paragraphs (a)(~~h~~) and (b~~c~~) contemplate a screening arrangement. See Rule 1.0(l)
2476 (requirements for screening procedures). These paragraphs do not prohibit a lawyer from
2477 receiving a salary or partnership share established by prior independent agreement. They
2478 prohibit, but that lawyer may not receive compensation directly relating the
2479 attorney lawyer's compensation to the fee in the matter in which the lawyer is
2480 disqualified.

2481 ~~Paragraph (a)(2) does not require that a lawyer give notice to~~^[7] Notice, including a
2482 description of the screened lawyer's prior representation and of the government agency at
2483 a time when premature disclosure would injure the client; a requirement for premature
2484 diselcure might preclude engagement of the lawyer. Such notice is, however screening
2485 procedures employed, required to generally should be given as soon as practicable in
2486 order that the government agency or affected person will have a reasonable opportunity
2487 to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if
2488 they believe the lawyer is not complying. after the need for screening becomes apparent.

2489 [8] Paragraph (b~~c~~) operates only when the lawyer in question has knowledge of the
2490 information, which means actual knowledge; it does not operate with respect to
2491 information that merely could be imputed to the lawyer.

2492 [9] Paragraphs (a) and (e~~d~~) do not prohibit a lawyer from jointly representing a private
2493 party and a government agency when doing so is permitted by Rule 1.7 and is not
2494 otherwise prohibited by law.

2495 ~~Paragraph (e) does not disqualify other lawyers in the agency with which~~

2496 [10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form.
2497 In determining whether two particular matters are the same, the lawyer in question has
2498 become associated, should consider the extent to which the matters involve the same basic
2499 facts, the same or related parties, and the time elapsed.

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2501 **RULE 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR OR LAW CLERK**
2502 **OTHER THIRD-PARTY NEUTRAL**

2503 (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection
2504 with a matter in which the lawyer participated personally and substantially as a judge or

2505 other adjudicative officer, ~~arbitrator~~ or law clerk to such a person or as an arbitrator,
2506 mediator or other third-party neutral, unless all parties to the proceeding give informed
2507 consent after disclosure, confirmed in writing.

2508
2509 (b) A lawyer shall not negotiate for employment with any person who is involved as a
2510 party or as ~~attorney~~lawyer for a party in a matter in which the lawyer is participating
2511 personally and substantially as a judge or other adjudicative officer; or as an arbitrator,
2512 mediator or other third-party neutral. A lawyer serving as a law clerk to a judge, or other
2513 adjudicative officer ~~or arbitrator~~ may negotiate for employment with a party or
2514 ~~attorney~~lawyer involved in a matter in which the clerk is participating personally and
2515 substantially, but only after the lawyer has notified the judge, or other adjudicative officer
2516 ~~or arbitrator.~~

2517
2518 (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that
2519 lawyer is associated may knowingly undertake or continue representation in the matter
2520 unless:

2521 (1) the disqualified lawyer is timely screened from any participation in the matter and is
2522 apportioned no part of the fee therefrom; and

2523 (2) written notice is promptly given to the parties and any appropriate tribunal to enable
2524 ~~it~~them to ascertain compliance with the provisions of this rule.

2525
2526 (d) An arbitrator selected as a partisan of a party in a ~~multi-member~~multimember
2527 arbitration panel is not prohibited from subsequently representing that party.

2528 **Comment**

2529 [1] This ~~rule~~Rule generally parallels Rule 1.11. The term “personally and substantially”
2530 signifies that a judge who was a member of a ~~multi-member~~multimember court, and
2531 thereafter left judicial office to practice law, is not prohibited from representing a client
2532 in a matter pending in the court, but in which the former judge did not participate. So also
2533 the fact that a former judge exercised administrative responsibility in a court does not
2534 prevent the former judge from acting as a lawyer in a matter where the judge had
2535 previously exercised remote or incidental administrative responsibility that did not affect
2536 the merits. Compare the Comment to Rule 1.11. The term “adjudicative officer” includes
2537 such officials as judges pro tempore, referees, special masters, hearing officers and other
2538 parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons
2539 A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge,
2540 judge pro tempore or retired judge recalled to active service, may not “act as a lawyer in
2541 any proceeding in which he served as a judge or in any other proceeding related thereto.”
2542 Although phrased differently from this Rule, those Rules correspond in meaning.

2543 [2] Like former judges, lawyers who have served as arbitrators, mediators or other third-
2544 party neutrals may be asked to represent a client in a matter in which the lawyer
2545 participated personally and substantially. This Rule forbids such representation unless all
2546 of the parties to the proceedings give their informed consent, confirmed in writing. See
2547 Rule 1.0(f) and (b). Other law or codes of ethics governing third-party neutrals may
2548 impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

2549 [3] Although lawyers who serve as third-party neutrals do not have information
2550 concerning the parties that is protected under Rule 1.6, they typically owe the parties an

2551 obligation of confidentiality under law or codes of ethics governing third-party neutrals.
2552 Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be
2553 imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

2554 [4] Requirements for screening procedures are stated in Rule 1.0(1). Paragraph (c)(1) does
2555 not prohibit the screened lawyer from receiving a salary or partnership share established
2556 by prior independent agreement, but that lawyer may not receive compensation directly
2557 related to the matter in which the lawyer is disqualified.

2558 [5] Notice, including a description of the screened lawyer's prior representation and of
2559 the screening procedures employed, generally should be given as soon as practicable after
2560 the need for screening becomes apparent.

2561
2562 **RULE 1.13: ORGANIZATION AS CLIENT**

2563
2564 (a) A lawyer employed or retained by an organization represents the organization acting
2565 through its duly authorized constituents.

2566 (b) If a lawyer for an organization knows that an officer, employee or other person
2567 associated with the organization is engaged in action, intends to act or refuses to act in a
2568 matter related to the representation that is a violation of a legal obligation to the
2569 organization, or a violation of law which reasonably might be imputed to the
2570 organization, and is likely to result in substantial injury to the organization, the lawyer
2571 shall proceed as is reasonably necessary in the best interest of the organization. In
2572 determining how to proceed, the lawyer shall give due consideration to the seriousness of
2573 the violation and its consequences, the scope and nature of the lawyer's representation,
2574 the responsibility in the organization and ~~all~~ the apparent motivation of the person
2575 involved, the policies of the organization concerning such matters and any other relevant
2576 considerations. Any measures taken shall be designed to minimize disruption of the
2577 organization and the risk of revealing information relating to the representation to persons
2578 outside the organization. Such measures may include among others:
2579 (1) asking for reconsideration of the matter;
2580 (2) advising that a separate legal opinion on the matter be sought for presentation to
2581 appropriate authority in the organization; and
2582 (3) referring the matter to higher authority in the organization, including, if warranted
2583 by the seriousness of the matter, referral to the highest authority that can act ~~in~~ on behalf
2584 of the organization as determined by applicable law.

2585 (c) If, despite the lawyer's efforts in accordance with paragraph (b), a violation of law
2586 appears likely, the lawyer may resign in accordance with Rule 1.16 and, ~~if the violation is~~
2587 ~~criminal or fraudulent,~~ may reveal or disclose information in accordance with
2588 the Rules of Professional Conduct. Rule 1.6.

2589 (d) In dealing with an organization's directors, officers, employees, members,
2590 shareholders or other constituents, a lawyer shall explain the identity of the client when ~~it~~
2591 appears the lawyer knows or reasonably should know that the organization's interests are
2592 adverse to those of the constituents with whom the lawyer is dealing.

2593 (e) A lawyer representing an organization may also represent any of its directors, officers,
2594 employees, members, shareholders or other constituents, subject to the provisions of Rule
2595 1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the
2596 consent shall be given by an appropriate official of the organization other than the
2597 individual who is to be represented, or by the shareholders.

2598 **Comment**

2599 **The Entity as the Client**

2600 [1] An organizational client is a legal entity, but it cannot act except through its officers,
2601 directors, employees, shareholders and other constituents. Officers, directors, employees
2602 and shareholders are the constituents of the corporate organizational client. The duties
2603 defined in this Comment apply equally to unincorporated associations. “Other
2604 constituents” as used in this Comment means the ~~position~~positions equivalent to officers,
2605 directors, employees and shareholders held by persons acting for organizational clients
2606 that are not corporations.

2607 [2] When one of the constituents of an organizational client communicates with the
2608 organization’s lawyer in that person’s organizational capacity, the communication is
2609 protected by Rule 1.6. Thus, by way of example, if an organizational client requests its
2610 lawyer to investigate allegations of wrongdoing, interviews made in the course of that
2611 investigation between the lawyer and the client’s employees or other constituents are
2612 covered by Rule 1.6. This does not mean, however, that constituents of an organizational
2613 client are the clients of the lawyer. The lawyer may not disclose to such constituents
2614 information relating to the representation except for disclosures explicitly or impliedly
2615 authorized by the organizational client in order to carry out the representation or as
2616 otherwise permitted by Rule 1.6.

2617 [3] When constituents of the organization make decisions for it, the decisions ordinarily
2618 must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions
2619 concerning policy and operations, including ones entailing serious risk, are not as such in
2620 the lawyer’s province. However, different considerations arise when the lawyer knows
2621 that the organization may be substantially injured by action of a constituent that is in
2622 violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to
2623 ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient
2624 seriousness and importance to the organization, it may be reasonably necessary for the
2625 lawyer to take steps to have the matter reviewed by a higher authority in the organization.
2626 ~~Clear justification should exist for seeking review over the head of the constituent~~
2627 ~~normally responsible for it.~~ The stated policy of the organization may define
2628 circumstances and prescribe channels for such review, and a lawyer should encourage the
2629 formulation of such a policy. Even in the absence of organization policy, however, the
2630 lawyer may have an obligation to refer a matter to higher authority, depending on the
2631 seriousness of the matter and whether the constituent in question has apparent motives to
2632 act at variance with the organization’s interest. Review by the chief executive officer or
2633 by the board of directors may be required when the matter is of importance
2634 commensurate with their authority. At some point it may be useful or essential to obtain
2635 an independent legal opinion.

2636 ~~In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to~~
2637 ~~the~~[4] The organization’s highest authority. ~~Ordinarily, that is to whom a matter may be~~
2638 referred ordinarily will be the board of directors or similar governing body. However,
2639 applicable law may prescribe that under certain conditions the highest authority reposes
2640 elsewhere; for example, in the independent directors of a corporation.

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Relation to Other Rules

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[5] The authority and responsibility provided in ~~paragraph (b)~~ this Rule are concurrent with the authority and responsibility provided ~~to~~ in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under ~~Rules~~ Rule 1.6, 1.8, 1.16, 3.3 or 3.3-4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

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Government Agency

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[6] The duty defined in this Rule applies to governmental organizations. ~~However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context.~~ Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it is generally may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or ~~the government as a whole~~ relevant branch of government may be the client for ~~purpose~~ purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See ~~note on~~ Scope.

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Clarifying the Lawyer's Role

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[7] There are times when the organization's interest may be or ~~becomes~~ become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent ~~and~~ individual, and that ~~discussion~~ discussions between the lawyer for the organization and the individual may not be privileged.

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[8] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

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Dual Representation

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[9] Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

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Derivative Actions

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[10] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

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[11] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

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RULE 1.14: CLIENT UNDER A DISABILITY WITH DIMINISHED CAPACITY

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(a) When a client's ~~ability~~capacity to make adequately considered decisions in connection with ~~the~~a representation is ~~impaired~~diminished, whether because of minority, mental ~~disability~~impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

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~~(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when~~ When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably protective action, including consulting individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

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(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6 (b) (3) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

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Comment

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[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental disorder or disability~~capacity~~, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, ~~an~~ a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client ~~lacking legal competence~~with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. ~~Furthermore, to an increasing extent the law recognizes intermediate degrees of competence.~~ For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings

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2733 concerning their custody. So also, it is recognized that some persons of advanced age can
2734 be quite capable of handling routine financial matters while needing special legal
2735 protection concerning major transactions.

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2737 [2] The fact that a client suffers ~~an disability~~ ~~impairment~~ does not diminish the lawyer's
2738 obligation to treat the client with attention and respect. ~~If~~ Even if the person has ~~no~~
2739 ~~guardian or legal representative, the lawyer often must act as de facto guardian. Even if~~
2740 ~~the person does have~~ a legal representative, the lawyer should as far as possible accord
2741 the represented person the status of client, particularly in maintaining communication.

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2743 [3] The client may wish to have family members or other persons participate in
2744 discussions with the lawyer. When necessary to assist in the representation, the presence
2745 of such persons generally does not affect the applicability of the attorney-client
2746 evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost
2747 and, except for protective action authorized under paragraph (b), must look to the client,
2748 and not family members, to make decisions on the client's behalf.

2749
2750 [4] If a legal representative has already been appointed for the client, the lawyer should
2751 ordinarily look to the representative for decisions on behalf of the client. ~~If~~ In matters
2752 ~~involving a legal representative has not been appointed~~ minor, whether the lawyer should
2753 ~~see~~ look to such the parents as natural guardians may depend on the type of proceeding or
2754 ~~matter in which the lawyer is representing the minor. If the lawyer represents the~~
2755 ~~guardian as distinct from the ward, and is aware that the guardian is acting adversely to~~
2756 ~~the ward's interest, the lawyer may have an appointment where it would serve~~ obligation
2757 ~~to prevent or rectify the guardian's misconduct. See Rule 1.2(d).~~

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2759 **Taking Protective Action**

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2761 [5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial
2762 or other harm unless action is taken, and that a normal client-lawyer relationship cannot
2763 be maintained as provided in paragraph (a) because the client lacks sufficient capacity to
2764 communicate or to make adequately considered decisions in connection with the
2765 representation, then paragraph (b) permits the lawyer to take protective measures deemed
2766 necessary. Such measures could include: consulting with family members, using a
2767 reconsideration period to permit clarification or improvement of circumstances, using
2768 voluntary surrogate decisionmaking tools such as durable powers of attorney or
2769 consulting with support groups, professional services, adult-protective agencies or other
2770 individuals or entities that have the ability to protect the client. In taking any protective
2771 action, the lawyer should be guided by such factors as the wishes and values of the client
2772 to the extent known, the client's best interests and the goals of intruding into the client's
2773 decisionmaking autonomy to the least extent feasible, maximizing client capacities and
2774 respecting the client's family and social connections.

2775
2776 [6] In determining the extent of the client's diminished capacity, the lawyer should
2777 consider and balance such factors as: the client's ability to articulate reasoning leading to
2778 a decision, variability of state of mind and ability to appreciate consequences of a
2779 decision; the substantive fairness of a decision; and the consistency of a decision with the
2780 known long-term commitments and values of the client. In appropriate circumstances, the
2781 lawyer may seek guidance from an appropriate diagnostician.

2782
2783 [7] If a legal representative has not been appointed, the lawyer should consider whether
2784 appointment of a guardian ad litem, conservator or guardian is necessary to protect the
2785 client's interests. Thus, if a ~~disabled~~ client with diminished capacity has substantial
2786 property that should be sold for the client's benefit, effective completion of the

2787 transaction ~~ordinarily may require~~ require appointment of a legal representative. In
2788 addition, rules of procedure in litigation sometimes provide that minors or persons with
2789 diminished capacity must be represented by a guardian or next friend if they do not have
2790 a general guardian. In many circumstances, however, appointment of a legal
2791 representative may be more expensive or traumatic for the client than circumstances in
2792 fact require. Evaluation of these such considerations circumstances is a matter of entrusted
2793 to the professional judgment on the lawyer's part. of the lawyer. In considering
2794 alternatives, however, the lawyer should be aware of any law that requires the lawyer to
2795 advocate the least restrictive action on behalf of the client.
2796 ~~If the lawyer represents the guardian as distinct from the ward, and is aware that the~~
2797 ~~guardian is acting adversely to the ward's interest, the lawyer may have an obligation to~~
2798 ~~prevent or rectify the guardian's misconduct. See Rule 1.2(e).~~

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2800 **Disclosure of the Client's Condition**

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2802 [8] Disclosure of the client's diminished capacity could adversely affect the client's
2803 interests. For example, raising the question could, in some circumstances, lead to
2804 proceedings for involuntary commitment. Information relating to the representation is
2805 protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose
2806 such information. When taking protective action pursuant to paragraph (b), the lawyer is
2807 impliedly authorized to make the necessary disclosures, even when the client directs the
2808 lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits
2809 what the lawyer may disclose in consulting other individuals or entities or seeking the
2810 appointment of a legal representative. At the very least, the lawyer should determine
2811 whether it is likely that the person or entity consulted will act adversely to the client's
2812 interests before discussing matters related to the client. The lawyer's position in such
2813 cases is an unavoidably difficult one.

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2815 **Emergency Legal Assistance**

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2817 [9] In an emergency where the health, safety or a financial interest of a person with
2818 seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer
2819 may take legal action on behalf of such a person even though the person is unable to
2820 establish a client-lawyer relationship or to make or express considered judgments about
2821 the matter, when the person or another acting in good faith on that person's behalf has
2822 consulted the lawyer. Even in such an emergency, however, the lawyer should not act
2823 unless the lawyer reasonably believes that the person has no other lawyer, agent or other
2824 representative available. The lawyer should take legal action on behalf of the person only
2825 to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent
2826 and irreparable harm. A lawyer who undertakes to represent a person in such an exigent
2827 situation has the same duties under these Rules as the lawyer would with respect to a
2828 client.

2829

2830 [10] A lawyer who acts on behalf of a person with seriously diminished capacity in an
2831 emergency should keep the confidences of the person as if dealing with a client,
2832 disclosing them only to the extent necessary to accomplish the intended protective action.
2833 The lawyer should disclose to any tribunal involved and to any other counsel involved the
2834 nature of his or her relationship with the person. The lawyer should take steps to
2835 regularize the relationship or implement other protective solutions as soon as possible.
2836 Normally, a lawyer would not seek compensation for such emergency actions taken.

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2839 **RULE 1.15: SAFEKEEPING PROPERTY**

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2841 (a) All funds of clients or third persons held by a lawyer or law firm in connection with a
2842 representation shall be deposited in one or more identifiable interest bearing trust
2843 accounts as set forth in paragraphs (d) through (g). No funds belonging to the lawyer or
2844 law firm shall be deposited therein except as follows:

2845 (1) funds of the lawyer or law firm reasonably sufficient to pay service charges may be
2846 deposited therein.(2) funds belonging in part to a client or third person and in part
2847 presently or potentially to the lawyer or law firm must be deposited therein.
2848

2849 (b) A lawyer must withdraw earned fees and any other funds belonging to the lawyer or
2850 the law firm from the trust account within a reasonable time after the fees have been
2851 earned or entitlement to the funds has been established and the lawyer must provide the
2852 client or third person with: (i) written notice of the time, amount and the purpose of the
2853 withdrawal; and (ii) an accounting of the client's or third person's funds in the trust
2854 account. If the right of the lawyer or law firm to receive funds from the account is
2855 disputed by the client or third person claiming entitlement to the funds, the disputed
2856 portion shall not be withdrawn until the dispute is finally resolved. If the right of the
2857 lawyer or law firm to receive funds from the account is disputed within a reasonable time
2858 after the funds have been withdrawn, the disputed portion must be restored to the account
2859 until the dispute is resolved.

2860
2861 (c) A lawyer shall:

2862 (1) promptly notify a client or third person of the receipt of the client's or third person's
2863 funds, securities, or other properties.

2864 (2) identify and label securities and properties of a client or third person promptly upon
2865 receipt and place them in a safe deposit box or other place of safekeeping as soon as
2866 practicable.

2867 (3) maintain complete records of all funds, securities, and other properties of a client or
2868 third person coming into the possession of the lawyer and render appropriate accounts to
2869 the client or third person regarding them.

2870 (4) promptly pay or deliver to the client or third person as requested the funds,
2871 securities, or other properties in the possession of the lawyer which the client or third
2872 person is entitled to receive.

2873 (5) deposit all fees in advance of the legal services being performed into a trust account
2874 and withdraw the fees as earned, unless the lawyer and the client have entered into a
2875 written agreement pursuant to Rule 1.5(b).
2876

2877 (d) Each trust account referred to in paragraph (a) shall be an interest bearing account in a
2878 bank, savings bank, trust company, savings and loan association, savings association, or
2879 federally regulated investment company selected by a lawyer in the exercise of ordinary
2880 prudence.

2881
2882 (e) A lawyer who receives client or third person funds shall maintain a pooled interest
2883 bearing trust account for deposit of funds that are nominal in amount or expected to be
2884 held for a short period of time. The interest accruing on this account, net of any

2885 transaction costs, shall be paid to the Lawyer Trust Account Board established by the
2886 Minnesota Supreme Court.

2887

2888 (f) All client or third person funds shall be deposited in the account specified in
2889 paragraph (e) unless they are deposited in a:

2890 (1) separate interest bearing trust account for the particular third person, client or
2891 client's matter on which the interest, net of any transaction costs, will be paid to the
2892 client or third person; or

2893 (2) pooled interest bearing trust account with subaccounting which will provide for
2894 computation of interest earned by each client's or third person's funds and the payment
2895 thereof, net of any transaction costs, to the client.

2896

2897 (g) In determining whether to use the account specified in paragraph (e) or an account
2898 specified in paragraph (f), a lawyer shall take into consideration the following factors:

2899 (1) the amount of interest which the funds would earn during the period they are
2900 expected to be deposited;

2901 (2) the cost of establishing and administering the account, including the cost of the
2902 lawyer's services;

2903 (3) the capability of financial institutions described in paragraph (d) to calculate and pay
2904 interest to individual clients.

2905

2906 (h) Every lawyer engaged in private practice of law shall maintain or cause to be
2907 maintained on a current basis books and records sufficient to demonstrate income derived
2908 from, and expenses related to, the lawyer's private practice of law, and to establish
2909 compliance with paragraphs (a) through (f). Equivalent books and records demonstrating
2910 the same information in an easily accessible manner and in substantially the same detail
2911 are acceptable. The books and records shall be preserved for at least six years following
2912 the end of the taxable year to which they relate or, as to books and records relating to
2913 funds or property of clients or third persons, for at least six years after completion of the
2914 employment to which they relate.

2915

2916 (i) Every lawyer subject to paragraph (h) shall certify, in connection with the annual
2917 renewal of the lawyer's registration and in such form as the Clerk of the Appellate Court
2918 may prescribe, that the lawyer or the lawyer's law firm maintains books and records as
2919 required by paragraph (h). The Lawyers Professional Responsibility Board shall publish
2920 annually the books and records required by paragraph (h).

2921

2922 (j) Lawyer trust accounts shall be maintained only in financial institutions approved by
2923 the Office of Lawyers Professional Responsibility. Every check, draft, electronic
2924 transfer, or other withdrawal instrument or authorization shall be personally signed or, in
2925 the case of electronic, telephone, or wire transfer, directed by one or more lawyers
2926 authorized by the law firm.

2927

2928 (k) A financial institution shall be approved as a depository for lawyer trust accounts if it
2929 shall file with the Office of Lawyers Professional Responsibility an agreement, in a form
2930 provided by the Office, to report to the Office in the event any properly payable

2931 instrument is presented against a lawyer trust account containing insufficient funds,
2932 irrespective of whether or not the instrument is honored. The Lawyers Professional
2933 Responsibility Board shall establish rules governing approval and termination of
2934 approved status for financial institutions, and shall annually publish a list of approved
2935 financial institutions. No trust account shall be maintained in any financial institution
2936 which does not agree to make such reports. Any such agreement shall apply to all
2937 branches of the financial institution and shall not be canceled except upon ~~(3)~~three days
2938 notice in writing to the Office.

2939

2940 (l) The overdraft notification agreement shall provide that all reports made by the
2941 financial institution shall be in the following format:

2942 (1) In the case of a dishonored instrument, the report shall be identical to the overdraft
2943 notice customarily forwarded to the depositor, and should include a copy of the
2944 dishonored instrument, if such a copy is normally provided to depositors.

2945 (2) In the case of instruments that are presented against insufficient funds but which
2946 instruments are honored, the report shall identify the financial institution, the lawyer or
2947 law firm, the account number, the date of presentation for payment and the date paid, as
2948 well as the amount of overdraft created thereby.

2949 Such reports shall be made simultaneously with, and within the time provided by law for
2950 notice of dishonor, if any. If an instrument presented against insufficient funds is
2951 honored, then the report shall be made within ~~(5)~~five banking days of the date of
2952 presentation for payment against insufficient funds.

2953

2954 (m) Every lawyer practicing or admitted to practice in this jurisdiction shall, as a
2955 condition thereof, be conclusively deemed to have consented to the reporting and
2956 production requirements mandated by this rule.

2957

2958 (n) Nothing herein shall preclude a financial institution from charging a particular lawyer
2959 or law firm for the reasonable cost of producing the reports and records required by this
2960 rule.

2961

2962 (o) Definitions.

2963 “Financial Institution” includes banks, savings and loan associations, savings banks and
2964 any other business or person which accepts for deposit funds held in trust by lawyers.

2965 “Properly payable” refers to an instrument which, if presented in the normal course of
2966 business, is in a form requiring payment under the laws of this jurisdiction.

2967 “Notice of dishonor” refers to the notice which a financial institution is required to give,
2968 under the laws of this jurisdiction, upon presentation of an instrument which the
2969 institution dishonors.

2970

2971

Comment

2972

2973 [1] A lawyer should hold property of others with the care required of a professional
2974 fiduciary. Securities should be kept in a safe deposit box, except when some other form
2975 of safekeeping is warranted by special circumstances. All property ~~which that~~ is the
2976 property of clients or third persons ~~should, including prospective clients, must~~ be kept
2977 separate from the lawyer’s business and personal property and, if monies, in one or more

2978 trust accounts. Separate trust accounts may be warranted when administering estate
2979 monies or acting in similar fiduciary capacities.

2980
2981 [2] While normally it is impermissible to commingle the lawyer's own funds with client
2982 funds, paragraph (a) (1) provides that it is permissible when necessary to pay bank
2983 service charges on that account. Accurate records must be kept regarding which part of
2984 the funds is the lawyer's.

2985
2986 [3] Lawyers often receive funds from third parties from which the lawyer's fee will be
2987 paid. If there is risk that the client may divert the funds without paying the fee, the
2988 lawyer is not required to remit the portion from which the fee is to be paid. The client
2989 funds that the lawyer reasonably believes represent fees owed. However, a lawyer may
2990 not hold funds to coerce a client into accepting the lawyer's contention. The disputed
2991 portion of the funds should be kept in a trust account and the lawyer should suggest
2992 means for prompt resolution of the dispute, such as arbitration. The undisputed portion of
2993 the funds shall be promptly distributed.

2994
2995 Third [4] Paragraph (b) also recognizes that third parties, such as a client's creditors, may
2996 have just lawful claims against specific funds or other property in a lawyer's custody,
2997 such as a client's creditor who has a lien on funds recovered in a personal injury action. A
2998 lawyer may have a duty under applicable law to protect such third-party claims against
2999 wrongful interference by the client. In such cases, and accordingly may when the third-
3000 party claim is not frivolous under applicable law, the lawyer must refuse to surrender the
3001 property to the client until the claims are resolved. However, a lawyer should not
3002 unilaterally assume to arbitrate a dispute between the client and the third party, but, when
3003 there are substantial grounds for dispute as to the person entitled to the funds, the lawyer
3004 may file an action to have a court resolve the dispute.

3005
3006 [5] The obligations of a lawyer under this Rule are independent of those arising from
3007 activity other than rendering legal services. For example, a lawyer who serves only as an
3008 escrow agent is governed by the applicable law relating to fiduciaries even though the
3009 lawyer does not render legal services in the transaction and is not governed by this Rule.

3010

3011

3012 **RULE 1.16: DECLINING OR TERMINATING REPRESENTATION**

3013

3014 (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where
3015 representation has commenced, shall withdraw from the representation of a client if:

3016 (1) the representation will result in violation of the ~~Rules of Professional Conduct~~rules
3017 of professional conduct or other law;

3018 (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to
3019 represent the client; or

3020 (3) the lawyer is discharged.

3021

3022 (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client
3023 if:

3024 (1) withdrawal can be accomplished without material adverse effect on the interests of
3025 the client; or

3026 (2) the client persists in a course of action ~~using~~involving the lawyer's services that the
3027 lawyer reasonably believes is criminal or fraudulent.

3028 ~~(b) Except as stated in paragraph (e), a lawyer may withdraw from representing a client~~
3029 ~~if:~~~~(13) the client has used the lawyer's services to perpetrate a crime or fraud;~~
3030 ~~(24) the client insists upon pursuing an objective taking action that the lawyer considers~~
3031 ~~repugnant or imprudent with which the lawyer has a fundamental disagreement;~~
3032 ~~(35) the client fails substantially to fulfill an obligation to the lawyer regarding the~~
3033 ~~lawyer's services and has been given reasonable warning that the lawyer will withdraw~~
3034 ~~unless the obligation is fulfilled;~~
3035 ~~(46) the representation will result in an unreasonable financial burden on the lawyer or~~
3036 ~~has been rendered unreasonably difficult by the client; or~~
3037 ~~(57) other good cause for withdrawal exists.~~

3038 ~~(e) If~~

3039
3040 ~~(c) A lawyer must comply with applicable law requiring notice to or permission for~~
3041 ~~withdrawal from employment is required by the rules of a tribunal, a lawyer shall not~~
3042 ~~withdraw from employment in a proceeding before that tribunal without its permission.~~
3043 ~~when terminating a representation. When ordered to do so by a tribunal, a lawyer shall~~
3044 ~~continue representation notwithstanding good cause for terminating the representation.~~

3045
3046 (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably
3047 practicable to protect a client's interests, such as giving reasonable notice to the client,
3048 allowing time for employment of other counsel, surrendering papers and property to
3049 which the client is entitled and refunding any advance payment of fee or expense that has
3050 not been earned or incurred.

3051
3052 (e) Papers and property to which the client is entitled include the following, whether
3053 stored electronically or otherwise:

3054 (1) In all representations, the papers and property delivered to the lawyer by or on behalf
3055 of the client and the papers and property for which the client has paid the lawyer's fees
3056 and reimbursed the lawyer's costs.

3057 (2) In pending claims or litigation representations:

3058 (i) all pleadings, motions, discovery, memoranda, correspondence and other litigation
3059 materials which have been drafted and served or filed regardless of whether the client has
3060 paid the lawyer for drafting and serving the document(s), but shall not include pleadings,
3061 discovery, motion papers, memoranda and correspondence which have been drafted, but
3062 not served or filed if the client has not paid the lawyer's fee for drafting or creating the
3063 documents; and

3064 (ii) all items for which the lawyer has agreed to advance costs and expenses regardless of
3065 whether the client has reimbursed the lawyer for the costs and expenses including
3066 depositions, expert opinions and statements, business records, witness statements, and
3067 other materials which may have evidentiary value.

3068 (3) In non-litigation or transactional representations, client files, papers and property shall
3069 not include drafted but unexecuted estate plans, title opinions, articles of incorporation,
3070 contracts, partnership agreements, or any other unexecuted document which does not
3071 otherwise have legal effect, where the client has not paid the lawyer's fee for drafting the
3072 document(s).

3073

3074 (f) A lawyer may charge a client for the reasonable costs of duplicating or retrieving the
3075 client's papers and property after termination of the representation only if the client has,
3076 prior to termination of the lawyer's services, agreed in writing to such a charge.

3077 (g) A lawyer shall not condition the return of client papers and property on payment of
3078 the lawyer's fee or the cost of copying the files or papers.

3079
3080

Comment

3081 [1] A lawyer should not accept representation in a matter unless it can be performed
3082 competently, promptly, without improper conflict of interest and to completion.
3083 Ordinarily, a representation in a matter is completed when the agreed-upon assistance has
3084 been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

3085 **Mandatory Withdrawal**

3086 [2] A lawyer ordinarily must decline or withdraw from representation if the client
3087 demand that the lawyer engage in conduct that is illegal or violates the Rules of
3088 Professional Conduct or other law. The lawyer is not obliged to decline or withdraw
3089 simply because the client suggests such a course of conduct; a client may make such a
3090 suggestion in the hope that a lawyer will not be constrained by a professional obligation.

3091 [3] When a lawyer has been appointed to represent a client, withdrawal ordinarily
3092 requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval
3093 or notice to the court is often required by applicable law before a lawyer withdraws from
3094 pending litigation. Difficulty may be encountered if withdrawal is based on the client's
3095 demand that the lawyer engage in unprofessional conduct. The court may ~~wish~~request
3096 an explanation for the withdrawal, while the lawyer may be bound to keep confidential the
3097 facts that would constitute such an explanation. The lawyer's statement that professional
3098 considerations require termination of the representation ordinarily should be accepted as
3099 sufficient. Lawyers should be mindful of their obligations to both clients and the court
3100 under Rules 1.6 and 3.3.

3101 **Discharge**

3102 [4] A client has a right to discharge a lawyer at any time, with or without cause, subject to
3103 liability for payment for the lawyer's services. Where future dispute about the withdrawal
3104 may be anticipated, it may be advisable to prepare a written statement reciting the
3105 circumstances.

3106 [5] Whether a client can discharge appointed counsel may depend on applicable law. A
3107 client seeking to do so should be given a full explanation of the consequences. These
3108 consequences may include a decision by the appointing authority that appointment of
3109 successor counsel is unjustified, thus requiring self-representation by the client—to
3110 ~~represent himself.~~

3111 [6] If the client is ~~mentally incompetent~~has severely diminished capacity, the client may
3112 lack the legal capacity to discharge the lawyer, and in any event the discharge may be
3113 seriously adverse to the client's interests. The lawyer should make special effort to help
3114 the client consider the consequences and, ~~in an extreme case,~~ may initiate proceedings for
3115 ~~a conservatorship or similar protection of the client.~~ Seetake reasonably necessary
3116 protective action as provided in Rule 1.14.

3117

Optional Withdrawal

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[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also may withdraw where the client insists on taking action that the lawyer considers repugnant or imprudent objectively with which the lawyer has a fundamental disagreement.

3127
3128
3129

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

3130

~~Assisting the Client Upon Withdrawal~~

3131
3132

~~Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.~~

3133
3134
3135

~~Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules~~

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RULE 1.17: SALE OF LAW PRACTICE

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- (a) A lawyer shall not sell or buy a law practice unless:
 - (1) The seller sells the practice as an entirety, as defined in paragraph (c) of this Rule, to a lawyer or firm of lawyers licensed to practice law in Minnesota;
 - (2) The seller sends a written notification that complies with paragraph (d) of this Rule to all clients whose files are currently active and all clients whose inactive files will be taken over by the buying lawyer or firm of lawyers.
- (b) The buying lawyer or firm of lawyers shall not increase the fees charged to clients by reason of the sale for a period of at least one year from the date of the sale. The buying lawyer or firm of lawyers shall honor all existing fee agreements for at least one year from the date of the sale and shall continue to completion, on the same terms agreed to by the selling lawyer and the client, any matters that the selling lawyer has agreed to do on a pro bono publico basis or for a reduced fee.
- (c) For purposes of this Rule, a practice is sold as an entirety if the buying lawyer or firm of lawyers assumes responsibility for at least all of the currently active files except those that deal with matters that the buying lawyer or firm of lawyers would not be competent to handle, those that the buying lawyer or firm of lawyers would be barred from handling because of a conflict of interest, or those from which the selling lawyer is denied permission to withdraw by a tribunal in a matter subject to Rule 1.161.6(c).

- 3160 (d) The written notification that the seller lawyer must send pursuant to paragraph (a)(2)
3161 of this Rule must include at a minimum:
3162 (1) A statement that the law practice of the selling lawyer has been sold to the buying
3163 lawyer or law firm;
3164 (2) A summary of the buying lawyer's or law firm's professional background,
3165 including education and experience and the length of time that the buying lawyer or
3166 members of the buying law firm has been in practice;
3167 (3) A statement that the client has the right to continue to retain the buying lawyer under
3168 the same fee arrangement as the client had with the selling lawyer or to have the
3169 client's complete file sent to the client or to another lawyer of the client's choice.
3170
3171 (e) If the written notification described in paragraph (d) has actually reached the client
3172 through personal service or by certified mail, the notification may include a provision that
3173 states that if the client does not respond to the buying lawyer by ninety days from the date
3174 that the client receives the notification, the client's silence shall be deemed to be the
3175 client's waiver of confidentiality and the client's consent to the buying lawyer's
3176 representing the client in the matter that was the subject of the selling lawyer's
3177 representation. The client's failure to respond within that time shall be such a waiver
3178 and consent.
3179
3180 (f) The transaction may include a promise by the selling lawyer that the selling lawyer
3181 will not engage in the practice of law for a reasonable period of time within a reasonable
3182 geographic area and will not advertise for or solicit clients within that area for that time.
3183
3184 (g) The selling lawyer shall retain responsibility for the proper management and
3185 disposition of all inactive files that are not transferred as part of the sale of the law
3186 practice.
3187
3188 (h) For purposes of this Rule, the term "lawyer" means an individual lawyer or a law
3189 firm that buys or sells a law practice.

3190
3191 **Comment**

3192
3193 [1] A representative of a deceased, disabled or disappeared lawyer may sell the lawyer's
3194 law practice under the same restrictions as imposed by this Rule. See Rule 5.4 (a)(4).

3195
3196 [2]- Rule 1.6 on Confidentiality of Information limits the amount and type of information
3197 that the selling lawyer may give to the potential buying lawyer during negotiations.
3198 Before the prospective buyer could see the client's files the selling lawyer would be
3199 required to obtain from the affected client a waiver of confidentiality.

3200
3201 [3] The selling lawyer should consider extending malpractice insurance for some
3202 reasonable period of time following the sale to insure against losses arising from errors
3203 that might come to light after the sale.
3204
3205
3206

3207 **RULE 1.18: DUTIES TO PROSPECTIVE CLIENT**

3208
3209 (a) A person who discusses with a lawyer the possibility of forming a client-lawyer
3210 relationship with respect to a matter is a prospective client.

3211
3212 (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions
3213 with a prospective client shall not use or reveal information learned in the consultation,
3214 except as Rule 1.9 would permit with respect to information of a former client.

3215
3216 (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially
3217 adverse to those of a prospective client in the same or a substantially related matter if the
3218 lawyer received information from the prospective client that could be significantly
3219 harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is
3220 disqualified from representation under this paragraph, no lawyer in a firm with which that
3221 lawyer is associated may knowingly undertake or continue representation in such a
3222 matter, except as provided in paragraph (d).

3223
3224 (d) When the lawyer has received disqualifying information as defined in paragraph (c),
3225 representation is permissible if:

3226 (1) both the affected client and the prospective client have given informed consent,
3227 confirmed in writing, or:

3228 (2) the lawyer who received the information took reasonable measures to avoid exposure
3229 to more disqualifying information than was reasonably necessary to determine whether to
3230 represent the prospective client; and

3231 (i) the disqualified lawyer is timely screened from any participation in the matter and is
3232 apportioned no part of the fee therefrom; and

3233 (ii) written notice is promptly given to the prospective client.

3234
3235 **Comment**

3236
3237 [1] Prospective clients, like clients, may disclose information to a lawyer, place
3238 documents or other property in the lawyer's custody, or rely on the lawyer's advice. A
3239 lawyer's discussions with a prospective client usually are limited in time and depth and
3240 leave both the prospective client and the lawyer free (and sometimes required) to proceed
3241 no further. Hence, prospective clients should receive some but not all of the protection
3242 afforded clients.

3243
3244 [2] Not all persons who communicate information to a lawyer are entitled to protection
3245 under this Rule. A person who communicates information unilaterally to a lawyer,
3246 without any reasonable expectation that the lawyer is willing to discuss the possibility of
3247 forming a client-lawyer relationship, is not a "prospective client" within the meaning of
3248 paragraph (a).

3249
3250 [3] It is often necessary for a prospective client to reveal information to the lawyer during
3251 an initial consultation prior to the decision about formation of a client-lawyer
3252 relationship. The lawyer often must learn such information to determine whether there is
3253 a conflict of interest with an existing client and whether the matter is one that the lawyer
3254 is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that
3255 information, except as permitted by Rule 1.9, even if the client or lawyer decides not to

3256 proceed with the representation. The duty exists regardless of how brief the initial
3257 conference may be.

3258
3259 [4] In order to avoid acquiring disqualifying information from a prospective client, a
3260 lawyer considering whether or not to undertake a new matter should limit the initial
3261 interview to only such information as reasonably appears necessary for that purpose.
3262 Where the information indicates that a conflict of interest or other reason for non-
3263 representation exists, the lawyer should so inform the prospective client or decline the
3264 representation. If the prospective client wishes to retain the lawyer, and if consent is
3265 possible under Rule 1.7, then consent from all affected present or former clients must be
3266 obtained before accepting the representation.

3267
3268 [5] A lawyer may condition conversations with a prospective client on the person's
3269 informed consent that no information disclosed during the consultation will prohibit the
3270 lawyer from representing a different client in the matter. See Rule 1.0(f) for the definition
3271 of informed consent. If the agreement expressly so provides, the prospective client may
3272 also consent to the lawyer's subsequent use of information received from the prospective
3273 client.

3274
3275 [6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited
3276 from representing a client with interests adverse to those of the prospective client in the
3277 same or a substantially related matter unless the lawyer has received from the prospective
3278 client information that could be significantly harmful if used against the prospective
3279 client in the matter.

3280
3281 [7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as
3282 provided in Rule 1.10, but, under paragraph (d), imputation may be avoided if the lawyer
3283 obtains the informed consent, confirmed in writing, of both the prospective and affected
3284 clients. In the alternative, imputation may be avoided if all disqualified lawyers are
3285 timely screened and written notice is promptly given to the prospective client. See Rule
3286 1.0(l) (requirements for screening procedures). Paragraph (d)(1) does not prohibit the
3287 screened lawyer from receiving a salary or partnership share established by prior
3288 independent agreement, but that lawyer may not receive compensation directly related to
3289 the matter in which the lawyer is disqualified.

3290
3291 [8] Notice, including a description of the screened lawyer's prior representation and of
3292 the screening procedures employed, generally should be given as soon as practicable after
3293 the need for screening becomes apparent. When disclosure is likely to significantly injure
3294 the client, a reasonable delay may be justified.

3295
3296 [9] For the duty of competence of a lawyer who gives assistance on the merits of a matter
3297 to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client
3298 entrusts valuables or papers to the lawyer's care, see Rule 1.15.

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3300

COUNSELOR

RULE 2.1: ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in ~~narrowly~~narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility, as advisor, may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer ~~not offer advice~~ offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute

3343 resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily
3344 has no duty to initiate investigation of a client's affairs or to give advice that the client
3345 has indicated is unwanted, but a lawyer may initiate advice to a client when doing so
3346 appears to be in the client's interest.

3347 **RULE 2.2 INTERMEDIARY**

3348 ~~(a) A lawyer may act as intermediary between clients if: (1) the lawyer consults with~~
3349 ~~each client concerning the implications of the common representation, including the~~
3350 ~~advantages and risks involved, and the effect on the attorney-client privileges, and~~
3351 ~~obtains each client's consent to the common representation;(2) the lawyer reasonably~~
3352 ~~believes that the matter can be resolved on terms compatible with the clients' best~~
3353 ~~interests, that each client will be able to make adequately informed decisions in the~~
3354 ~~matter and that there is little risk of material prejudice to the interests of any of the~~
3355 ~~clients if the contemplated resolution is unsuccessful; and(3) the lawyer reasonably~~
3356 ~~believes that the common representation can be undertaken impartially and without~~
3357 ~~improper effect on other responsibilities the lawyer has to any of the clients.~~

3358 ~~(b) While acting as intermediary, the lawyer shall consult with each client concerning~~
3359 ~~the decisions to be made and the considerations relevant in making them, so that each~~
3360 ~~client can make adequately informed decisions.~~

3361 ~~(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of~~
3362 ~~the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the~~
3363 ~~lawyer shall not continue to represent any of the clients in the matter that was the subject~~
3364 ~~of the intermediation.~~

3365 **Comment**

3366 A lawyer acts as intermediary under this Rule when the lawyer represents two or more
3367 parties with potentially conflicting interests. A key factor in defining the relationship is
3368 whether the parties share responsibility for the lawyer's fee, but the common
3369 representation may be inferred from other circumstances. Because confusion can arise as
3370 to the lawyer's role where each party is not separately represented, it is important that
3371 the lawyer make clear the relationship.

3372 The Rule does not apply to a lawyer acting as arbitrator or mediator between or among
3373 parties who are not clients of the lawyer, even where the lawyer has been appointed with
3374 the concurrence of the parties. In performing such a role the lawyer may be subject to
3375 applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial
3376 Disputes prepared by a joint Committee of the American Bar Association and the
3377 American Arbitration Association.

3378 A lawyer acts as intermediary in seeking to establish or adjust a relationship between
3379 clients on an amicable and mutually advantageous basis; for example, in helping to
3380 organize a business in which two or more clients are entrepreneurs, working out the
3381 financial reorganization of an enterprise in which two or more clients have an interest,
3382 arranging a property distribution in settlement of an estate or mediating a dispute
3383 between clients. The lawyer seeks to resolve potentially conflicting interests by
3384 developing the parties' mutual interests. The alternative can be that each party may have
3385 to obtain separate representation with the possibility in some situations of incurring
3386 additional cost, complication or even litigation. Given these and other relevant factors,
3387 all the clients may prefer that the lawyer act as intermediary.

3388 In considering whether to act as intermediary between clients, a lawyer should be
3389 mindful that if the intermediation fails the result can be additional costs, embarrassment
3390 and recrimination. In some situations the risk of failure is so great that intermediation is
3391 plainly impossible. For example, a lawyer cannot undertake common representation of
3392 clients between whom contentious litigation is imminent or who contemplate

3393 contentious negotiations. More generally, if the relationship between the parties has
3394 already assumed definite antagonism, the possibility that the clients' interests can be
3395 adjusted by intermediation ordinarily is not very good.
3396 The appropriateness of intermediation can depend on its form. Forms of intermediation
3397 range from informal arbitration where each client's case is presented by the respective
3398 client and the lawyer decides the outcome, to mediation, to common representation
3399 where the client's interest are substantially though not entirely compatible. One form
3400 may be appropriate in circumstances where another would not. Other relevant factors
3401 are whether the lawyer subsequently will represent both parties on a continuing basis
3402 and whether the situation involves creating a relationship between the parties or
3403 terminating one.

3404 **Confidentiality and Privilege**

3405 A particularly important factor in determining the appropriateness of intermediation is
3406 the effect on client lawyer confidentiality and the attorney client privilege. In a common
3407 representation, the lawyer is still required both to keep each client adequately informed
3408 and to maintain confidentiality of information relating to the representation. See Rules
3409 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a
3410 delicate balance. If the balance cannot be maintained, the common representation is
3411 improper. With regard to the attorney client privilege, the prevailing rule is that as
3412 between commonly represented clients the privilege does not attach. Hence, it must be
3413 assumed that if litigation eventuates between the clients, the privilege will not protect
3414 any such communications, and the clients should be so advised.

3415 Since the lawyer is required to be impartial between commonly represented clients,
3416 intermediation is improper when that impartiality cannot be maintained. For example, a
3417 lawyer who has represented one of the clients for a long period and in a variety of
3418 matters might have difficulty being impartial between that client and one to whom the
3419 lawyer has only recently been introduced.

3420 **Withdrawal**

3421 Common representation does not diminish the rights of each client in the client lawyer
3422 relationship. Each has the right to loyal and diligent representation, the right to
3423 discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning
3424 obligations to a former client.

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3426 **RULE 2.3: EVALUATION FOR USE BY THIRD PERSONS**

3427 (a) A lawyer may undertake provide an evaluation of a matter affecting a client for the use
3428 of someone other than the client if: (1) the lawyer reasonably believes that making the
3429 evaluation is compatible with other aspects of the lawyer's relationship with the client;
3430 ~~and (2) the client consents after consultation or the evaluation is impliedly authorized by~~
3431 ~~the nature of the representation of the client.~~

3432 (b) When the lawyer knows or reasonably should know that the evaluation is likely to
3433 affect the client's interests materially and adversely, the lawyer shall not provide the
3434 evaluation unless the client gives informed consent.

3435 ~~(b)~~ Except as disclosure is required authorized in connection with a report of an
3436 evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

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Comment

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Definition

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[1] An evaluation may be performed at the client's direction ~~but~~ when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of ~~the~~ prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

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~~Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.~~

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[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

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Duty/Duties Owed to Third Person and Client

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[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

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Access to and Disclosure of Information

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[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some

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3483 circumstances, however, the terms of the evaluation may be limited. For example,
3484 certain issues or sources may be categorically excluded, or the scope of search may be
3485 limited by time constraints or the ~~non-cooperation~~noncooperation of persons having
3486 relevant information. Any such limitations ~~which~~that are material to the evaluation
3487 should be described in the report. If after a lawyer has commenced an evaluation, the
3488 client refuses to comply with the terms upon which it was understood the evaluation was
3489 to have been made, the lawyer's obligations are determined by law, having reference to
3490 the ~~term~~terms of the client's agreement and the surrounding circumstances. In no
3491 circumstances is the lawyer permitted to knowingly make a false statement of material
3492 fact or law in providing an evaluation under this Rule. See Rule 4.1.

3493 Obtaining Client's Informed Consent

3494 [5] Information relating to an evaluation is protected by Rule 1.6. In many situations,
3495 providing an evaluation to a third party poses no significant risk to the client; thus, the
3496 lawyer may be impliedly authorized to disclose information to carry out the
3497 representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing
3498 the evaluation will affect the client's interests materially and adversely, the lawyer must
3499 first obtain the client's consent after the client has been adequately informed concerning
3500 the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(f).

3501 Financial Auditors' Requests for Information

3502 [6] When a question concerning the legal situation of a client arises at the instance of the
3503 client's financial auditor and the question is referred to the lawyer, the lawyer's response
3504 may be made in accordance with procedures recognized in the legal profession. Such a
3505 procedure is set forth in the American Bar Association Statement of Policy Regarding
3506 Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

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3508 **RULE 2.4: LAWYER SERVING AS THIRD-PARTY NEUTRAL**

3509 (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons
3510 who are not clients of the lawyer to reach a resolution of a dispute or other matter that has
3511 arisen between them. Service as a third-party neutral may include service as an arbitrator,
3512 a mediator or in such other capacity as will enable the lawyer to assist the parties to
3513 resolve the matter.

3514 (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the
3515 lawyer is not representing them. When the lawyer knows or reasonably should know that
3516 a party does not understand the lawyer's role in the matter, the lawyer shall explain the
3517 difference between the lawyer's role as a third-party neutral and a lawyer's role as one
3518 who represents a client.

3519 Comment

3520 [1] Alternative dispute resolution has become a substantial part of the civil justice
3521 system. Aside from representing clients in dispute-resolution processes, lawyers often
3522 serve as third-party neutrals. A third-party neutral is a person, such as a mediator,
3523 arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented,

3524 in the resolution of a dispute or in the arrangement of a transaction. Whether a third-
3525 party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the
3526 particular process that is either selected by the parties or mandated by a court.

3527 [2] The role of a third-party neutral is not unique to lawyers, although, in some court-
3528 connected contexts, only lawyers are allowed to serve in this role or to handle certain
3529 types of cases. In performing this role, the lawyer may be subject to court rules or other
3530 law that apply either to third-party neutrals generally or to lawyers serving as third-party
3531 neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the
3532 Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of
3533 the American Bar Association and the American Arbitration Association or the Model
3534 Standards of Conduct for Mediators jointly prepared by the American Bar Association,
3535 the American Arbitration Association and the Society of Professionals in Dispute
3536 Resolution.

3537 [3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role
3538 may experience unique problems as a result of differences between the role of a third-
3539 party neutral and a lawyer's service as a client representative. The potential for
3540 confusion is significant when the parties are unrepresented in the process. Thus,
3541 paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is
3542 not representing them. For some parties, particularly parties who frequently use dispute-
3543 resolution processes, this information will be sufficient. For others, particularly those
3544 who are using the process for the first time, more information will be required. Where
3545 appropriate, the lawyer should inform unrepresented parties of the important differences
3546 between the lawyer's role as third-party neutral and a lawyer's role as a client
3547 representative, including the inapplicability of the attorney-client evidentiary privilege.
3548 The extent of disclosure required under this paragraph will depend on the particular
3549 parties involved and the subject matter of the proceeding, as well as the particular
3550 features of the dispute-resolution process selected.

3551 [4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a
3552 lawyer representing a client in the same matter. The conflicts of interest that arise for
3553 both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

3554 [5] Lawyers who represent clients in alternative dispute-resolution processes are
3555 governed by the Rules of Professional Conduct. When the dispute-resolution process
3556 takes place before a tribunal, as in binding arbitration (see Rule 1.0(n)), the lawyer's
3557 duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward
3558 both the third-party neutral and other parties is governed by Rule 4.1.

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3560 **ADVOCATE**

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3562 **RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS**
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3565 A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein,
3566 unless there is a basis in law and fact for doing so that is not frivolous, which includes a
3567 good faith argument for an extension, modification or reversal of existing law. A lawyer
3568 for the defendant in a criminal proceeding, or the respondent in a proceeding that could
3569 result in incarceration, may nevertheless so defend the proceeding as to require that every
3570 element of the case be established.

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3572 **Comment**

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3574 [1] The advocate has a duty to use legal procedure for the fullest ~~benefits~~benefit of the
3575 client's cause, but also a duty not to abuse legal procedure. The law, both procedural and
3576 substantive, establishes the limits within which an advocate may proceed. However, the
3577 law is not always clear and never is static. Accordingly, in determining the proper scope
3578 of advocacy, account must be taken of the law's ambiguities and potential for change.

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3580 [2] The filing of an action or defense or similar action taken for a client is not
3581 frivolous merely because the facts have not first been fully substantiated or because the
3582 lawyer expects to develop vital evidence only by discovery. What is required of lawyers,
3583 however, is that they inform themselves about the facts of their clients' cases and the
3584 applicable law and determine that they can make good faith arguments in support of their
3585 clients' positions. Such action is not frivolous even though the lawyer believes that the
3586 client's position ultimately will not prevail. The action is frivolous, however, if the ~~client~~
3587 ~~desires to have the action taken primarily for the purpose of harassing or maliciously~~
3588 ~~injuring a person or if the lawyer is unable either to make a good faith argument on the~~
3589 ~~merits of the action taken or to support the action taken by a good faith argument for an~~
3590 extension, modification or reversal of existing law.

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3592 [3] The lawyer's obligations under this Rule are subordinate to federal or state
3593 constitutional law that entitles a defendant in a criminal matter to the assistance of
3594 counsel in presenting a claim or contention that otherwise would be prohibited by this
3595 Rule.

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3599 **RULE 3.2: EXPEDITING LITIGATION**

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3601 A lawyer shall make reasonable efforts to expedite litigation consistent with the interests
3602 of the client.

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3604 **Comment**

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3606 [1] Dilatory practices bring the administration of justice into disrepute. ~~Delay~~
3607 ~~should~~Although there will be occasions when a lawyer may properly seek a
3608 postponement for personal reasons, it is not ~~be indulged merely~~proper for a lawyer to
3609 routinely fail to expedite litigation solely for the convenience of the advocates, ~~or.~~ Nor

3610 will a failure to expedite be reasonable if done for the purpose of frustrating an opposing
3611 party's attempt to obtain rightful redress or repose. It is not a justification that similar
3612 conduct is often tolerated by the bench and bar. The question is whether a competent
3613 lawyer acting in good faith would regard the course of action as having some substantial
3614 purpose other than delay. Realizing financial or other benefit from otherwise improper
3615 delay in litigation is not a legitimate interest of the client.

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3618 **RULE 3.3: CANDOR TOWARD THE TRIBUNAL**

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3620 (a) A lawyer shall not knowingly:

3621 (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of
3622 material fact or law previously made to the tribunal by the lawyer;

3623 ~~(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a~~
3624 ~~criminal or fraudulent act by the client;~~ (3) ~~fail to disclose to the tribunal legal authority~~
3625 ~~in the controlling jurisdiction known to the lawyer to be directly adverse to the position~~
3626 ~~of the client and not disclosed by opposing counsel; or~~

3627 (4) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or
3628 a witness called by the lawyer, has offered material evidence and the lawyer comes to
3629 know of its falsity, the lawyer shall take reasonable remedial measures, including, if
3630 necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than
3631 the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is
3632 false.

3633 (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a
3634 person intends to engage, is engaging or has engaged in criminal or fraudulent conduct
3635 related to the proceeding shall take reasonable remedial measures, including, if necessary,
3636 disclosure to the tribunal.

3637 ~~(b)~~ The duties stated in paragraphs (a) and (b) continue to the conclusion of
3638 the proceeding, and apply even if compliance requires disclosure of information
3639 otherwise protected by Rule 1.6.

3640 ~~(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.~~

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3642 (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts
3643 known to the lawyer ~~which~~ that will enable the tribunal to make an informed decision,
3644 whether or not the facts are adverse.

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3647 **Comment**

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3649 [1] This Rule governs the conduct of a lawyer who is representing a client in the
3650 proceedings of a tribunal. See Rule 1.0(n) for the definition of "tribunal." It also applies
3651 when the lawyer is representing a client in an ancillary proceeding conducted pursuant to
3652 the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph
3653 (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to
3654 know that a client who is testifying in a deposition has offered evidence that is false.

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3655 ~~The advocate's task is~~ [2] This Rule sets forth the special duties of lawyers as officers of
3656 the court to avoid conduct that undermines the integrity of the adjudicative process. A

3657 lawyer acting as an advocate in an adjudicative proceeding has an obligation to present
3658 the client's case with persuasive force. Performance of that duty while maintaining
3659 confidences of the client, however, is qualified by the advocate's duty of candor to the
3660 tribunal. ~~However~~Consequently, although a lawyer in an advocate does adversary
3661 proceeding is not required to present an impartial exposition of the law or to vouch for
3662 the evidence submitted in a cause, the lawyer must not allow the tribunal ~~is responsible~~
3663 for assessing its probative value to be misled by false statements of law or fact or
3664 evidence that the lawyer knows to be false.

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Representations by a Lawyer

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[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(ed) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(ed), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Misleading Legal Argument

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[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(~~3~~2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction ~~which~~that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

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False Offering Evidence

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~~When~~[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

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~~When false evidence is offered by the client, however,~~[6] If a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material knows that the client intends to testify falsely or wants the lawyer to introduce false evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

3706 [7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense
3707 counsel in criminal cases. See also Comment [9].

3708 [8] The prohibition against offering false evidence only applies if the lawyer knows that
3709 the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude
3710 its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however,
3711 can be inferred from the circumstances. See Rule 1.0(g). Thus, although a lawyer should
3712 resolve doubts about the veracity of testimony or other evidence in favor of the client, the
3713 lawyer cannot ignore an obvious falsehood.

3714 [9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer
3715 knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the
3716 lawyer reasonably believes is false. Offering such proof may reflect adversely on the
3717 lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's
3718 effectiveness as an advocate. Because of the special protections historically provided
3719 criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the
3720 testimony of such a client where the lawyer reasonably believes but does not know that
3721 the testimony will be false. Unless the lawyer knows the testimony will be false, the
3722 lawyer must honor the client's decision to testify. See also Comment [7].

3723 **Remedial Measures**

3724 [10] Having offered material evidence in the belief that it was true, a lawyer may
3725 subsequently come to know that the evidence is false. Or, a lawyer may be surprised
3726 when the lawyer's client, or another witness called by the lawyer, offers testimony the
3727 lawyer knows to be false, either during the lawyer's direct examination or in response to
3728 cross-examination by the opposing lawyer. In such situations or if the lawyer knows of
3729 the falsity of testimony elicited from the client during a deposition, the lawyer must take
3730 reasonable remedial measures. In such situations, the advocate's proper course is to
3731 remonstrate with the client confidentially, advise the client of the lawyer's duty of candor
3732 to the tribunal and seek the client's cooperation with respect to the withdrawal or
3733 correction of the false statements or evidence. If that fails, the advocate must take further
3734 remedial action. If withdrawal from the representation is not permitted or will not undo
3735 the effect of the false evidence, the advocate must make such disclosure to the tribunal as
3736 is reasonably necessary to remedy the situation, even if doing so requires the lawyer to
3737 reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal
3738 then to determine what should be done — making a statement about the matter to the trier
3739 of fact, ordering a mistrial or perhaps nothing.

3740 ~~Except in the defense~~[11] The disclosure of a ~~criminal accused, the rule generally~~
3741 ~~recognized is that, if necessary to rectify the situation, an advocate must disclose the~~
3742 ~~existence of the client's deception to the court or to the other party. Such disclosure's~~
3743 ~~false testimony~~ can result in grave consequences to the client, including not only a sense
3744 of betrayal but also loss of the case and perhaps a prosecution for perjury. But the
3745 alternative is that the lawyer cooperate in deceiving the court, thereby subverting the
3746 truth-finding process which the adversary system is designed to implement. See Rule
3747 1.2(ed). Furthermore, unless it is clearly understood that the lawyer will act upon the duty
3748 to disclose the existence of false evidence, the client can simply reject the lawyer's
3749 advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client
3750 could in effect coerce the lawyer into being a party to fraud on the court.

3751 **Perjury by a Criminal Defendant**

3752 ~~Whether an advocate for a criminally accused has the same duty of~~

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Preserving Integrity of Adjudicative Process

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[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure has been intensely debated. While it is agreed if necessary, whenever the lawyer knows that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the a person, including the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because of the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

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The most difficult situation, therefore, arises's client, intends to engage, is engaging or has engaged in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of fraudulent conduct related to the proceeding.

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Duration of Obligation

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[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

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Three resolutions the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is Rule when a coherent solution but makes the advocate a knowing instrument of perjury.

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The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused final judgment in the proceeding has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate been affirmed on appeal or the time for review has an obligation not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(e).

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Remedial Measures

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If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate

3798 ~~should seek to withdraw if that will remedy the situation. If withdrawal will not remedy~~
3799 ~~the situation or is impossible, the advocate should make disclosure to the court. It is for~~
3800 ~~the court then to determine what should be done making a statement about the~~
3801 ~~matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false~~
3802 ~~testimony was that of the client, the client may controvert the lawyer's version of their~~
3803 ~~communication when the lawyer discloses the situation to the court. If there is an issue~~
3804 ~~whether the client has committed perjury, the lawyer cannot represent the client in~~
3805 ~~resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might~~
3806 ~~in this way attempt to produce a series of mistrials and thus escape prosecution. However,~~
3807 ~~a second such encounter could be construed as a deliberate abuse of the right to counsel~~
3808 ~~and as such a waiver of the right to further representation.~~

3809 **Constitutional Requirements**

3810 ~~The general rule that an advocate must disclose the existence of perjury with respect to~~
3811 ~~a material fact, even that of a client applies to defense counsel in criminal cases, as well~~
3812 ~~as in other instances. However, the definition of the lawyer's ethical duty in such a~~
3813 ~~situation may be qualified by constitutional provisions for due process and the right to~~
3814 ~~counsel in criminal cases. The obligation of the advocate under these Rules is subordinate~~
3815 ~~to such constitutional requirements.~~

3816 **Refusing to Offer Proof Believed to Be False**

3817 ~~Generally speaking a lawyer has authority to refuse to offer testimony or other proof that~~
3818 ~~the lawyer believes is untrustworthy. Offering such proof may reflect~~
3819 ~~adversely on the lawyer's ability to discriminate in the quality of~~
3820 ~~evidence and thus impair the lawyer's effectiveness as an advocate.~~
3821 ~~In criminal cases, however, a lawyer may be denied this authority by constitutional~~
3822 ~~requirements governing the right to counsel.~~passed.

3823 **Ex Parte Proceedings**

3824 [14] Ordinarily, an advocate has the limited responsibility of presenting one side of the
3825 matters that a tribunal should consider in reaching a decision; the conflicting position is
3826 expected to be presented by the opposing party. However, in ~~many~~ ex parte proceeding,
3827 such as an application for a temporary restraining order, there is no balance of
3828 presentation by opposing advocates. The object of an ex parte proceeding is nevertheless
3829 to yield a substantially just result. The judge has an affirmative responsibility to accord
3830 the absent party just consideration. The lawyer for the represented party has the
3831 correlative duty to make disclosures of material facts known to the lawyer and that the
3832 lawyer reasonably believes are necessary to an informed decision.

3833 **Withdrawal**

3834 [15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does
3835 not require that the lawyer withdraw from the representation of a client whose interests
3836 will be or have been adversely affected by the lawyer's disclosure. The lawyer may,
3837 however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the
3838 lawyer's compliance with this Rule's duty of candor results in such an extreme
3839 deterioration of the client-lawyer relationship that the lawyer can no longer competently
3840 represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will
3841 be permitted to seek a tribunal's permission to withdraw. In connection with a request for
3842 permission to withdraw that is premised on a client's misconduct, a lawyer may reveal

3843 information relating to the representation only to the extent reasonably necessary to
3844 comply with this Rule or as otherwise permitted by Rule 1.6.

3845

3846 **RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL**
3847

3848 A lawyer shall not:

3849 (a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or
3850 conceal a document or other material having potential evidentiary value. A lawyer shall
3851 not counsel or assist another person to do any such act;

3852 (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement
3853 to a witness that is prohibited by law;

3854 (c) knowingly disobey an obligation under the rules of a tribunal except for an open
3855 refusal based on an assertion that no valid obligation exists;

3856 (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably
3857 diligent effort to comply with a legally proper discovery request by an opposing party;

3858 (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or
3859 that will not be supported by admissible evidence, assert personal knowledge of facts in
3860 issue except when testifying as a witness, or state a personal opinion as to the justness of
3861 a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or
3862 innocence of an accused; or

3863 (f) request a person other than a client to refrain from voluntarily giving relevant
3864 information to another party unless:

3865 (1) the person is a relative or an employee or other agent of a client; and

3866 (2) the lawyer reasonably believes that the person's interests will not be adversely
3867 affected by refraining from giving such information.

3868 **Comment**

3869 [1] The procedure of the adversary system contemplates that the evidence in a case is to
3870 be marshalled competitively by the contending parties. Fair competition in the adversary
3871 system is secured by prohibitions against destruction or concealment of evidence,
3872 improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

3873 [2] Documents and other items of evidence are often essential to establish a claim or
3874 defense. Subject to evidentiary privileges, the right of an opposing party, including the
3875 government, to obtain evidence through discovery or subpoena is an important procedural
3876 right. The exercise of that right can be frustrated if relevant material is altered, concealed
3877 or destroyed.

3878 [3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to
3879 compensate an expert witness on terms permitted by law.

3880 [4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving
3881 information to another party, for the employees may identify their interests with those of
3882 the client. See also Rule 4.2.

3883

3884 **RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL**

3885 (a) Before the trial of a case, a lawyer connected therewith shall not, except in the course
3886 of official proceedings, communicate with or cause another to communicate with anyone
3887 the lawyer knows to be a member of the venire from which the jury will be selected for
3888 the trial of the case.

3889 (b) During the trial of the case:

3890 (1) a lawyer connected therewith shall not, except in the course of official proceedings,
3891 communicate with or cause another to communicate with any member of the jury.

3892 (2) a lawyer who is not connected therewith shall not, except in the course of official
3893 proceedings, communicate with or cause another to communicate with a juror
3894 concerning the case.

3895

3896 (c) After discharge of the jury from further consideration of a case with which the lawyer
3897 was connected, the lawyer shall not ask questions of or make comments to a member of
3898 that jury that are calculated merely to harass or embarrass the juror or to influence the
3899 juror's actions in future jury service.

3900 (d) A lawyer shall not conduct or cause another, by financial support or otherwise, to
3901 conduct a vexatious or harassing investigation of a juror or prospective juror.

3902 (e) All restrictions imposed by this rule apply also to communications with or
3903 investigations of members of a family of a juror or prospective juror.

3904 (f) A lawyer shall reveal promptly to the court improper conduct by, or by another
3905 toward, a juror or prospective juror or a member of the family thereof, of which the
3906 lawyer has knowledge.

3907 (g) In an adversary proceeding a lawyer shall not communicate or cause another to
3908 communicate as to the merits of the case with the judge or an official before whom a
3909 proceeding is pending except:

3910 (1) in the course of official proceedings.

3911 (2) in writing, if the lawyer promptly delivers a copy of the writing to opposing counsel
3912 or to the adverse party if the party is not represented by a lawyer.

3913 (3) orally upon adequate notice to opposing counsel or to the adverse party if the
3914 adverse party is not represented by a lawyer.

3915 (4) as otherwise authorized by law.

3916 (h) A lawyer shall not engage in conduct intended to disrupt a tribunal.

3917 **Comment**

3918 [1] Many forms of improper influence upon a tribunal are proscribed by criminal law.
3919 Others are specified in the ABA Model Code of Judicial Conduct, with which an
3920 advocate should be familiar. A lawyer is required to avoid contributing to a violation of
3921 such provisions.

3922 [2] The advocate's function is to present evidence and argument so that the cause may be
3923 decided according to law. Refraining from abusive or obstreperous conduct is a corollary
3924 of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against
3925 abuse by a judge but should avoid reciprocation; the judge's default is no justification for
3926 similar dereliction by an advocate. An advocate can prevent the cause, protect the record
3927 for subsequent review and preserve professional integrity by patient firmness no less
3928 effectively than by belligerence or theatrics.

3929

3930 **RULE 3.6: TRIAL PUBLICITY**

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3932 ~~A lawyer~~(a) A lawyer who is participating or has participated in the investigation or
3933 litigation of a criminal matter shall not make an extrajudicial statement that a
3934 reasonable person would expect to statement about the matter that the lawyer knows or
3935 reasonably should know will be disseminated by means of public communication if the
3936 lawyer knows or reasonably should know that it will and will have a substantial
3937 likelihood of materially prejudicing a pending criminal jury trial of materially prejudicing
3938 a jury trial in a pending criminal matter.

3939 (b) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable
3940 lawyer would believe is required to protect a client from the substantial undue prejudicial
3941 effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement
3942 made pursuant to this paragraph shall be limited to such information as is necessary to
3943 mitigate the recent adverse publicity.

3944 (c) No lawyer associated in a firm or government agency with a lawyer subject to
3945 paragraph (a) shall make a statement prohibited by paragraph (a).

3946 **Comment**

3947 ~~Special rules of confidentiality may validly govern~~

3948 [1] It is difficult to strike a balance between protecting the right to a fair trial and
3949 safeguarding the right of free expression. Preserving the right to a fair trial necessarily
3950 entails some curtailment of the information that may be disseminated about a party prior
3951 to trial, particularly where trial by jury is involved. If there were no such limits, the result
3952 would be the practical nullification of the protective effect of the rules of forensic
3953 decorum and the exclusionary rules of evidence. On the other hand, there are vital social
3954 interests served by the free dissemination of information about events having legal
3955 consequences and about legal proceedings themselves. The public has a right to know

3956 about threats to its safety and measures aimed at assuring its security. It also has a
3957 legitimate interest in juvenile, domestic relations and mental disabilitythe conduct of
3958 judicial proceedings, and perhaps other types of litigation. Rule 3.4(e) requires
3959 compliance with such rules, particularly in matters of general public concern.
3960 Furthermore, the subject matter of legal proceedings is often of direct significance in
3961 debate and deliberation over questions of public policy.

3962 [2] The Rule sets forth a basic general prohibition against a lawyer's making statements
3963 that the lawyer knows or should know will have a substantial likelihood of materially
3964 prejudicing a pending criminal jury trial. Recognizing that the public value of informed
3965 commentary is great and the likelihood of prejudice to a proceeding by the commentary
3966 of a lawyer who is not involved in the proceeding is small, the rule applies only to
3967 lawyers who are, or who have been involved in the investigation or litigation of a case,
3968 and their associates.

3969 [3] Extrajudicial statements that might otherwise raise a question under this Rule may be
3970 permissible when they are made in response to statements made publicly by another
3971 party, another party's lawyer, or third persons, where a reasonable lawyer would believe
3972 a public response is required in order to avoid prejudice to the lawyer's client. When
3973 prejudicial statements have been publicly made by others, responsive statements may
3974 have the salutary effect of lessening any resulting adverse impact on the adjudicative
3975 proceeding. Such responsive statements should be limited to contain only such
3976 information as is necessary to mitigate undue prejudice created by the statements made
3977 by others.

3978 [4] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial
3979 statements about criminal proceedings.

3980

3981 **RULE 3.7: LAWYER AS WITNESS**

3982 (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a
3983 necessary witness ~~except where~~unless:

- 3984 (1) the testimony relates to an uncontested issue;
3985 (2) the testimony relates to the nature and value of legal services rendered in the case; or
3986 (3) disqualification of the lawyer would work substantial hardship on the client.

3987 (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is
3988 likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

3989 **Comment**

3990 [1] Combining the roles of advocate and witness can prejudice the tribunal and the
3991 opposing party and can also involve a conflict of interest between the lawyer and client.

3992 **Advocate-Witness Rule**

3993 [2] The tribunal has proper objection when the trier of fact may be confused or misled by
3994 a lawyer serving as both advocate and witness. The opposing party has proper objection
3995 where the combination of roles may prejudice that party's rights in the litigation. A
3996 witness is required to testify on the basis of personal knowledge, while an advocate is
3997 expected to explain and comment on evidence given by others. It may not be clear

3998 whether a statement by an advocate-witness should be taken as proof or as an analysis of
3999 the proof.

4000 [3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving
4001 as advocate and necessary witness except in those circumstances specified in paragraphs
4002 (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be
4003 uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2)
4004 recognizes that where the testimony concerns the extent and value of legal services
4005 rendered in the action in which the testimony is offered, permitting the lawyers to testify
4006 avoids the need for a second trial with new counsel to resolve that issue. Moreover, in
4007 such a situation the judge has first-hand~~firsthand~~ knowledge of the matter in issue; hence,
4008 there is less dependence on the adversary process to test the credibility of the testimony.

4009 [4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is
4010 required between the interests of the client and those of the tribunal and the opposing
4011 party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer
4012 prejudice depends on the nature of the case, the importance and probable tenor of the
4013 lawyer's testimony, and the probability that the lawyer's testimony will conflict with that
4014 of other witnesses. Even if there is risk of such prejudice, in determining whether the
4015 lawyer should be disqualified, due regard must be given to the effect of disqualification
4016 on the lawyer's client. It is relevant that one or both parties could reasonably foresee that
4017 the lawyer would probably be a witness. The principle~~conflict~~ of imputed interest
4018 disqualification principles stated in Rule~~Rules~~ 1.7, 1.9 and 1.10 have~~has~~ no application to
4019 this aspect of the problem.

4020 [5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a
4021 trial in which another lawyer in the lawyer's firm will testify as a necessary witness,
4022 paragraph (b) permits the lawyer to do so except in situations involving a conflict of
4023 interest.

4024 **Conflict of Interest**

4025 ~~Whether the combination of roles involves an improper~~ [6] In determining if it is
4026 permissible to act as advocate in a trial in which the lawyer will be a necessary witness,
4027 the lawyer must also consider that the dual role may give rise to a conflict of interest that
4028 will require compliance with respect to the client is determined by Rule~~Rules~~ 1.7 or 1.9.
4029 For example, if there is likely to be substantial conflict between the testimony of the
4030 client and that of the lawyer or a member of the lawyer's firm, the representation is
4031 improper~~involves~~ a conflict of interest that requires compliance with Rule 1.7. This
4032 would be true even though the lawyer might not be prohibited by paragraph (a) from
4033 simultaneously serving as advocate and witness because the lawyer's disqualification
4034 would work a substantial hardship on the client. Similarly, a lawyer who might be
4035 permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might
4036 be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is
4037 called as a witness on behalf of the client or is called by the opposing party. Determining
4038 whether or not such a conflict exists is primarily the responsibility of the lawyer
4039 involved. See Comment to Rule 1.7. If a lawyer who~~there~~ is a member of a firm may not
4040 act as both advocate and witness by reason of conflict of interest, the lawyer must secure
4041 the client's informed consent, confirmed in writing. In some cases, the lawyer will be
4042 precluded from seeking the client's consent. See Rule 1.10~~disqualifies the firm also~~ 1.7.
4043 See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(f) for the
4044 definition of "informed consent."

4045 [7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate
4046 because a lawyer with whom the lawyer is associated in a firm is precluded from doing so

4047 by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule
4048 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be
4049 precluded from representing the client by Rule 1.10 unless the client gives informed
4050 consent under the conditions stated in Rule 1.7.

4051

4052 **RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR**

4053 The prosecutor in a criminal case shall:

4054 (a) refrain from prosecuting a charge that the prosecutor knows is not supported by
4055 probable cause;

4056 (b) make reasonable efforts to assure that the accused has been advised of the right to,
4057 and the procedure for obtaining, counsel; and has been given reasonable opportunity to
4058 obtain counsel;

4059 (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights,
4060 such as the right to a preliminary hearing;

4061 (d) make timely disclosure to the defense of all evidence or information known to the
4062 prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in
4063 connection with sentencing, disclose to the defense and to the tribunal all unprivileged
4064 mitigating information known to the prosecutor, except when the prosecutor is relieved of
4065 this responsibility by a protective order of the tribunal;~~and~~

4066 (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present
4067 evidence about a past or present client unless the prosecutor reasonably believes:

4068 (1) the information sought is not protected from disclosure by any applicable privilege;

4069 (2) the evidence sought is essential to the successful completion of an ongoing
4070 investigation or prosecution; and

4071 (3) there is no other feasible alternative to obtain the information;

4072 ~~(e)~~ exercise reasonable care to prevent employees or other persons assisting or
4073 associated with the prosecutor in a criminal case and over whom the prosecutor has direct
4074 control from making an extrajudicial statement that the prosecutor would be prohibited
4075 from making under Rule 3.6.

4076

Comment

4077 [1] A prosecutor has the responsibility of a minister of justice and not simply that of an
4078 advocate. This responsibility carries with it specific obligations to see that the defendant
4079 is accorded procedural justice and that guilt is decided upon the basis of sufficient
4080 evidence. Precisely how far the prosecutor is required to go in this direction is a matter of
4081 debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA
4082 Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the
4083 product of prolonged and careful deliberation by lawyers experienced in both criminal

4084 prosecution and defense. Applicable law may require other measures by the prosecutor
4085 and knowing disregard of those obligations or a systematic abuse of prosecutorial
4086 discretion could constitute a violation of Rule 8.4.

4087 [2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a
4088 valuable opportunity to challenge probable cause. Accordingly, prosecutors should not
4089 seek to obtain waivers of preliminary hearings or other important pretrial rights from
4090 unrepresented accused persons. Paragraph (c) does not apply, however, to an accused
4091 appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful
4092 questioning of an uncharged suspect who has knowingly waived the rights to counsel
4093 and silence.

4094 [3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate
4095 protective order from the tribunal if disclosure of information to the defense could result
4096 in substantial harm to an individual or to the public interest.

4097 [4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and
4098 other criminal proceedings to those situations in which there is a genuine need to intrude
4099 into the client-lawyer relationship.

4100 [5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have
4101 a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a
4102 criminal prosecution, a prosecutor's extrajudicial statement can create the additional
4103 problem of increasing public condemnation of the accused. Although the announcement
4104 of an indictment, for example, will necessarily have severe consequences for the accused,
4105 a prosecutor can, and should, avoid comments which have no legitimate law enforcement
4106 purpose and have a substantial likelihood of increasing public opprobrium of the accused.
4107 Nothing in this Comment is intended to restrict the statements which a prosecutor may
4108 make which comply with Rule 3.6(b) or 3.6(c).

4109 [6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to
4110 responsibilities regarding lawyers and nonlawyers who work for or are associated with
4111 the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these
4112 obligations in connection with the unique dangers of improper extrajudicial statements in
4113 a criminal case.

4114

4115 **RULE 3.9: ADVOCATE IN NONADJUDICATIVE PROCEEDINGS**

4116 A lawyer representing a client before a legislative body or administrative body agency in
4117 a nonadjudicative proceeding shall disclose that the appearance is in a representative
4118 capacity and shall conform to the provisions of Rules 3.3(a) through (c), ~~and~~ 3.4(a)
4119 through (c), and 3.5.

4120 **Comment**

4121 [1] In representation before bodies such as legislatures, municipal councils, and executive
4122 and administrative agencies acting in a rule-making or policy-making capacity, lawyers
4123 present facts, formulate issues and advance argument in the matters under consideration.
4124 The decision-making body, like a court, should be able to rely on the integrity of the
4125 submissions made to it. A lawyer appearing before such a body ~~should~~ must deal with it

4126 honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through
4127 (c), 3.4(a) through (c) and 3.5.

4128 [2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do
4129 before a court. The requirements of this Rule therefore may subject lawyers to regulations
4130 inapplicable to advocates who are not lawyers. However, legislatures and administrative
4131 agencies have a right to expect lawyers to deal with them as they deal with courts.

4132 ~~This Rule~~[3] This Rule only applies when a lawyer represents a client in connection with
4133 an official hearing or meeting of a governmental agency or a legislative body to which
4134 the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to
4135 representation of a client in a negotiation or other bilateral transaction with a
4136 governmental agency; or in connection with an application for a license or other privilege
4137 or the client's compliance with generally applicable reporting requirements, such as the
4138 filing of income-tax returns. Nor does it apply to the representation of a client in
4139 connection with an investigation or examination of the client's affairs conducted by
4140 government investigators or examiners. Representation in such a ~~transaction~~ matters
4141 is governed by Rules 4.1 through 4.4.

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TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

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RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

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In the course of representing a client a lawyer shall not knowingly make a false statement of fact or law.

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Comment

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Misrepresentation

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[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

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Statements of Fact

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[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

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RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

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In representing a client, a lawyer shall not communicate about the subject of the representation with a ~~party~~person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized ~~by law to do so. A party who is a lawyer may communicate directly with another party unless expressly instructed to avoid communication by the lawyer for the other party, or unless the other party manifests a desire to communicate only through counsel by law or a court order.~~

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Comment

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[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those

4179 lawyers with the client-lawyer relationship and the uncounselled disclosure of
4180 information relating to the representation.

4181 [2] This Rule applies to communications with any person who is represented by counsel
4182 concerning the matter to which the communication relates.

4183 [3] The Rule applies even though the represented person initiates or consents to the
4184 communication. A lawyer must immediately terminate communication with a person if,
4185 after commencing communication, the lawyer learns that the person is one with whom
4186 communication is not permitted by this Rule.

4187 [4] This Rule does not prohibit communication with a ~~party~~represented person, or an
4188 employee or agent of ~~such a party~~person, concerning matters outside the representation.
4189 For example, the existence of a controversy between a government agency and a private
4190 party, or between two organizations, does not prohibit a lawyer for either from
4191 communicating with nonlawyer representatives of the other regarding a separate matter.
4192 ~~Also, parties~~Nor does this Rule preclude communication with a represented person who
4193 is seeking advice from a lawyer who is not otherwise representing a client in the matter.
4194 A lawyer may not make a communication prohibited by this Rule through the acts of
4195 another. See Rule 8.4(a). Parties to a matter may communicate directly with each other,
4196 and a lawyer is not prohibited from advising a client concerning a communication that the
4197 client is legally entitled to make. Also, a lawyer having independent justification or legal
4198 authorization for communicating with ~~the other party~~a represented person is permitted to
4199 do so. Communications authorized by law include, for example, the right of a party to a
4200 controversy with a government agency to speak with government officials about the
4201 matter.

4202 [5] Communications authorized by law may include communications by a lawyer on
4203 behalf of a client who is exercising a constitutional or other legal right to communicate
4204 with the government. Communications authorized by law may also include investigative
4205 activities of lawyers representing governmental entities, directly or through investigative
4206 agents, prior to the commencement of criminal or civil enforcement proceedings. When
4207 communicating with the accused in a criminal matter, a government lawyer must comply
4208 with this Rule in addition to honoring the constitutional rights of the accused. The fact
4209 that a communication does not violate a state or federal constitutional right is insufficient
4210 to establish that the communication is permissible under this Rule.

4211 [6] A lawyer who is uncertain whether a communication with a represented person is
4212 permissible may seek a court order. A lawyer may also seek a court order in exceptional
4213 circumstances to authorize a communication that would otherwise be prohibited by this
4214 Rule, for example, where communication with a person represented by counsel is
4215 necessary to avoid reasonably certain injury.

4216 [7] In the case of ~~an~~a represented organization, this Rule prohibits communications
4217 by ~~with~~a constituent of the organization who supervises, directs or regularly consults with
4218 the organization's lawyer for ~~one party~~concerning the matter in ~~representation with~~
4219 persons having a managerial responsibility on behalf of the organization, and with any
4220 other person or has authority to obligate the organization with respect to the matter or
4221 whose act or omission in connection with ~~that~~the matter may be imputed to the
4222 organization for purposes of civil or criminal liability or whose statement may constitute
4223 an admission on the part. The term "constituent" is defined in Comment [1] to Rule 1.13.
4224 Consent of the organization's lawyer is not required for communication with a former
4225 constituent. If ~~an~~ agent or employeeconstituent of the organization is represented in the
4226 matter by ~~his or her own~~ counsel, the consent by that counsel to a communication will be

4227 sufficient for purposes of this Rule. Compare Rule 3.4(f). ~~This Rule also covers any~~
4228 communicating with a current or former constituent of an organization, a lawyer must not
4229 use methods of obtaining evidence that violate the legal rights of the organization. See
4230 Rule 4.4.

4231 [8] The prohibition on communications with a represented person only applies in
4232 circumstances where the lawyer knows that the person is in fact represented in the matter
4233 to be discussed. This means that the lawyer has actual knowledge of the fact of the
4234 representation; but such actual knowledge may be inferred from the circumstances. See
4235 Rule 1.0(g). Thus, the lawyer cannot evade the requirement of obtaining the consent of
4236 counsel by closing eyes to the obvious.

4237 [9] In the event the person, whether or with whom the lawyer communicates is not a
4238 party to a formal proceeding, who is known to be represented by counsel concerning the
4239 matter in question, the lawyer's communications are subject to Rule 4.3.

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4241 **RULE 4.3: DEALING WITH UNREPRESENTED PERSON**

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4243 (a) In dealing on behalf of a client with a person who is not represented by counsel, a
4244 lawyer ~~shall clearly disclose whether the client's interests are adverse to the~~
4245 ~~interests of such person and shall not state or imply that the lawyer is disinterested;~~

4246 (b) a lawyer shall clearly disclose that the client's interests are adverse to the interests of
4247 the unrepresented person, if the lawyer knows or reasonably should know that the
4248 interests are adverse;

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4250 ~~(b) When~~(c) when the lawyer knows or reasonably should know that the unrepresented
4251 person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable
4252 efforts to correct the misunderstanding; and

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4254 ~~(ed) During the course of representation of a client a lawyer shall not give legal advice to~~
4255 ~~the unrepresented person who is not represented by a lawyer, other than the advice to~~
4256 ~~secure counsel, on those issues as to which~~if the lawyer knows or reasonably should
4257 know that the interests of each the unrepresented person are or have a reasonable
4258 possibility of being in conflict with the interests of the client.

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Comment

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4262 [1] An unrepresented person, particularly one not experienced in dealing with legal
4263 matters, might assume that a lawyer is disinterested in loyalties or is a disinterested
4264 authority on the law even when the lawyer represents a client. In order to avoid a
4265 misunderstanding, a lawyer will typically need to identify the lawyer's client and, where
4266 the lawyer knows or reasonably should know that the interests are adverse, disclose that
4267 the client has interests opposed to those of the unrepresented person. For
4268 misunderstandings that sometimes arise when a lawyer for an organization deals with an
4269 unrepresented constituent, see Rule 1.13(d).

4270

4271 [2] The Rule distinguishes between situations involving unrepresented persons whose
4272 interests may be adverse to those of the lawyer’s client and those in which the person’s
4273 interests are not in conflict with the client’s. In the former situation, the possibility that
4274 the lawyer will compromise the unrepresented person’s interests is so great that the Rule
4275 prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a
4276 lawyer is giving impermissible advice may depend on the experience and sophistication
4277 of the unrepresented person, as well as the setting in which the behavior and comments
4278 occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or
4279 settling a dispute with an unrepresented person. So long as the lawyer has explained that
4280 the lawyer represents a party whose interests are adverse and is not representing the
4281 person, the lawyer may inform the person of the terms on which the lawyer’s client will
4282 enter into an agreement or settle a matter, prepare documents that require the person’s
4283 signature and explain the lawyer’s own view of the meaning of the document or the
4284 lawyer’s view of the underlying legal obligations.

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4286 **RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS**

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4288 (a) In representing a client, a lawyer shall not use means that have no substantial
4289 purpose other than to embarrass, delay, or burden a third person, or use methods
4290 of obtaining evidence that violate the legal rights of such a person.

4291 (b) A lawyer who receives a document relating to the representation of the
4292 lawyer’s client and knows or reasonably should know that the document was
4293 inadvertently sent shall promptly notify the sender.

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Comment

4295 [1] Responsibility to a client requires a lawyer to subordinate the interests of others to
4296 those of the client, but that responsibility does not imply that a lawyer may disregard the
4297 rights of third persons. It is impractical to catalogue all such rights, but they include legal
4298 restrictions on methods of obtaining evidence from third persons and unwarranted
4299 intrusions into privileged relationships, such as the client-lawyer relationship.

4300

LAW FIRMS AND ASSOCIATIONS

4301 [2] Paragraph (b) recognizes that lawyers sometimes receive documents that were
4302 mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or
4303 reasonably should know that such a document was sent inadvertently, then this Rule
4304 requires the lawyer to promptly notify the sender in order to permit that person to take
4305 protective measures. Whether the lawyer is required to take additional steps, such as
4306 returning the original document, is a matter of law beyond the scope of these Rules, as is
4307 the question of whether the privileged status of a document has been waived. Similarly,
4308 this Rule does not address the legal duties of a lawyer who receives a document that the
4309 lawyer knows or reasonably should know may have been wrongfully obtained by the
4310 sending person. For purposes of this Rule, “document” includes e-mail or other electronic
4311 modes of transmission subject to being read or put into readable form.

4312 [3] Some lawyers may choose to return a document unread, for example, when the
4313 lawyer learns before receiving the document that it was inadvertently sent to the wrong

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address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

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4318 **LAW FIRM AND ASSOCIATIONS**
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4320 **RULE 5.1: RESPONSIBILITIES OF A PARTNER OR SUPERVISORY**
4321 **LAWYER**

4322 (a) A partner in a law firm, and a lawyer who individually or together with other lawyers
4323 possesses comparable managerial authority in a law firm, shall make reasonable efforts to
4324 ensure that the firm has in effect measures giving reasonable assurance that all lawyers in
4325 the firm conform to the Rules of Professional Conduct.

4326 (b) A lawyer having direct supervisory authority over another lawyer shall make
4327 reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional
4328 Conduct.

4329 (c) A lawyer shall be responsible for another lawyer's violation of the Rules of
4330 Professional Conduct if:

4331 (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct
4332 involved; or

4333 (2) the lawyer is a partner or has comparable managerial authority in the law firm in
4334 which the other lawyer practices, or has direct supervisory authority over the other
4335 lawyer, and knows of the conduct at a time when its consequences can be avoided or
4336 mitigated but fails to take reasonable remedial action.

4337
4338 **Comment**

4339 Paragraphs [1] Paragraph (a) and (b) refer applies to lawyers who have
4340 supervisory managerial authority over the professional work of a firm or legal department
4341 of a government agency. See Rule 1.0(d). This includes members of a partnership and,
4342 the shareholders in a law firm organized as a professional corporation, and members of
4343 other associations authorized to practice law; lawyers having supervisory comparable
4344 managerial authority in the a legal services organization or a law department of an
4345 enterprise or government agency; and lawyers who have intermediate managerial
4346 responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory
4347 authority over the work of other lawyers in a firm.

4348 [2] Paragraph (a) requires lawyers with managerial authority within a firm to make
4349 reasonable efforts to establish internal policies and procedures designed to provide
4350 reasonable assurance that all lawyers in the firm will conform to the Rules of Professional
4351 Conduct. Such policies and procedures include those designed to detect and resolve
4352 conflicts of interest, identify dates by which actions must be taken in pending matters,
4353 account for client funds and property and ensure that inexperienced lawyers are properly
4354 supervised.

4355 The [3] Other measures that may be required to fulfill the responsibility prescribed in
4356 paragraphs paragraph (a) and (b) can depend on the firm's structure and the nature of its
4357 practice. In a small firm of experienced lawyers, informal supervision and occasional
4358 admonition periodic review of compliance with the required systems ordinarily might be
4359 sufficient will suffice. In a large firm, or in practice situations in which intensely difficult
4360 ethical problems frequently arise, more elaborate procedures measures may be necessary.

4361 Some firms, for example, have a procedure whereby junior lawyers can make
4362 confidential referral of ethical problems directly to a designated senior partner or special
4363 committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal
4364 education in professional ethics. In any event, the ethical atmosphere of a firm can
4365 influence the conduct of all its members and ~~a lawyer having authority over the work of~~
4366 ~~another partner~~ may not assume that all lawyers associated with the subordinate
4367 lawyer firm will inevitably conform to the Rules.

4368 [4] Paragraph (c)(4) expresses a general principle of personal responsibility for acts of
4369 another. See also Rule 8.4(a).

4370 [5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable
4371 managerial authority in a law firm, as well as a lawyer who has direct supervisory
4372 authority over performance of specific legal work by another lawyer. Whether a lawyer
4373 has ~~such~~ supervisory authority in particular circumstances is a question of fact. Partners
4374 ~~of a private firm and lawyers with comparable authority~~ have at least indirect
4375 responsibility for all work being done by the firm, while a partner or manager in charge
4376 of a particular matter ordinarily also has direct authority over supervisory responsibility
4377 for the work of other firm lawyers engaged in the matter. Appropriate remedial action by
4378 a partner or managing lawyer would depend on the immediacy of ~~the that partner lawyer's~~
4379 involvement and the seriousness of the misconduct. ~~The~~ supervisor is required to
4380 intervene to prevent avoidable consequences of misconduct if the supervisor knows that
4381 the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate
4382 misrepresented a matter to an opposing party in negotiation, the supervisor as well as the
4383 subordinate has a duty to correct the resulting misapprehension.

4384 [6] Professional misconduct by a lawyer under supervision could reveal a violation of
4385 paragraph (b) on the part of the supervisory lawyer even though it does not entail a
4386 violation of paragraph (c) because there was ~~not~~ no direction, ratification or knowledge of
4387 the violation.

4388 [7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for
4389 the conduct of a partner, associate or subordinate. Whether a lawyer ~~might~~ may be liable
4390 civilly or criminally for another lawyer's conduct is a question of law beyond the scope
4391 of these Rules.

4392 [8] The duties imposed by this Rule on managing and supervising lawyers do not alter the
4393 personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See
4394 Rule 5.2(a).

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4397 **RULE 5.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER**

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4399 (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the
4400 lawyer acted at the direction of another person.

4401 (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that
4402 lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an
4403 arguable question of professional duty.

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Comment

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[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

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[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

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RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

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With respect to a nonlawyer employed or retained by or associated with a lawyer:

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(a) ~~A partner~~ a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

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(b) ~~A~~ a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

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(c) ~~A~~ a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

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Comment

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[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether

4443 employees or independent contractors, act for the lawyer in rendition of the lawyer's
4444 professional services. A lawyer ~~should~~must give such assistants appropriate instruction
4445 and supervision concerning the ethical aspects of their employment, particularly
4446 regarding the obligation not to disclose information relating to representation of the
4447 client, and should be responsible for their work product. The measures employed in
4448 supervising nonlawyers should take account of the fact that they do not have legal
4449 training and are not subject to professional discipline.

4450 [2] Paragraph (a) requires lawyers with managerial authority within a law firm to make
4451 reasonable efforts to establish internal policies and procedures designed to provide
4452 reasonable assurance that nonlawyers in the firm will act in a way compatible with the
4453 Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to
4454 lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c)
4455 specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer
4456 that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

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4460 **RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER**

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4462 (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

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4463 (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide
4464 for the payment of money, over a reasonable period of time after the lawyer's death, to
4465 the lawyer's estate or to one or more specified persons;

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4466 (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer
4467 may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of
4468 that lawyer the agreed-upon purchase price;

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4469 (3) a lawyer or law firm may include nonlawyer employees in a compensation or
4470 retirement plan, even though the plan is based in whole or in part on a profit-sharing
4471 arrangement;

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4472 (4) subject to full disclosure and court approval a lawyer may share court-awarded legal
4473 fees with a nonprofit organization that employed, retained or recommended employment
4474 of the lawyer in the matter; and

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4475 (5) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer
4476 may pay to the estate of the deceased lawyer the proportion of the total compensation
4477 which fairly represents the services rendered by the deceased lawyer; ~~(3) a lawyer or~~
4478 law firm may include nonlawyer employees in a ~~compensation or retirement plan, even~~
4479 though the plan is based in whole or in part on a profit sharing arrangement; and ~~(4) a~~
4480 lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may,
4481 pursuant to the provisions of Rule 1.17, pay to the ~~estate or other representative of that~~
4482 lawyer the agreed-upon purchase price.

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4484 (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the
4485 partnership consist of the practice of law.

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4487 (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to
4488 render legal services for another to direct or regulate the lawyer's professional judgment
4489 in rendering such legal services.

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- (d) A lawyer shall not practice with or in the form of a professional ~~firm~~corporation or association authorized to practice law for a profit, if
- (1) a nonlawyer~~;~~⁽¹⁾ owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of a ~~the~~ lawyer for a reasonable time during administration;
 - (2) ~~possess~~a nonlawyer possesses governance authority, unless permitted by the Minnesota ~~Professional~~Professional Firms Act; or
 - (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, ~~the~~that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8 (f).

**RULE 5.5: UNAUTHORIZED PRACTICE OF LAW
; MULTIJURISDICTIONAL PRACTICE OF LAW**

(a) A lawyer shall not:~~(a)~~ practice law in a jurisdiction where to do so violates in violation of the regulation of the legal profession in that jurisdiction; or assist another in doing so, except that a lawyer admitted to practice in Minnesota does not violate this rule by conduct in another jurisdiction that is permitted in Minnesota under Rule 5.5 (c) and (d) for lawyers not admitted to practice in Minnesota.

~~(b) assist a person who is not a member of the bar in the performance~~

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of activity that constitutes the unauthorized practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

4537 (2) are in or reasonably related to a pending or potential proceeding before a tribunal in
4538 this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized
4539 by law or order to appear in such proceeding or reasonably expects to be so authorized;
4540 (3) are in or reasonably related to a pending or potential arbitration, mediation, or other
4541 alternative dispute resolution proceeding in this or another jurisdiction, if the services
4542 arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the
4543 lawyer is admitted to practice and are not services for which the forum requires pro hac
4544 vice admission; or
4545 (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to
4546 the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
4547
4548 (d) A lawyer admitted in another United States jurisdiction, and not disbarred or
4549 suspended from practice in any jurisdiction, may provide legal services in this
4550 jurisdiction that are services that the lawyer is authorized to provide by federal law or
4551 other law of this jurisdiction.

4552 **Comment**

4553 [1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to
4554 practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or
4555 may be authorized by court rule or order or by law to practice for a limited purpose or on
4556 a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer,
4557 whether through the lawyer's direct action or by the lawyer assisting another person. The
4558 exception is intended to permit a Minnesota lawyer, without violating this Rule, to
4559 engage in practice in another jurisdiction as Rule 5.5 (c) and (d) permit a lawyer admitted
4560 to practice in another jurisdiction to engage in practice in Minnesota. A lawyer who does
4561 so in another jurisdiction in violation of its law or rules may be subject to discipline or
4562 other sanctions in that jurisdiction.

4563 [2] The definition of the practice of law is established by law and varies from one
4564 jurisdiction to another. Whatever the definition, limiting the practice of law to members
4565 of the bar protects the public against rendition of legal services by unqualified persons.
4566 Paragraph (b) This Rule does not prohibit a lawyer from employing the services of
4567 paraprofessionals and delegating functions to them, so long as the lawyer supervises the
4568 delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does
4569 not prohibit lawyers from providing

4570 [3] A lawyer may provide professional advice and instruction to nonlawyers whose
4571 employment requires knowledge of the law; for example, claims adjusters, employees of
4572 financial or commercial institutions, social workers, accountants and persons employed in
4573 government agencies. Lawyers also may assist independent nonlawyers, such as
4574 paraprofessionals, who are authorized by the law of a jurisdiction to provide particular
4575 law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed
4576 pro se.

4577 [4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice
4578 generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or
4579 other systematic and continuous presence in this jurisdiction for the practice of law.
4580 Presence may be systematic and continuous even if the lawyer is not physically present
4581 here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer
4582 is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

4583 [5] There are occasions in which a lawyer admitted to practice in another United States
4584 jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may
4585 provide legal services on a temporary basis in this jurisdiction under circumstances that
4586 do not create an unreasonable risk to the interests of their clients, the public or the courts.
4587 Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified
4588 does not imply that the conduct is or is not authorized. With the exception of paragraph
4589 (d), this Rule does not authorize a lawyer to establish an office or other systematic and
4590 continuous presence in this jurisdiction without being admitted to practice generally here.

4591 [6] There is no single test to determine whether a lawyer’s services are provided on a
4592 “temporary basis” in this jurisdiction, and may therefore be permissible under paragraph
4593 (c). Services may be “temporary” even though the lawyer provides services in this
4594 jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is
4595 representing a client in a single lengthy negotiation or litigation.

4596 [7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any
4597 United States jurisdiction, which includes the District of Columbia and any state, territory
4598 or commonwealth of the United States. The word “admitted” in paragraph (c)
4599 contemplates that the lawyer is authorized to practice in the jurisdiction in which the
4600 lawyer is admitted and excludes a lawyer who while technically admitted is not
4601 authorized to practice, because, for example, the lawyer is on inactive status.

4602 [8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if
4603 a lawyer admitted only in another jurisdiction associates with a lawyer licensed to
4604 practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to
4605 practice in this jurisdiction must actively participate in and share responsibility for the
4606 representation of the client.

4607 [9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law
4608 or order of a tribunal or an administrative agency to appear before the tribunal or agency.
4609 This authority may be granted pursuant to formal rules governing admission pro hac vice
4610 or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a
4611 lawyer does not violate this Rule when the lawyer appears before a tribunal or agency
4612 pursuant to such authority. To the extent that a court rule or other law of this jurisdiction
4613 requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission
4614 pro hac vice before appearing before a tribunal or administrative agency, this Rule
4615 requires the lawyer to obtain that authority.

4616 [10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on
4617 a temporary basis does not violate this Rule when the lawyer engages in conduct in
4618 anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized
4619 to practice law or in which the lawyer reasonably expects to be admitted pro hac vice.
4620 Examples of such conduct include meetings with the client, interviews of potential
4621 witnesses, and the review of documents. Similarly, a lawyer admitted only in another
4622 jurisdiction may engage in conduct temporarily in this jurisdiction in connection with
4623 pending litigation in another jurisdiction in which the lawyer is or reasonably expects to
4624 be authorized to appear, including taking depositions in this jurisdiction.

4625 [11] When a lawyer has been or reasonably expects to be admitted to appear before a
4626 court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are
4627 associated with that lawyer in the matter, but who do not expect to appear before the
4628 court or administrative agency. For example, subordinate lawyers may conduct research,
4629 review documents, and attend meetings with witnesses in support of the lawyer
4630 responsible for the litigation.

4631 [12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to
4632 perform services on a temporary basis in this jurisdiction if those services are in or
4633 reasonably related to a pending or potential arbitration, mediation, or other alternative
4634 dispute resolution proceeding in this or another jurisdiction, if the services arise out of or
4635 are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is
4636 admitted to practice. The lawyer, however, must obtain admission pro hac vice in the
4637 case of a court-annexed arbitration or mediation or otherwise if court rules or law so
4638 require.

4639 [13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain
4640 legal services on a temporary basis in this jurisdiction that arise out of or are reasonably
4641 related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are
4642 not within paragraphs (c)(2) or (c)(3). These services include both legal services and
4643 services that nonlawyers may perform but that are considered the practice of law when
4644 performed by lawyers.

4645 [14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably
4646 related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety
4647 of factors evidence such a relationship. The lawyer's client may have been previously
4648 represented by the lawyer, or may be resident in or have substantial contacts with the
4649 jurisdiction in which the lawyer is admitted. The matter, although involving other
4650 jurisdictions, may have a significant connection with that jurisdiction. In other cases,
4651 significant aspects of the lawyer's work might be conducted in that jurisdiction or a
4652 significant aspect of the matter may involve the law of that jurisdiction. The necessary
4653 relationship might arise when the client's activities or the legal issues involve multiple
4654 jurisdictions, such as when the officers of a multinational corporation survey potential
4655 business sites and seek the services of their lawyer in assessing the relative merits of
4656 each. In addition, the services may draw on the lawyer's recognized expertise developed
4657 through the regular practice of law on behalf of clients in matters involving a particular
4658 body of federal, nationally-uniform, foreign, or international law.

4659 [15] Paragraph (d) identifies a circumstance in which a lawyer who is admitted to
4660 practice in another United States jurisdiction, and is not disbarred or suspended from
4661 practice in any jurisdiction, may establish an office or other systematic and continuous
4662 presence in this jurisdiction for the practice of law as well as provide legal services on a
4663 temporary basis. Except as provided in paragraph (d), a lawyer who is admitted to
4664 practice law in another jurisdiction and who establishes an office or other systematic or
4665 continuous presence in this jurisdiction must become admitted to practice law generally
4666 in this jurisdiction.

4667 [16] Paragraph (d) recognizes that a lawyer may provide legal services in a jurisdiction
4668 in which the lawyer is not licensed when authorized to do so by federal or other law,
4669 which includes statute, court rule, executive regulation or judicial precedent.

4670 [17] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or
4671 otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

4672 [18] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to
4673 paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to
4674 practice law in this jurisdiction. For example, that may be required when the
4675 representation occurs primarily in this jurisdiction and requires knowledge of the law of
4676 this jurisdiction. See Rule 1.4(b).

4677 [19] Paragraphs (c) and (d) do not authorize communications advertising legal services to
4678 prospective clients in this jurisdiction by lawyers who are admitted to practice in other
4679 jurisdictions. Whether and how lawyers may communicate the availability of their
4680 services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

4681

4682 **RULE 5.6: RESTRICTIONS ON RIGHT TO PRACTICE**

4683

4684 A lawyer shall not participate in offering or making:

4685

4686 (a) a partnership or, shareholders, operating, employment, or other similar type of
4687 agreement that restricts the right~~rights~~ of a lawyer to practice after termination of the
4688 relationship, except an agreement concerning benefits upon retirement; or

4689

4690 (b) an agreement in which a restriction on the lawyer's right to practice is part of the
4691 settlement of a client controversy between private parties.

4692

4693 **Comment**

4694

4695 [1] An agreement restricting the right of partners or associates~~lawyers~~ to practice after
4696 leaving a firm not only limits their professional autonomy but also limits the freedom of
4697 clients to choose a lawyer. Paragraph (a) prohibits such agreements except for
4698 restrictions incident to provisions concerning retirement benefits from~~for~~ service with the
4699 firm.

4700

4701 Paragraph~~2~~ paragraph (b) prohibits a lawyer from agreeing~~agreement~~ not to represent
4702 other persons in connection with settling a claim on behalf of a client.

4703

4704 [3] This Rule does not apply to prohibit restrictions that may be included in the terms of
4705 the sale of a law practice pursuant to Rule 1.17.

4706

4707

4708

4709 **RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES**

4710

4711 (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the
4712 provision of law-related services, as defined in paragraph (b), if the law-related services
4713 are provided:

4714 (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of
4715 legal services to clients; or

4716 (2) in other circumstance by an entity controlled by the lawyer individually or with others
4717 if the lawyer fails to take reasonable measures to assure that a person obtaining the law-
4718 related services knows that the services are not legal services and that the protections of
4719 the client-lawyer relationship do not exist.

4720

4721 (b) The term “law-related services” denotes services that might reasonably be performed
4722 in conjunction with and in substance are related to the provision of legal services, and
4723 that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

4724
4725 **Comment**

4726 ~~This Rule does not prohibit restrictions that may be included in the terms of~~

4727
4728 [1] When a lawyer performs law-related services or controls an organization that does
4729 so, there exists the potential for ethical problems. Principal among these is the sale of a
4730 law practice pursuant to possibility that the person for whom the law-related services are
4731 performed fails to Rule 1.17.

4732 ~~**Rule 5.7. Employment Of Disbarred, Suspended, Or Involuntarily Inactive**~~
4733 ~~**Lawyers**~~understand that the services may not carry with them the protections normally
4734 afforded as part of the client-lawyer relationship. The recipient of the law-related
4735 services may expect, for example, that the protection of client confidences, prohibitions
4736 against representation of persons with conflicting interests, and obligations of a lawyer
4737 to maintain professional independence apply to the provision of law-related services
4738 when that may not be the case.

4739
4740 [2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the
4741 lawyer does not provide any legal services to the person for whom the law-related
4742 services are performed and whether the law-related services are performed through a
4743 law firm or a separate entity. The Rule identifies the circumstances in which all of the
4744 Rules of Professional Conduct apply to the provision of law-related services. Even
4745 when those circumstances do not exist, however, the conduct of a lawyer involved in the
4746 provision of law-related services is subject to those Rules that apply generally to lawyer
4747 conduct, regardless of whether the conduct involves the provision of legal services. See,
4748 e.g., Rule 8.4.

4749
4750 [3] When law-related services are provided by a lawyer under circumstances that are not
4751 distinct from the lawyer’s provision of legal services to clients, the lawyer in providing
4752 the law-related services must adhere to the requirements of the Rules of Professional
4753 Conduct as provided in paragraph (a)(1). Even when the law-related and legal services
4754 are provided in circumstances that are distinct from each other, for example through
4755 separate entities or different support staff within the law firm, the Rules of Professional
4756 Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes
4757 reasonable measures to assure that the recipient of the law-related services knows that
4758 the services are not legal services and that the protections of the client-lawyer
4759 relationship do not apply.

4760
4761 [4] Law-related services also may be provided through an entity that is distinct from that
4762 through which the lawyer provides legal services. If the lawyer individually or with
4763 others has control of such an entity’s operations, the Rule requires the lawyer to take
4764 reasonable measures to assure that each person using the services of the entity knows
4765 that the services provided by the entity are not legal services and that the Rules of
4766 Professional Conduct that relate to the client-lawyer relationship do not apply. A
4767 lawyer’s control of an entity extends to the ability to direct its operation. Whether a
4768 lawyer has such control will depend upon the circumstances of the particular case.

4769
4770 [5] When a client-lawyer relationship exists with a person who is referred by a lawyer to
4771 a separate law-related service entity controlled by the lawyer, individually or with
4772 others, the lawyer must comply with Rule 1.8(a).

4773
4774 [6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a

4775 person using law-related services understands the practical effect or significance of the
4776 inapplicability of the Rules of Professional Conduct, the lawyer should communicate to
4777 the person receiving the law-related services, in a manner sufficient to assure that the
4778 person understands the significance of the fact, that the relationship of the person to the
4779 business entity will not be a client-lawyer relationship. The communication should be
4780 made before entering into an agreement for provision of or providing law-related
4781 services, and preferably should be in writing.

4782
4783 [7] The burden is upon the lawyer to show that the lawyer has taken reasonable
4784 measures under the circumstances to communicate the desired understanding. For
4785 instance, a sophisticated user of law-related services, such as a publicly held
4786 corporation, may require a lesser explanation than someone unaccustomed to making
4787 distinctions between legal services and law-related services, such as an individual
4788 seeking tax advice from a lawyer-accountant or investigative services in connection with
4789 a lawsuit.

4790
4791 [8] Regardless of the sophistication of potential recipients of law-related services, a
4792 lawyer should take special care to keep separate the provision of law-related and legal
4793 services in order to minimize the risk that the recipient will assume that the law-related
4794 services are legal services. The risk of such confusion is especially acute when the
4795 lawyer renders both types of services with respect to the same matter. Under some
4796 circumstances the legal and law-related services may be so closely entwined that they
4797 cannot be distinguished from each other, and the requirement of disclosure and
4798 consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a
4799 lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent
4800 required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer
4801 controls complies in all respects with the Rules of Professional Conduct.

4802
4803 [9] A broad range of economic and other interests of clients may be served by lawyers'
4804 engaging in the delivery of law-related services. Examples of law-related services
4805 include providing title insurance, financial planning, accounting, trust services, real
4806 estate counseling, legislative lobbying, economic analysis, social work, psychological
4807 counseling, tax preparation, and patent, medical or environmental consulting.

4808
4809 [10] When a lawyer is obliged to accord the recipients of such services the protections
4810 of those Rules that apply to the client-lawyer relationship, the lawyer must take special
4811 care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7
4812 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously
4813 adhere to the requirements of Rule 1.6 relating to disclosure of confidential information.
4814 The promotion of the law-related services must also in all respects comply with Rules
4815 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should
4816 take special care to identify the obligations that may be imposed as a result of a
4817 jurisdiction's decisional law.

4818
4819 [11] When the full protections of all of the Rules of Professional Conduct do not apply
4820 to the provision of law-related services, principles of law external to the Rules, for
4821 example, the law of principal and agent, govern the legal duties owed to those receiving
4822 the services. Those other legal principles may establish a different degree of protection
4823 for the recipient with respect to confidentiality of information, conflicts of interest and
4824 permissible business relationships with clients. See also Rule 8.4 (Misconduct).

4825
4826
4827

4828 **RULE 5.8: EMPLOYMENT OF DISBARRED, SUSPENDED, OR**
4829 **INVOLUNTARILY INACTIVE LAWYERS**

4830
4831 (a) For purposes of this rule “employ” means to engage the services of another,
4832 including employees, agents, independent contractors and consultants, regardless of
4833 whether any compensation is paid.

4834
4835 (b) A lawyer shall not employ, associate professionally with, or aid a person the lawyer
4836 knows or reasonably should know has been disbarred, suspended, or placed on disability
4837 inactive status by order of the court to do any of the following on behalf of the lawyer’s
4838 client:

- 4839 (1) render legal consultation or advice to the client;
4840 (2) appear on behalf of a client in any hearing or proceeding or before any judicial
4841 officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or
4842 hearing officer unless the rules of the tribunal involved permit representation by ~~non-~~
4843 lawyersnonlawyers and the client has been informed of the lawyer’s suspension,
4844 disbarment, or disability inactive status;
4845 (3) appear as a representative of the client at a deposition or other discovery matter;
4846 (4) negotiate or transact any matter for or on behalf of the client with third parties;
4847 (5) receive, disburse or otherwise handle the client’s funds; or
4848 (6) engage in activities that constitute the practice of law.

4849
4850 (c) A lawyer may employ, associate professionally with, or aid a disbarred, suspended, or
4851 disability inactive lawyer to perform research, drafting, clerical, or similar activities,
4852 including but not limited to:

- 4853 (1) legal work of a preparatory nature for the lawyer’s review, such as legal research, the
4854 gathering of information, drafting of pleadings, briefs, and other similar documents;
4855 (2) direct communication with the client or third parties regarding matters such as
4856 scheduling, billing, updates, information gathering, confirmation of receipt or sending of
4857 correspondence and messages; or
4858 (3) accompanying an active lawyer in attending a deposition or other discovery procedure
4859 for the limited purpose of providing clerical assistance to the active lawyer who will
4860 appear as the representative of the client.

4861
4862 (d) Prior to or at the time of employing a person the lawyer knows or reasonably should
4863 know is a disbarred, suspended, or disability inactive lawyer, the lawyer shall serve upon
4864 the Office of Lawyers Professional Responsibility written notice of the employment,
4865 including a full description of such person’s current license status. The notice shall state
4866 that the suspended, disbarred, or disability inactive lawyer shall not be employed to
4867 perform any of the activities prohibited by paragraph (b).

4868
4869 (e) Upon termination of the employment of the disbarred, suspended, or disability
4870 inactive lawyer, the employing lawyer shall promptly serve upon the Office of Lawyers
4871 Professional Responsibility written notice of the termination.

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PUBLIC SERVICE

RULE 6.1: VOLUNTARY PRO BONO PUBLICO SERVICE

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the 50 hours of legal services without fee or expectation of fee to:

- (1) persons of limited means or
- (2) charitable, religious, civic, community, governmental and educational organizations in matters ~~which~~that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

- (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect ~~the~~—civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
- (2) delivery of legal services at a substantially reduced fee ~~to~~—of persons of limited means; or
- (3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Comment

~~The ABA House of Delegates has formally acknowledged “the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services” without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. This Rule expresses that policy but is not intended to be enforced through disciplinary process.~~

~~The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well to do.~~

~~The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be~~

4922 an obligation of each lawyer as well as the profession generally, but the efforts of
4923 individual lawyers are often not enough to meet the need. Thus, it has been necessary for
4924 the profession and government to institute additional programs to provide legal services.
4925 Accordingly, legal aid offices, lawyer referral services and other related programs have
4926 been developed, and others will be developed by the profession and government. Every
4927 lawyer should support all proper efforts to meet this need for legal services.

4928 **Comment**

4929
4930 Every practicing[1] Every lawyer, regardless of professional prominence or professional
4931 work load, has a responsibility to provide legal services to those unable to pay, and
4932 personal involvement in the problems of the disadvantaged can be one of the most
4933 rewarding experiences in the life of a lawyer. ~~All practicing~~The Minnesota State Bar
4934 Association urges all lawyers ~~should aspire~~ to provide a minimum of 50 hours of pro
4935 bono services annually. It is recognized that in some years a lawyer may render greater or
4936 fewer ~~than 50 hours than the annual standard specified~~ but, during the course of this or
4937 her legal career, each lawyer should ~~aspire to render on average of 50 hours of service per~~
4938 year the number of hours set forth in this Rule. Services can be performed in civil matters
4939 or in criminal or quasi- criminal matters for which there is no government obligation to
4940 provide funds for legal representation, such as post- conviction death penalty appeal
4941 cases.

4942
4943 [2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists
4944 among persons of limited means by providing that a substantial majority of the legal
4945 services rendered annually to the disadvantaged be furnished ~~to the disadvantaged~~
4946 without fee or expectation of fee. Legal services under these paragraphs consist of a full
4947 range of activities, including individual and class representation, the provision of legal
4948 advice, legislative lobbying, administrative rule making and the provision of free training
4949 or mentoring to those who represent persons of limited means ~~and otherwise contributing~~
4950 legal talents. The variety of these activities should facilitate participation by government
4951 ~~attorneys~~lawyers, even when restrictions exist on their engaging in the outside practice of
4952 law.

4953
4954 [3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who
4955 qualify for participation in programs funded by the Legal Services Corporation and those
4956 whose incomes and financial resources are slightly above the guidelines utilized by such
4957 programs but nevertheless, cannot afford counsel. ~~Legal~~Legal services can be rendered to
4958 individuals or to organizations such as homeless shelters, battered women's centers and
4959 food pantries that serve those of limited means. The term "governmental organizations"
4960 includes, but is not limited to, public protection programs and sections of governmental
4961 or public sector agencies.

4962
4963 [4] Because service must be provided without fee or expectation of fee, the intent of the
4964 lawyer to render free legal services is essential for the work performed to fall within the
4965 meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be
4966 considered pro bono if an anticipated fee is uncollected, but the award of statutory
4967 attorneys' fees in a case originally accepted as pro bono would not disqualify such
4968 services from inclusion under this section. Lawyers who do receive fees in such cases are
4969 encouraged to contribute an appropriate portion of such fees to organizations or projects
4970 that benefit persons of limited means.

4971
4972 [5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro
4973 bono services exclusively through activities described in paragraphs (a)(1) and (2), to the
4974 extent that any hours of service ~~remain~~remained unfulfilled, the remaining commitment
4975 can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory, or
4976 regulatory restrictions may prohibit or impede government and public sector lawyers and

4977 judges from performing the pro bono services outlined in paragraphs (a)(1) and (2).
4978 Accordingly, where those restrictions apply, government and public sector lawyers and
4979 judges may fulfill their pro bono responsibility by performing services outlined in
4980 paragraph (b).

4981
4982 [6] Paragraph (b)(1) includes the provision of certain types of legal services to those
4983 whose incomes and financial resources place them above limited means. It also permits
4984 the pro bono ~~attorney~~ lawyer to accept a substantially reduced fee for services. Examples
4985 of the types of issues that may be addressed under this paragraph include First
4986 Amendment claims, Title VII claims and environmental protection claims. Additionally,
4987 a wide range of organizations may be represented, including social service, medical
4988 research, cultural and religious groups.

4989
4990 [7] Paragraph (b)(2) covers instances in which ~~attorneys~~ lawyers agree to and receive a
4991 modest fee for furnishing legal services to persons of limited means. Participation in
4992 judicare programs and acceptance of court appointments in which the fee is substantially
4993 below a lawyer's usual rate are encouraged under this section.

4994
4995 [8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve
4996 the law, the legal system or the legal profession. Serving on bar association committees,
4997 serving on boards of pro bono or legal services programs, taking part in Law Day
4998 activities, acting as a continuing legal education instructor, a mediator or an arbitrator and
4999 engaging in legislative lobbying to improve the law, the legal system or the profession
5000 are a few examples of the many activities that fall within this paragraph.

5001
5002 [9] Because the provision of pro bono services is a professional responsibility, it is the
5003 individual ethical commitment of each lawyer. Nevertheless, there may be times when it
5004 is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may
5005 discharge the pro bono responsibility by providing financial support to organizations
5006 providing free legal services to persons of limited means. Such financial support should
5007 be reasonably equivalent to the value of the hours of service that would have otherwise
5008 been provided. In addition, at times it may be more feasible to satisfy the pro bono
5009 responsibility collectively, as by a firm's aggregate pro bono activities.

5010
5011 [10] Because the efforts of individual lawyers are not enough to meet the need for free
5012 legal services that exists among persons of limited means, the government and the
5013 profession have instituted additional programs to provide those services. Every lawyer
5014 should financially support such programs, in addition to either providing direct pro bono
5015 services or making financial contributions when pro bono service is not feasible.

5016
5017 [11] Law firms should act reasonably to enable and encourage all lawyers in the firm to
5018 provide the pro bono legal services called for by this Rule.

5019
5020 [12] The responsibility set forth in this Rule is not intended to be enforced through
5021 disciplinary process.

5022
5023
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5025 **RULE 6.2: ACCEPTING APPOINTMENTS**

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A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

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(a) representing the client is likely to result in violation of the ~~rules~~Rules of ~~professional~~Professional ~~conduct~~Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.

Comment

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer’s freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

RULE 6.3: MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer’s obligations to a client under Rule 1.7; or

5079 (b) where the decision or action could have a material adverse effect on the representation
5080 of a client of the organization whose interests are adverse to a client of the lawyer.

5081

5082

Comment

5083

5084 [1] Lawyers should be encouraged to support and participate in legal service
5085 organizations. A lawyer who is an officer or a member of such an organization does not
5086 thereby have a client-lawyer relationship with persons served by the organization.
5087 However, there is potential conflict between the interests of such persons and the interests
5088 of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from
5089 serving on the board of a legal services organization, the profession's involvement in
5090 such organizations would be severely curtailed.

5091

5092 [2] It may be necessary in appropriate cases to reassure a client of the organization that
5093 the representation will not be affected by conflicting loyalties of a member of the board.
5094 Established, written policies in this respect can enhance the credibility of such
5095 assurances.

5096

5097

5098

RULE 6.4: LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

5099

5100

5101

5102 A lawyer may serve as a director, officer or member of an organization involved in
5103 reform of the law or its administration notwithstanding that the reform may affect the
5104 interests of a client of the lawyer. When the lawyer knows that the interests of a client
5105 may be materially benefitted by a decision in which the lawyer participates, the lawyer
5106 shall disclose ~~the~~that fact but need not identify the client.

5107

5108

Comment

5109

5110 [1] Lawyers involved in organizations seeking law reform generally do not have a client-
5111 lawyer relationship with the organization. Otherwise, it might follow that a lawyer could
5112 not be involved in a bar association law reform program that might indirectly affect a
5113 client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation
5114 might be regarded as disqualified from participating in drafting revisions of rules
5115 governing that subject. In determining the nature and scope of participation in such
5116 activities, a lawyer should be mindful of obligations to clients under other Rules,
5117 particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the
5118 program by making an appropriate disclosure within the organization when the lawyer
5119 knows a private client might be materially benefitted.

5120

INFORMATION ABOUT

5121

5122

5123 **RULE 6.5: PRO BONO LIMITED LEGAL SERVICES PROGRAMS**

5124
5125 (a) A lawyer who, under the auspices of a program offering pro bono legal services,
5126 provides short-term limited legal services to a client without expectation by either the
5127 lawyer or the client that the lawyer will provide continuing representation in the matter:
5128 (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of
5129 the client involves a conflict of interest; and
5130 (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with
5131 the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

5132
5133 (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation
5134 governed by this Rule.

5135
5136 **Comment**

5137
5138 [1] Legal services organizations, courts and various organizations have established
5139 programs through which lawyers provide short-term limited legal services — such as
5140 advice or the completion of legal forms - that will assist persons to address their legal
5141 problems without further representation by a lawyer. In these programs, such as legal-
5142 advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer
5143 relationship is established, but there is no expectation that the lawyer’s representation of
5144 the client will continue beyond the limited consultation. Such programs are normally
5145 operated under circumstances in which it is not feasible for a lawyer to systematically
5146 screen for conflicts of interest as is generally required before undertaking a
5147 representation. See, e.g., Rules 1.7, 1.9 and 1.10.

5148
5149 [2] A lawyer who provides short-term limited legal services pursuant to this Rule must
5150 secure the client’s informed consent to the limited scope of the representation. See Rule
5151 1.2(c). If a short-term limited representation would not be reasonable under the
5152 circumstances, the lawyer may offer advice to the client but must also advise the client of
5153 the need for further assistance of counsel. Except as provided in this Rule, the Rules of
5154 Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited
5155 representation.

5156
5157 [3] Because a lawyer who is representing a client in the circumstances addressed by this
5158 Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a)
5159 requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the
5160 representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the
5161 lawyer knows that another lawyer in the lawyer’s firm is disqualified by Rules 1.7 or
5162 1.9(a) in the matter.

5163
5164 [4] Because the limited nature of the services significantly reduces the risk of conflicts of
5165 interest with other matters being handled by the lawyer’s firm, paragraph (b) provides
5166 that Rule 1.10 is inapplicable to a representation governed by this Rule except as
5167 provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to
5168 comply with Rule 1.10 when the lawyer knows that the lawyer’s firm is disqualified by
5169 Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer’s participation in a
5170 short-term limited legal services program will not preclude the lawyer’s firm from
5171 undertaking or continuing the representation of a client with interests adverse to a client
5172 being represented under the program’s auspices. Nor will the personal disqualification of
5173 a lawyer participating in the program be imputed to other lawyers participating in the
5174 program.

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[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

5180

5181

INFORMATION ABOUT LEGAL SERVICES

5182

5183

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

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5185

5186 A lawyer shall not make a false or misleading communication about the lawyer or the
5187 lawyer's services. A communication is false or misleading if it:~~(a)~~ contains a material
5188 misrepresentation of fact or law, or omits a fact necessary to make the statement
5189 considered as a whole not materially misleading;

5190 ~~(b) is likely to create an unjustified expectation about results the lawyer can achieve, or
5191 states or implies that the lawyer can achieve results by means that violate the Rules of
5192 Professional Conduct or other law; or~~

5193 ~~(c) compares the lawyer's services with other lawyer's services, unless the comparison
5194 can be factually substantiated.~~

5195

5196

Comment

5197

5198 [1] This Rule governs all communications about a lawyer's services, including
5199 advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's
5200 services, statements about them ~~should~~ must be truthful.

~~RULE 7.2 ADVERTISING AND WRITTEN COMMUNICATION~~

5202

5203 ~~(a) Subject~~

5204

5205 [2] Truthful statements that are misleading are also prohibited by this Rule. A truthful
5206 statement is misleading if it omits a fact necessary to make the requirements of Rule 7.1,
5207 a lawyer may advertise services through public media, or through written's
5208 communication.

5209 ~~(b) A copy or recording of an advertisement considered as a whole not materially
5210 misleading. A truthful statement is also misleading if there is a substantial likelihood
5211 that it will lead a reasonable person to formulate a specific conclusion about the lawyer
5212 or the lawyer's services for which there is no reasonable factual foundation.~~

5213

5214 [3] An advertisement that truthfully reports a lawyer's achievements on behalf of
5215 clients or former clients may be misleading if presented so as to lead a reasonable
5216 person to form an unjustified expectation that the same results could be obtained for
5217 other clients in similar matters without reference to the specific factual and legal
5218 circumstances of each client's case. Similarly, an unsubstantiated comparison of the
5219 lawyer's services or written communication shall be kept for two years after its last
5220 dissemination along fees with a record of when and where it was used. the services or
5221 fees of other lawyers may be misleading if presented with such specificity as would lead
5222 a reasonable person to conclude that the comparison can be substantiated. The inclusion
5223 of an appropriate disclaimer or qualifying language may preclude a finding that a
5224 statement is likely to create unjustified expectations or otherwise mislead a prospective
5225 client.

5226

5227 [4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to
5228 influence improperly a government agency or official or to achieve results by means that
5229 violate the Rules of Professional Conduct or other law.

5230

5231

5232 **RULE 7.2: ADVERTISING**

5233

5234 (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services
5235 through written, recorded or electronic communication, including public media.

5236

5237 ~~(e)~~ A lawyer shall not give anything of value to a person for recommending the
5238 lawyer's services, except that a lawyer may

5239 (1) pay the reasonable costs of advertising advertisements or written
5240 communication communications permitted by this Rule and may;

5241 (2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service
5242 or other legal service organization, and may;

5243 (3) pay for a law practice that is sold in accordance with Rule 4.17.1.17; and

5244 (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement
5245 not otherwise prohibited under these Rules that provides for the other person to refer
5246 clients or customers to the lawyer, if

5247 (i) the reciprocal referral agreement is not exclusive, and

5248 (ii) the client is informed of the existence and nature of the agreement.

5249

5250 ~~(d)~~ Any communication made pursuant to this Rule shall include the name of at
5251 least one licensed Minnesota lawyer or law firm responsible for its content if the legal
5252 services advertised are to be performed in whole or in part in Minnesota.

5253 ~~(e)~~ Advertisements and written communications indicating that the charging of a fee is
5254 contingent on outcome must disclose that the client will be liable

5255

5256 **Comment**

5257

5258 [1] To assist the public in obtaining legal services, lawyers should be allowed to make
5259 known their services not only through reputation but also through organized information
5260 campaigns in the form of advertising. Advertising involves an active quest for expenses
5261 regardless of outcome, if the clients, contrary to the tradition that a lawyer so intends to
5262 hold should not seek clientele. However, the public's need to know about legal services
5263 can be fulfilled in part through advertising. This need is particularly acute in the client
5264 liable.

5265 ~~(f)~~ The word "ADVERTISEMENT" must appear clearly and conspicuously at the
5266 beginning of persons of any written solicitation to a prospective client with whom the
5267 lawyer has no family or prior professional relationship and who may be in need moderate
5268 means who have not made extensive use of specific legal services because of a condition
5269 or occurrence that is known legal services. The interest in expanding public information
5270 about legal services ought to the soliciting lawyer.

5271 ~~(g)~~ Every lawyer associated with or employed by a law firm which causes or makes a
5272 communication in violation of this Rule may be subject to discipline for failure to make
5273 reasonable remedial efforts to bring the communication into compliance with this Rule.

5274 ~~Comment~~ prevail over considerations of tradition. Nevertheless, advertising by lawyers
5275 entails the risk of practices that are misleading or overreaching.

5276
5277 [2] This Rule permits public dissemination of information concerning a lawyer's name or
5278 firm name, address and telephone number; the kinds of services the lawyer will
5279 undertake; the basis on which the lawyer's fees are determined, including prices for
5280 specific services and payment and credit arrangements; a lawyer's foreign language
5281 ability; names of references; and, with their consent, names of clients regularly
5282 represented; and other information that might invite the attention of those seeking legal
5283 assistance.

5284
5285 [3] Questions of effectiveness and taste in advertising are matters of speculation and
5286 subjective judgment. Some jurisdictions have had extensive prohibitions against
5287 television advertising, against advertising going beyond specified facts about a lawyer, or
5288 against "undignified" advertising. Television is now one of the most powerful media for
5289 getting information to the public, particularly persons of low and moderate income;
5290 prohibiting television advertising, therefore, would impede the flow of information about
5291 legal services to many sectors of the public. Limiting the information that may be
5292 advertised has a similar effect and assumes that the bar can accurately forecast the kind of
5293 information that the public would regard as relevant.

5294
5295 [4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as
5296 notice to members of a class in class action litigation.

Record of Advertising

5297
5298 Paragraph (b) ~~requires that a record of the content and use of advertising be kept in order~~
5299 ~~to facilitate enforcement of this Rule. It does not require that advertising be subject to~~
5300 ~~review prior to dissemination. Such a requirement would be burdensome and expensive~~
5301 ~~relative to its possible benefits, and may be of doubtful constitutionality.~~

Paying Others to Recommend a Lawyer

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5304
5305 ~~A lawyer is allowed to pay for advertising[5] _____ Lawyers are not permitted by this~~
5306 ~~Rule, but otherwise is not permitted to pay another person_____ others for channeling~~
5307 ~~professional work. This restriction does not prevent an organization or person other than~~
5308 ~~the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid~~
5309 ~~agency or prepaid legal services plan may pay to advertise legal services provided under~~
5310 ~~its auspices. Likewise, a lawyer may participate in not for profit lawyer~~
5311 ~~referral programs and pay the usual fees charged by such programs. Paragraph (e) does~~
5312 ~~not prohibit paying regular compensation to an assistant, such as a secretary, to prepare~~
5313 ~~b)(1), however, allows a lawyer to pay for advertising and communications permitted by~~
5314 ~~this Rule, including the costs of print directory listings, on-line directory listings,~~
5315 ~~newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees,~~
5316 ~~banner ads, and group advertising. A lawyer may compensate employees, agents and~~
5317 ~~vendors who are engaged to provide marketing or client-development services, such as~~
5318 ~~publicists, public-relations personnel, business-development staff and website designers.~~
5319 ~~See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of~~
5320 ~~nonlawyers who prepare marketing materials for them.~~

5321
5322 [6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit
5323 lawyer referral service. A legal service plan is a prepaid or group legal service plan or a
5324 similar delivery system that assists prospective clients to secure legal representation. A
5325 lawyer referral service, on the other hand, is any organization that holds itself out to the
5326 public as a lawyer referral service. Such referral services are understood by laypersons to
5327 be consumer-oriented organizations that provide unbiased referrals to lawyers with

5328 appropriate experience in the subject matter of the representation and afford other client
5329 protections, such as complaint procedures or malpractice insurance requirements.
5330 Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit
5331 lawyer referral service.

5332
5333 [7] A lawyer who accepts assignments or referrals from a legal service plan or referrals
5334 from a not-for-profit lawyer referral service must act reasonably to assure that the
5335 activities of the plan or service are compatible with the lawyer's professional obligations.
5336 See Rule 5.3. Legal service plans and lawyer referral services may communicate with
5337 prospective clients, but such communication must be in conformity with these Rules.
5338 Thus, advertising must not be false or misleading, as would be the case if the
5339 communications of a group advertising program or a group legal services plan would
5340 mislead prospective clients to think that it was a lawyer referral service sponsored by a
5341 state agency or bar association. Nor could the lawyer allow in-person or telephonic
5342 contacts that would violate Rule 7.3.

5343

5344 [8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer
5345 professional, in return for the undertaking of that person to refer clients or customers to
5346 the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's
5347 professional judgment as to making referrals or as to providing substantive legal services.
5348 See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives
5349 referrals from a lawyer or nonlawyer professional must not pay anything solely for the
5350 referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer
5351 clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral
5352 agreement is not exclusive and the client is informed of the referral agreement. Conflicts
5353 of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral
5354 agreements should not be of indefinite duration and should be reviewed periodically to
5355 determine whether they comply with these Rules. This Rule does not restrict referrals or
5356 divisions of revenues or net income among lawyers within a firm.

5357

5358

5359 **RULE 7.3: IN-PERSON AND TELEPHONE: DIRECT CONTACT WITH**
5360 **PROSPECTIVE CLIENTS**

5361

5362

5363 (a) A lawyer ~~may~~ shall not by in-person or live telephone contact solicit professional
5364 employment from a prospective client with whom the lawyer has no family or prior
5365 professional relationship, by in-person or telephone contact, when a significant motive
5366 for the lawyer's doing so is the lawyer's pecuniary gain-, unless the person contacted:

5367 (1) is a lawyer; or

5368 (2) has a family, close personal, or prior professional relationship with the lawyer.

5369

5370 (b) A lawyer shall not solicit professional employment from a prospective client by
5371 written, recorded or electronic communication or by in-person or telephone contact even
5372 when not otherwise prohibited by paragraph (a), if:

5373 (1) the prospective client has made known to the lawyer a desire not to be solicited by the
5374 lawyer; or

5375 (2) the solicitation involves coercion, duress or harassment.

5376

5377 (c) Every written, recorded or electronic communication from a lawyer soliciting
5378 professional employment from a prospective client known to be in need of legal services
5379 in a particular matter shall clearly and conspicuously include the words “Advertising
5380 Material” on the outside envelope, if any, and within any written, recorded or electronic
5381 communication, unless the recipient of the communication is a person specified in
5382 paragraphs (a)(1) or (a)(2).

5383
5384 (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a
5385 prepaid or group legal service plan operated by an organization not owned or directed by
5386 the lawyer that uses in-person or telephone contact to solicit memberships or
5387 subscriptions for the plan from persons who are not known to need legal services in a
5388 particular matter covered by the plan.

5389
5390 **Comment**

5391
5392 [1] There is a potential for abuse inherent in direct solicitation in-person or live
5393 telephone contact by a lawyer of with a prospective clients client known to need legal
5394 services. It subjects These forms of contact between a lawyer and a prospective client
5395 subject the lay person layperson to the private importuning of a the trained advocate, in a
5396 direct interpersonal encounter. A The prospective client often feels, who may already feel
5397 overwhelmed by the situation circumstances giving rise to the need for legal services, and
5398 may have an impaired capacity for reason, find it difficult fully to evaluate all available
5399 alternatives with reasoned judgment and protective appropriate self-interest.
5400 Furthermore, in the lawyer seeking the retainer is faced with a conflict stemming from face
5401 of the lawyer’s own interest, which may color the advice presence and representation
5402 offered the vulnerable prospect insistence upon being retained immediately. The situation
5403 is therefore fraught with the possibility of undue influence, intimidation, and over-
5404 reaching.

5405
5406 [2] This potential for abuse inherent in direct in-person or live telephone solicitation of
5407 prospective clients justifies its prohibition, particularly since lawyer advertising and
5408 written and recorded communication permitted under the Rule 7.2 offers an offer
5409 alternative means of communicating conveying necessary information to those who may
5410 be in need of legal services. Advertising makes and written and recorded communications
5411 which may be mailed or autodialed make it possible for a prospective client to be
5412 informed about the need for legal services, and about the qualifications of available
5413 lawyers and law firms, without subjecting the prospective client to direct personal in-
5414 person or telephone persuasion that may overwhelm the client’s judgment.

5415
5416 [3] The use of general advertising and written, recorded or electronic communications
5417 to transmit information from lawyer to prospective client, rather than direct private in-
5418 person or live telephone contact, will help to assure that the information flows cleanly as
5419 well as freely. Advertising is out in public view, thus subject to scrutiny by those The
5420 contents of advertisements and communications permitted under Rule 7.2 can be
5421 permanently recorded so that they cannot be disputed and may be shared with others who
5422 know the lawyer. This potential for informal review is itself likely to help guard against
5423 statements and claims that might constitute false or and misleading communications, in
5424 violation of Rule 7.1. Direct, private communications from The contents of direct in-
5425 person or live telephone conversations between a lawyer to and a prospective client are can
5426 be disputed and may not be subject to such third-party scrutiny and consequently,
5427 Consequently, they are much more likely to approach (and occasionally cross) the
5428 dividing line between accurate representations and those that are false and misleading.

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[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal- service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

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[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

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[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

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[7] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

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5484 **RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE**
5485 **AND SPECIALIZATION**

5486

5487 (a) A lawyer may communicate the fact that the lawyer does or does not practice in
5488 particular fields of law. ~~A lawyer shall not use any false, fraudulent, misleading or~~
5489 ~~deceptive statement, claim or designation in describing the lawyer's or the lawyer's~~
5490 ~~firm's practice or in indicating its nature or limitations.~~

5491 ~~(b) A lawyer shall not state that the lawyer is a specialist in a field of law unless the~~
5492 ~~lawyer is currently certified or approved as a specialist in that field by an organization~~
5493 ~~that is approved by the State Board of Legal Certification.~~

5494 ~~(c) A lawyer shall not state that the lawyer is a certified specialist if the lawyer's~~
5495 ~~certification has terminated, or if the statement is otherwise contrary to the terms of such~~
5496 ~~certification.~~

5497

5498 ~~(d)~~(b) A lawyer admitted to engage in patent practice before the United States Patent and
5499 Trademark Office may use the designation "Patent Attorney" or a substantially similar
5500 designation.

5501

5502 ~~(e)~~ A lawyer engaged in Admiralty practice may use the designation "Admiralty,"
5503 "Proctor in Admiralty" or a substantially similar designation.

5504

5505 (d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a
5506 particular field of law, unless:

5507 (1) the lawyer is certified as a specialist by an organization that is approved by an
5508 appropriate state authority or that is accredited by the American Bar Association; and

5509 (2) the name of the certifying organization is clearly identified in the communication.

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5511

Comment

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5513 [1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in
5514 communications about the lawyer's services. If a lawyer practices only in certain fields,
5515 or will not accept matters except in a specified field or fields, the lawyer is permitted to
5516 so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist,"
5517 practices a "specialty," or "specializes in" particular fields, but such communications are
5518 subject to the "false and misleading" standard applied in Rule 7.1 to communications
5519 concerning a lawyer's services.

5520

5521 [2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark
5522 Office for the designation of lawyers practicing before the Office. Paragraph (c)
5523 recognizes that designation of Admiralty practice has a long historical tradition
5524 associated with maritime commerce and the federal courts.

5525

5526 [3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in
5527 a field of law if such certification is granted by an organization approved by an
5528 appropriate state authority or accredited by the American Bar Association or another
5529 organization, such as a state bar association, that is approved by the state authority to
5530 accredit organizations that certify lawyers as specialists. Certification signifies that an
5531 objective entity has recognized an advanced degree of knowledge and experience in the
5532 specialty area greater than is suggested by general licensure to practice law. Certifying
5533 organizations may be expected to apply standards of experience, knowledge and
5534 proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable.
5535 In order to insure that consumers can obtain access to useful information about an
5536 organization granting certification, the name of the certifying organization must be
5537 included in any communication regarding the certification.

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5541 **RULE 7.5: FIRM NAMES AND LETTERHEADS**

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5543
5544 (a) A lawyer shall not use a firm name, letterhead or other professional designation that
5545 violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not
5546 imply a connection with a government agency or with a public or charitable legal services
5547 organization and is not otherwise in violation of Rule 7.1.

5548
5549 (b) A law firm with offices in more than one jurisdiction may use the same name or other
5550 professional designation in each jurisdiction, but identification of the lawyers in an office
5551 of the firm shall indicate the jurisdictional limitations on those not licensed to practice in
5552 the jurisdiction where the office is located.

5553
5554 (c) The name of a lawyer holding a public office shall not be used in the name of a law
5555 firm, or in communications on its behalf, during any substantial period in which the
5556 lawyer is not actively and regularly practicing with the firm.

5557
5558 (d) Lawyers may state or imply that they practice in a partnership or other organization
5559 only when that is the fact.

5560
5561 **Comment**

5562
5563 [1] A firm may be designated by the names of all or some of its members, by the names
5564 of deceased members where there has been a continuing succession in the firm's identity
5565 or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be
5566 designated by a distinctive website address or comparable professional designation.
5567 Although the United States Supreme Court has held that legislation may prohibit the use
5568 of trade names in professional practice, use of such names in law practice is acceptable so
5569 long as it is not misleading. If a private firm uses a trade name that includes a
5570 geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a
5571 public legal aid agency may be required to avoid a misleading implication. It may be
5572 observed that any firm name including the name of a deceased partner is, strictly
5573 speaking, a trade name. The use of such names to designate law firms has proven a useful
5574 means of identification. However, it is misleading to use the name of a lawyer not
5575 associated with the firm or a predecessor of the firm.

5576 **MAINTAINING THE INTEGRITY OF THE PROFESSION**

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[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

5583 **MAINTAINING THE INTERGRITY OF THE PROFESSION**

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5585 **RULE 8.1: BAR ADMISSION AND DISCIPLINARY MATTERS**

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5588 ~~(a)~~ An applicant for admission to the bar, or a lawyer in connection with a bar admission
5589 application or in connection with a disciplinary matter, shall not:

5590
5591 ~~(1a)~~ knowingly make a false statement of material fact; or

5592
5593 ~~(2b)~~ fail to disclose a fact necessary to correct a misapprehension known by the person
5594 to have arisen in the matter; ~~(3)~~ or knowingly fail to respond to a lawful demand for
5595 information from an admissions or discipline—disciplinary authority’s lawfully
5596 authorized demand for information by either providing the information sought or
5597 making a good faith challenge to the demand. ~~(b)~~ This Rule, except that this rule does not
5598 require disclosure of information otherwise protected by Rule 1.6.

5599
5600 **Comment**

5601
5602 [1] The duty imposed by this Rule extends to persons seeking admission to the bar as
5603 well as to lawyers. Hence, if a person makes a material false statement in connection
5604 with an application for admission, it may be the basis for subsequent disciplinary action if
5605 the person is admitted, and in any event may be relevant in a subsequent admission
5606 application. The duty imposed by this Rule applies to a lawyer’s own admission or
5607 discipline as well as that of others. Thus, it is a separate professional offense for a lawyer
5608 to knowingly make a misrepresentation or omission in connection with a disciplinary
5609 investigation of the lawyer’s own conduct. This Paragraph (b) of this Rule also requires
5610 correction of any prior misstatement in the matter that the applicant or lawyer may have
5611 made and affirmative clarification of any misunderstanding on the part of the admissions
5612 or disciplinary authority of which the person involved becomes aware.

5613
5614 [2] This Rule is subject to the provisions of the ~~Fifth~~ Fifth Amendment amendment of the
5615 United States Constitution and corresponding provisions of ~~the~~ state
5616 ~~Constitution~~ constitutions. A person relying on such a provision in response to a question,
5617 however, should do so openly. See and not use the right of nondisclosure as a justification
5618 for failure to comply with this Rule 3.4(e).

5619
5620 [3] A lawyer representing an applicant for admission to the bar, or representing a lawyer
5621 who is the subject of a disciplinary inquiry or proceeding, is governed by the rules
5622 applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule
5623 3.3.

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5627 **RULE 8.2: JUDICIAL AND LEGAL OFFICIALS**

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5629
5630 (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless
5631 disregard as to its truth or falsity concerning the qualifications or integrity of a judge,

5632 adjudicatory officer or public legal officer, or of a candidate for election or appointment
5633 to judicial or legal office.

5634
5635 (b) A lawyer who is a candidate for judicial office shall comply with the applicable
5636 provisions of the Code of Judicial Conduct.

5637
5638

Comment

5639

5640 [1] Assessments by lawyers are relied on in evaluating the professional or personal
5641 fitness of persons being considered for election or appointment to judicial office and to
5642 public legal offices, such as attorney general, prosecuting attorney and public defender.
5643 Expressing honest and candid opinions on such matters contributes to improving the
5644 administration of justice. Conversely, false statements by a lawyer can unfairly
5645 undermine public confidence in the administration of justice.

5646

5647 [2] When a lawyer seeks judicial office, the lawyer should be bound by applicable
5648 limitations on political activity.

5649

5650 [3] To maintain the fair and independent administration of justice, lawyers are
5651 encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

5652

5653

5654

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

5655

5656

5657

5658 (a) A lawyer ~~having knowledge~~who knows that another lawyer has committed a violation
5659 of the ~~Rules~~rules of Professional Conduct that raises a substantial question as to that
5660 lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform
5661 the ~~Office of Lawyers Professional Responsibility~~appropriate professional authority.

5662

5663 (b) A lawyer ~~having knowledge~~who knows that a judge has committed a violation of
5664 applicable rules of judicial conduct that raises a substantial question as to the judge's
5665 fitness for office shall inform the ~~Board on Judicial Standards~~appropriate authority.

5666

5667 (c) This Rule does not require disclosure of information that Rule 1.6 requires or allows a
5668 lawyer to keep confidential or information gained by a lawyer or judge while
5669 participating in a lawyers assistance program or other program providing assistance,
5670 support or counseling to lawyers who are chemically dependent or have mental disorders.

5671

5672

Comment—2000

5673

5674 [1] Self-regulation of the legal profession requires that members of the profession initiate
5675 disciplinary investigation when they know of a violation of the Rules of Professional
5676 Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An
5677 apparently isolated violation may indicate a pattern of misconduct that only a disciplinary
5678 investigation can uncover. Reporting a violation is especially important where the victim
5679 is unlikely to discover the offense.

5680

5681 [2] A report about misconduct is not required where it would involve violation of Rule
5682 1.6. However, a lawyer should encourage a client to consent to disclosure where
5683 prosecution would not substantially prejudice the client's interests. ~~See the comment to~~
5684 ~~Rule 1.6.~~

5685
5686 [3] If a lawyer were obliged to report every violation of the Rules, the failure to report
5687 any violation would itself be a professional offense. Such a requirement existed in many
5688 jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to
5689 those offenses that a self-regulating profession must vigorously endeavor to prevent. A
5690 measure of judgment is, therefore, required in complying with the provisions of ~~the~~this
5691 Rule. The term "substantial" refers to the seriousness of the possible offense and not
5692 the quantum of evidence of which the lawyer is aware. A report should be made to the
5693 bar disciplinary agency unless some other agency, such as a peer review agency, is more
5694 appropriate in the circumstances. Similar considerations apply to the reporting of judicial
5695 misconduct.

5696
5697 [4] The duty to report professional misconduct does not apply to a lawyer retained to
5698 represent a lawyer whose professional conduct is in question. Such a situation is
5699 governed by the ~~rules~~Rules applicable to the client-lawyer relationship.

5700
5701 [5] Information about a lawyer's or judge's misconduct or fitness may be received by a
5702 lawyer in the course of that lawyer's participation in a bona fide lawyers assistance
5703 program or other program that provides assistance, support or counseling to lawyers,
5704 including lawyers and judges who may be impaired due to chemical abuse or
5705 dependency, behavioral addictions, depression or other mental disorders. In that
5706 circumstance, providing for the confidentiality of information obtained by a lawyer-
5707 participant encourages lawyers and judges to participate and seek treatment through such
5708 programs. Conversely, without such confidentiality, lawyers and judges may hesitate to
5709 seek assistance, which may then result in additional harm to themselves, their clients, and
5710 the public. The Rule therefore exempts lawyers participating in such programs from the
5711 reporting obligation of paragraphs (a) and (b) with respect to information they acquire
5712 while participating. A lawyer exempted from mandatory reporting under part (c) of the
5713 Rule may nevertheless report misconduct in the lawyer's discretion, particularly if the
5714 impaired lawyer or judge indicates an intent to engage in future illegal activity, for
5715 example, the conversion of client funds. See the comments to Rule 1.6.

5716

5717

5718

5719 **RULE 8.4: MISCONDUCT**

5720

5721

5722 It is professional misconduct for a lawyer to:

5723

5724 (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or
5725 induce another to do so, or do so through the acts of another;

5726 (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness
5727 or fitness as a lawyer in other respects;

5728 (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

5729 (d) engage in conduct that is prejudicial to the administration of justice;

5730 (e) state or imply an ability to influence improperly a government agency or official; or to
5731 achieve results by means that violate the Rules of Professional Conduct or other law;

5732 (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable
5733 rules of judicial conduct or other law;

5734 (g) harass a person on the basis of sex, race, age, creed, religion, color, national origin,
5735 disability, sexual ~~preference~~ orientation or marital status in connection with a lawyer's
5736 professional activities; ~~or~~

5737

5738 (h) commit a discriminatory act, prohibited by federal , state or local statute or ordinance,
5739 that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act
5740 reflects adversely on a lawyer's fitness as a lawyer shall be determined after
5741 consideration of all the ~~circumstances~~ circumstance, including :

5742 (1) the seriousness of the act,

5743 (2) whether the lawyer knew that it was prohibited by statute or ordinance,

5744 (3) whether it was part of a pattern of prohibited conduct, and

5745 (4) whether it was committed in connection with the lawyer's professional activities; or

5746

5747 (i) refuse to honor a final and binding fee arbitration award after agreeing to arbitrate a
5748 fee dispute.

5749

5750

Comment

5751

5752 [1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of
5753 Professional Conduct, knowingly assist or induce another to do so or do so through the
5754 acts of another, as when they request or instruct an agent to do so on the lawyer's behalf.
5755 Paragraph (a), however, does not prohibit a lawyer from advising a client concerning
5756 action the client is legally entitled to take.

5757 [2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as
5758 offenses involving fraud and the offense of willful failure to file an income tax return.
5759 Although a lawyer is personally answerable to the entire criminal law, a lawyer should be
5760 professionally answerable only for offenses that indicate lack of those characteristics
5761 relevant to the practice of law. Offenses involving violence, dishonesty, or breach of
5762 trust, or serious interference with the administration of justice are in that category. A
5763 pattern of repeated offenses, even ones of minor significance when considered separately,
5764 can indicate indifference to legal obligation.

5765 [3] Lawyers holding public office assume legal responsibilities going beyond those of
5766 other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the
5767 professional role of attorney. The same is true of abuse of positions of private trust such
5768 as trustee, executor, administrator, guardian, agent and officer, director or manager of a
5769 corporation or other organization.

5770 [4] Paragraph (g) specifies a particularly egregious type of discriminatory act -
5771 harassment on the basis of sex, race, age, creed, religion, color, national origin, disability,
5772 sexual ~~preference~~ orientation, or marital status. What constitutes harassment in this
5773 context may be determined with reference to antidiscrimination legislation and case law

5774 thereunder. This harassment ordinarily involves the active burdening of another, rather
5775 than mere passive failure to act properly.

5776 [5] Harassment on the basis of sex, race, age, creed, religion, color, national origin,
5777 disability, sexual preference orientation, or marital status may violate either paragraph (g)
5778 or paragraph (h). The harassment violates paragraph (g) if the lawyer committed it in
5779 connection with the lawyer's professional activities. Harassment, even if not committed
5780 in connection with the lawyer's professional activities, violates paragraph (h) if the
5781 harassment (1) is prohibited by antidiscrimination legislation and (2) reflects adversely
5782 on the lawyer's fitness as a lawyer, determined as specified in paragraph (h).

5783 [6] Paragraph (h) reflects the premise that the concept of human equality lies at the very
5784 heart of our legal system. A lawyer whose behavior demonstrates hostility toward or
5785 indifference to the policy of equal justice under the law may thereby manifest a lack of
5786 character required of members of the legal profession. Therefore, a lawyer's
5787 discriminatory act prohibited by statute or ordinance may reflect adversely on his or her
5788 fitness as a lawyer even if the unlawful discriminatory act was not committed in
5789 connection with the lawyer's professional activities.

5790 [7] Whether an unlawful discriminatory act reflects adversely on fitness as a lawyer is
5791 determined after consideration of all relevant circumstances, including the four factors
5792 listed in paragraph (h). It is not required that the listed factors be considered equally, nor
5793 is the list intended to be exclusive. For example, it would also be relevant that the lawyer
5794 reasonably believed that his or her conduct was protected under the state or federal
5795 constitution or that the lawyer was acting in a capacity for which the law provides an
5796 exemption from civil liability. *See, e.g.*, Minn. Stat. Section 317A.257 (unpaid director or
5797 officer of nonprofit organization acting in good faith and not willfully or recklessly).

5798 [8] A lawyer may refuse to comply with an obligation imposed by law upon a good faith
5799 belief that no valid obligation exists. The provisions of Rule 1.2(e)(d) concerning a good
5800 faith challenge to the validity, scope, meaning or application of the law apply to
5801 challenges of legal regulation of the practice of law.

5802

5803

5804 **RULE 8.5: JURISDICTION**
5805 **: DISCIPLINARY AUTHORITY; CHOICE OF LAW**
5806

5807 (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to
5808 the disciplinary authority of this jurisdiction ~~although engaged,~~ regardless of where the
5809 lawyer's conduct occurs. A lawyer not admitted in practice elsewhere, this jurisdiction is
5810 also subject to the disciplinary authority of this jurisdiction if the lawyer provides or
5811 offers to provide any legal services in this jurisdiction. A lawyer may be subject to the
5812 disciplinary authority of both this jurisdiction and another jurisdiction for the same
5813 conduct.

5814 (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the
5815 rules of professional conduct to be applied shall be as follows:

5816 (1) for conduct in connection with a matter pending before a tribunal, the rules of the
5817 jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise;
5818 and
5819 (2) for any other conduct, the rules of the jurisdiction in which the lawyer’s conduct
5820 occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the
5821 rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to
5822 discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the
5823 lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.

5824
5825 **Comment**
5826

5827 In modern practice lawyers frequently act outside the territorial limits of the

5828 **Disciplinary Authority**

5829 [1] It is longstanding law that the conduct of a lawyer admitted to practice in this
5830 jurisdiction in which they are licensed to practice, either in another state or outside the
5831 United States. In doing so, they remains subject to the governing disciplinary authority of
5832 the this jurisdiction in which they are licensed to practice. If their activity in another,
5833 Extension of the disciplinary authority of this jurisdiction is substantial and continuous, it
5834 may constitute practice of law in the to other lawyers who provide or offer to provide
5835 legal services in this jurisdiction. See is for the protection of the citizens of this
5836 jurisdiction. Reciprocal enforcement of a jurisdiction’s disciplinary findings and
5837 sanctions will further advance the purposes of this Rule-5.5.

5838 If the. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A
5839 lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a)
5840 appoints an official to be designated by this Court to receive service of process in this
5841 jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this
5842 jurisdiction may be a factor in determining whether personal jurisdiction may be asserted
5843 over the lawyer for civil matters.

5844 **Choice of Law**

5845 [2] A lawyer may be potentially subject to more than one set of rules of professional
5846 conduct in the two conduct which impose different obligations. The lawyer may be
5847 licensed to practice in more than one jurisdiction with differing rules, or may be admitted
5848 to practice before a particular court with rules that differ from those of the jurisdiction or
5849 jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise
5850 when a lawyer is licensed to practice in more than one jurisdiction.

5851 Where the lawyer is licensed to practice law in two in which the lawyer is licensed to
5852 practice. Additionally, the lawyer’s conduct may involve significant contacts with more
5853 than one jurisdiction.

5854 [3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing
5855 conflicts between rules, as well as uncertainty about which rules are applicable, is in the
5856 best interest of both clients and the profession (as well as the bodies having authority to
5857 regulate the profession). Accordingly, it takes the approach of (i) providing that any
5858 particular conduct of a lawyer shall be subject to only one set of rules of professional
5859 conduct, (ii) making the determination of which set of rules applies to particular conduct
5860 as straightforward as possible, consistent with recognition of appropriate regulatory
5861 interests of relevant jurisdictions which impose conflicting obligations, applicable rules

5862 of, and (iii) providing protection from discipline for lawyers who act reasonably in the
5863 face of uncertainty.

5864 [4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding
5865 pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction
5866 in which the tribunal sits unless the rules of the tribunal, including its choice of law may
5867 govern the situation. A related problem arises with respect to practice before a federal
5868 tribunal, rule, provide otherwise. As to all other conduct, including conduct in
5869 anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides
5870 that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct
5871 occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules
5872 of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation
5873 of a proceeding that is likely to be before a tribunal, the predominant effect of such
5874 conduct could be where the general authority of the states to regulate the practices of law
5875 must be reconciled with such authority as federal tribunals may have to regulate practice
5876 before them, conduct occurred, where the tribunal sits or in another jurisdiction.

5877 [5] When a lawyer's conduct involves significant contacts with more than one
5878 jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct
5879 will occur in a jurisdiction other than the one in which the conduct occurred. So long as
5880 the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer
5881 reasonably believes the predominant effect will occur, the lawyer shall not be subject to
5882 discipline under this Rule.

5883 [6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct,
5884 they should, applying this rule, identify the same governing ethics rules. They should take
5885 all appropriate steps to see that they do apply the same rule to the same conduct, and in
5886 all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

5887 [7] The choice of law provision applies to lawyers engaged in transnational practice,
5888 unless international law, treaties or other agreements between competent regulatory
5889 authorities in the affected jurisdictions provide otherwise.

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**MINNESOTA RULES
OF
PROFESSIONAL CONDUCT**

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86 **PREAMBLE: A LAWYER’S RESPONSIBILITIES**

87 [1] A lawyer, as a member of the legal profession, is a representative of clients, an
88 officer of the legal system and a public citizen having special responsibility for the
89 quality of justice.

90 [2] As a representative of clients, a lawyer performs various functions. As advisor, a
91 lawyer provides a client with an informed understanding of the client’s legal rights and
92 obligations and explains their practical implications. As advocate, a lawyer zealously
93 asserts the client’s position under the rules of the adversary system. As negotiator, a
94 lawyer seeks a result advantageous to the client but consistent with requirements of
95 honest dealings with others. As ~~an~~ evaluator, a lawyer acts by examining a client’s legal
96 affairs and reporting about them to the client or to others.

97 [3] In addition to these representational functions, a lawyer may serve as a third-party
98 neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter.
99 Some of these Rules apply directly to lawyers who are or have served as third-party
100 neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers
101 who are not active in the practice of law or to practicing lawyers even when they are
102 acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the
103 conduct of a business is subject to discipline for engaging in conduct involving
104 dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

105 [4] In all professional functions a lawyer should be competent, prompt and diligent. A
106 lawyer should maintain communication with a client concerning the representation. A
107 lawyer should keep in confidence information relating to representation of a client except
108 so far as disclosure is required or permitted by the Rules of Professional Conduct or other
109 law.

110 [5] A lawyer’s conduct should conform to the requirements of the law, both in
111 professional service to clients and in the lawyer’s business and personal affairs. A lawyer
112 should use the law’s procedures only for legitimate purposes and not to harass or
113 intimidate others. A lawyer should demonstrate respect for the legal system and for those
114 who serve it, including judges, other lawyers and public officials. While it is a lawyer’s
115 duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s
116 duty to uphold legal process.

117 [6] As a public citizen, a lawyer should seek improvement of the law, access to the legal
118 system, the administration of justice and the quality of service rendered by the legal
119 profession. As a member of a learned profession, a lawyer should cultivate knowledge of
120 the law beyond its use for clients, employ that knowledge in reform of the law and work
121 to strengthen legal education. In addition, a lawyer should further the public’s
122 understanding of and confidence in the rule of law and the justice system because legal
123 institutions in a constitutional democracy depend on popular participation and support to
124 maintain their authority. A lawyer should be mindful of deficiencies in the administration
125 of justice and of the fact that the poor, and sometimes persons who are not poor, cannot

126 afford adequate legal assistance. Therefore, all lawyers should devote professional time
127 and resources and use civic influence to ensure equal access to our system of justice for
128 all those who because of economic or social barriers cannot afford or secure adequate
129 legal counsel. A lawyer should aid the legal profession in pursuing these objectives and
130 should help the bar regulate itself in the public interest.

131 [7] Many of a lawyer’s professional responsibilities are prescribed in the Rules of
132 Professional Conduct, as well as substantive and procedural law. However, a lawyer is
133 also guided by personal conscience and the approbation of professional peers. A lawyer
134 should strive to attain the highest level of skill, to improve the law and the legal
135 profession and to exemplify the legal profession’s ideals of public service.

136 [8] A lawyer’s responsibilities as a representative of clients, an officer of the legal
137 system and a public citizen are usually harmonious. Thus, when an opposing party is well
138 represented, a lawyer can be a zealous advocate on behalf of a client and at the same time
139 assume that justice is being done. So also, a lawyer can be sure that preserving client
140 confidences ordinarily serves the public interest because people are more likely to seek
141 legal advice, and thereby heed their legal obligations, when they know their
142 communications will be private.

143 [9] In the nature of law practice, however, conflicting responsibilities are encountered.
144 Virtually all difficult ethical problems arise from conflict between a lawyer’s
145 responsibilities to clients, to the legal system and to the lawyer’s own interest in
146 remaining an ethical person while earning a satisfactory living. The Rules of Professional
147 Conduct often prescribe terms for resolving such conflicts. Within the framework of
148 these Rules, however, many difficult issues of professional discretion can arise. Such
149 issues must be resolved through the exercise of sensitive professional and moral
150 judgment guided by the basic principles underlying the Rules. These principles include
151 the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests,
152 within the bounds of the law, while maintaining a professional, courteous and civil
153 attitude toward all persons involved in the legal system.

154 [10] The legal profession is largely self-governing. Although other professions also have
155 been granted powers of self-government, the legal profession is unique in this respect
156 because of the close relationship between the profession and the processes of government
157 and law enforcement. This connection is manifested in the fact that ultimate authority
158 over the legal profession is vested largely in the courts.

159 [11] To the extent that lawyers meet the obligations of their professional calling, the
160 occasion for government regulation is obviated. Self-regulation also helps maintain the
161 legal profession’s independence from government domination. An independent legal
162 profession is an important force in preserving government under law, for abuse of legal
163 authority is more readily challenged by a profession whose members are not dependent
164 on government for the right to practice.

165 [12] The legal profession's relative autonomy carries with it special responsibilities of
166 self-government. The profession has a responsibility to assure that its regulations are
167 conceived in the public interest and not in furtherance of parochial or self-interested
168 concerns of the bar. Every lawyer is responsible for observance of the Rules of
169 Professional Conduct. A lawyer should also aid in securing their observance by other
170 lawyers. Neglect of these responsibilities compromises the independence of the
171 profession and the public interest which it serves.

172 [13] Lawyers play a vital role in the preservation of society. The fulfillment of this role
173 requires an understanding by lawyers of their relationship to our legal system. The Rules
174 of Professional Conduct, when properly applied, serve to define that relationship.

175

175 **SCOPE**

176 [14] The Rules of Professional Conduct are rules of reason. They should be interpreted
177 with reference to the purposes of legal representation and of the law itself. Some of the
178 Rules are imperatives, cast in the terms "shall" or "shall not." These define proper
179 conduct for purposes of professional discipline. Others, generally cast in the term "may,"
180 are permissive and define areas under the Rules in which the lawyer has discretion to
181 exercise professional judgment. No disciplinary action should be taken when the lawyer
182 chooses not to act or acts within the bounds of such discretion. Other Rules define the
183 nature of relationships between the lawyer and others. The Rules are thus partly
184 obligatory and disciplinary and partly constitutive and descriptive in that they define a
185 lawyer's professional role. Many of the Comments use the term "should." Comments do
186 not add obligations to the Rules but provide guidance for practicing in compliance with
187 the Rules.

188 [15] The Rules presuppose a larger legal context shaping the lawyer's role. That context
189 includes court rules and statutes relating to matters of licensure, laws defining specific
190 obligations of lawyers and substantive and procedural law in general. The Comments are
191 sometimes used to alert lawyers to their responsibilities under such other law.

192 [16] Compliance with the Rules, as with all law in an open society, depends primarily
193 upon understanding and voluntary compliance, secondarily upon reinforcement by peer
194 and public opinion and finally, when necessary, upon enforcement through disciplinary
195 proceedings. The Rules do not, however, exhaust the moral and ethical considerations
196 that should inform a lawyer, for no worthwhile human activity can be completely defined
197 by legal rules. For example, Minnesota's Professionalism Aspirations provide guidance
198 on best practices in situations typical in the practice of law. The Rules simply provide a
199 framework for the ethical practice of law.

200 [17] Furthermore, for purposes of determining the lawyer's authority and responsibility,
201 principles of substantive law external to these Rules determine whether a client-lawyer
202 relationship exists. Most of the duties flowing from the client-lawyer relationship attach
203 only after the client has requested the lawyer to render legal services and the lawyer has
204 agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6,
205 that attach when the lawyer agrees to consider whether a client-lawyer relationship shall
206 be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific
207 purpose can depend on the circumstances and may be a question of fact.

208 [18] Under various legal provisions, including constitutional, statutory and common law,
209 the responsibilities of government lawyers may include authority concerning legal
210 matters that ordinarily reposes in the client in private client-lawyer relationships. For
211 example, a lawyer for a government agency may have authority on behalf of the
212 government to decide upon settlement or whether to appeal from an adverse judgment.
213 Such authority in various respects is generally vested in the attorney general and the
214 state's attorney in state government, and their federal counterparts, and the same may be
215 true of other government law officers. Also, lawyers under the supervision of these

216 officers may be authorized to represent several government agencies in
217 intragovernmental legal controversies in circumstances where a private lawyer could not
218 represent multiple private clients. These Rules do not abrogate any such authority.

219 [19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for
220 invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a
221 lawyer's conduct will be made on the basis of the facts and circumstances as they existed
222 at the time of the conduct in question and in recognition of the fact that a lawyer often has
223 to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules
224 presuppose that whether or not discipline should be imposed for a violation, and the
225 severity of a sanction, depend on all the circumstances, such as the willfulness and
226 seriousness of the violation, extenuating factors and whether there have been previous
227 violations.

228 [20] Violation of a Rule should not itself give rise to a cause of action against a lawyer
229 nor should it create any presumption in such a case that a legal duty has been breached. In
230 addition, violation of a Rule does not necessarily warrant any other nondisciplinary
231 remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed
232 to provide guidance to lawyers and to provide a structure for regulating conduct through
233 disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore,
234 the purpose of the Rules can be subverted when they are invoked by opposing parties as
235 procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or
236 for sanctioning a lawyer under the administration of a disciplinary authority, does not
237 imply that an antagonist in a collateral proceeding or transaction has standing to seek
238 enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct
239 by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable
240 standard of conduct.

241 [21] The Comment accompanying each Rule explains and illustrates the meaning and
242 purpose of the Rule. The Preamble and this note on Scope provide general orientation.
243 The Comments are intended as guides to interpretation, but the text of each Rule is
244 authoritative.

245

245 **RULE 1.0: TERMINOLOGY**

246
247 (a) "Belief" or "believes" denotes that the person involved actually supposed the fact
248 in question to be true. A person's belief may be inferred from circumstances.

249
250 (b) "Confirmed in writing," when used in reference to the informed consent of a
251 person, denotes informed consent that is given in writing by the person or a writing that a
252 lawyer promptly transmits to the person confirming an oral informed consent. See
253 paragraph (ef) for the definition of "informed consent." If it is not feasible to obtain or
254 transmit the writing at the time the person gives informed consent, then the lawyer must
255 obtain or transmit it within a reasonable time thereafter.

256
257 (c) "Consult" or "Consultation" denotes communication of information reasonably
258 sufficient to permit the client to appreciate the significance of the matter in question.

259
260 (ed) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership,
261 professional corporation, sole proprietorship or other association authorized to practice
262 law; or lawyers employed in a legal services organization or the legal department of a
263 corporation or other organization.

264
265 (de) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive
266 or procedural law of the applicable jurisdiction and has a purpose to deceive.

267
268 (ef) "Informed consent" denotes the agreement by a person to a proposed course of
269 conduct after the lawyer has communicated adequate information and explanation about
270 the material risks of and reasonably available alternatives to the proposed course of
271 conduct.

272
273 (fg) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in
274 question. A person's knowledge may be inferred from circumstances.

275
276 (gh) "Partner" denotes a member of a partnership, a shareholder in a law firm
277 organized as a professional corporation, or a member of an association authorized to
278 practice law.

279
280 (hi) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer
281 denotes the conduct of a reasonably prudent and competent lawyer.

282
283 (ij) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer
284 denotes that the lawyer believes the matter in question and that the circumstances are
285 such that the belief is reasonable.

286
287 (jk) "Reasonably should know" when used in reference to a lawyer denotes that a
288 lawyer of reasonable prudence and competence would ascertain the matter in question.

289

290 (~~k~~l) "Screened" denotes the isolation of a lawyer from any participation in a matter
291 through the timely imposition of procedures within a firm that are reasonably adequate
292 under the circumstances to protect information that the isolated lawyer is obligated to
293 protect under these Rules or other law.

294

295 (~~h~~m) "Substantial" when used in reference to degree or extent denotes a material
296 matter of clear and weighty importance.

297

298 (~~m~~n) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a
299 legislative body, administrative agency or other body acting in an adjudicative capacity.
300 A legislative body, administrative agency or other body acts in an adjudicative capacity
301 when a neutral official, after the presentation of evidence or legal argument by a party or
302 parties, will render a binding legal judgment directly affecting a party's interests in a
303 particular matter.

304

305 (~~n~~o) "Writing" or "written" denotes a tangible or electronic record of a communication
306 or representation, including handwriting, typewriting, printing, photostating,
307 photography, audio or videorecording and e-mail. A "signed" writing includes an
308 electronic sound, symbol or process attached to or logically associated with a writing and
309 executed or adopted by a person with the intent to sign the writing.

310

311

Comment

312

Confirmed in Writing

313 [1] If it is not feasible to obtain or transmit a written confirmation at the time the
314 client gives informed consent, then the lawyer must obtain or transmit it within a
315 reasonable time thereafter. If a lawyer has obtained a client's informed consent, the
316 lawyer may act in reliance on that consent so long as it is confirmed in writing within a
317 reasonable time thereafter.

318

Firm

319 [2] Whether two or more lawyers constitute a firm within paragraph (~~e~~d) can depend
320 on the specific facts. For example, two practitioners who share office space and
321 occasionally consult or assist each other ordinarily would not be regarded as constituting
322 a firm. However, if they present themselves to the public in a way that suggests that they
323 are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes
324 of the Rules. The terms of any formal agreement between associated lawyers are relevant
325 in determining whether they are a firm, as is the fact that they have mutual access to
326 information concerning the clients they serve. Furthermore, it is relevant in doubtful
327 cases to consider the underlying purpose of the Rule that is involved. A group of lawyers
328 could be regarded as a firm for purposes of the Rule that the same lawyer should not
329 represent opposing parties in litigation, while it might not be so regarded for purposes of
330 the Rule that information acquired by one lawyer is attributed to another.

331 [3] With respect to the law department of an organization, ~~including the government,~~
332 there is ordinarily no question that the members of the department constitute a firm
333 within the meaning of the Rules of Professional Conduct. There can be uncertainty,
334 however, as to the identity of the client. For example, it may not be clear whether the law
335 department of a corporation represents a subsidiary or an affiliated corporation, as well as

336 the corporation by which the members of the department are directly employed. A similar
337 question can arise concerning an unincorporated association and its local affiliates.

338 [4] Similar questions can also arise with respect to lawyers in legal aid and legal
339 services organizations. Depending upon the structure of the organization, the entire
340 organization or different components of it may constitute a firm or firms for purposes of
341 these Rules.

342 **Fraud**

343 [5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that
344 is characterized as such under the substantive or procedural law of the applicable
345 jurisdiction and has a purpose to deceive. This does not include merely negligent
346 misrepresentation or negligent failure to apprise another of relevant information. For
347 purposes of these Rules, it is not necessary that anyone has suffered damages or relied on
348 the misrepresentation or failure to inform.

349 **Informed Consent**

350 [6] Many of the Rules of Professional Conduct require the lawyer to obtain the
351 informed consent of a client or other person (e.g., a former client or, under certain
352 circumstances, a prospective client) before accepting or continuing representation or
353 pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The
354 communication necessary to obtain such consent will vary according to the Rule involved
355 and the circumstances giving rise to the need to obtain informed consent. The lawyer
356 must make reasonable efforts to ensure that the client or other person possesses
357 information reasonably adequate to make an informed decision. Ordinarily, this will
358 require communication that includes a disclosure of the facts and circumstances giving
359 rise to the situation, any explanation reasonably necessary to inform the client or other
360 person of the material advantages and disadvantages of the proposed course of conduct
361 and a discussion of the client's or other person's options and alternatives. In some
362 circumstances it may be appropriate for a lawyer to advise a client or other person to seek
363 the advice of other counsel. A lawyer need not inform a client or other person of facts or
364 implications already known to the client or other person; nevertheless, a lawyer who does
365 not personally inform the client or other person assumes the risk that the client or other
366 person is inadequately informed and the consent is invalid. In determining whether the
367 information and explanation provided are reasonably adequate, relevant factors include
368 whether the client or other person is experienced in legal matters generally and in making
369 decisions of the type involved, and whether the client or other person is independently
370 represented by other counsel in giving the consent. Normally, such persons need less
371 information and explanation than others, and generally a client or other person who is
372 independently represented by other counsel in giving the consent should be assumed to
373 have given informed consent.

374 [7] Obtaining informed consent will usually require an affirmative response by the
375 client or other person. In general, a lawyer may not assume consent from a client's or
376 other person's silence. Consent may be inferred, however, from the conduct of a client or
377 other person who has reasonably adequate information about the matter. A number of
378 Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and
379 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (a) and
380 (b). Other Rules require that a client's consent be obtained in a writing signed by the
381 client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (a).

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Screened

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[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

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[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

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[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

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RULE 1.1: COMPETENCE

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A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

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Comment

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Legal Knowledge and Skill

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[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

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[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily

428 transcends any particular specialized knowledge. A lawyer can provide adequate
429 representation in a wholly novel field through necessary study. Competent representation
430 can also be provided through the association of a lawyer of established competence in the
431 field in question.

432 [3] In an emergency a lawyer may give advice or assistance in a matter in which the
433 lawyer does not have the skill ordinarily required where referral to or consultation or
434 association with another lawyer would be impractical. Even in an emergency, however,
435 assistance should be limited to that reasonably necessary in the circumstances, for ill-
436 considered action under emergency conditions can jeopardize the client's interest.

437 [4] A lawyer may accept representation where the requisite level of competence can
438 be achieved by reasonable preparation. This applies as well to a lawyer who is appointed
439 as counsel for an unrepresented person. See also Rule 6.2.

440 **Thoroughness and Preparation**

441
442 [5] Competent handling of a particular matter includes inquiry into and analysis of
443 the factual and legal elements of the problem, and use of methods and procedures
444 meeting the standards of competent practitioners. It also includes adequate preparation.
445 The required attention and preparation are determined in part by what is at stake; major
446 litigation and complex transactions ordinarily require more extensive treatment than
447 matters of lesser complexity and consequence. An agreement between the lawyer and the
448 client regarding the scope of the representation may limit the matters for which the
449 lawyer is responsible. See Rule 1.2(c).

450 **Maintaining Competence**

451
452 [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of
453 changes in the law and its practice, engage in continuing study and education and comply
454 with all continuing legal education requirements to which the lawyer is subject.
455

456 457 458 **RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF** 459 **AUTHORITY BETWEEN CLIENT AND LAWYER**

460
461 (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions
462 concerning the objectives of representation and, as required by Rule 1.4, shall consult
463 with the client as to the means by which they are to be pursued. A lawyer may take such
464 action on behalf of the client as is impliedly authorized to carry out the representation. A
465 lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the
466 lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea
467 to be entered, whether to waive jury trial and whether the client will testify.

468
469 (b) A lawyer's representation of a client, including representation by appointment,
470 does not constitute an endorsement of the client's political, economic, social or moral
471 views or activities.

472
473 (c) A lawyer may limit the scope of the representation if the limitation is reasonable
474 under the circumstances and the client gives informed consent.
475

476 (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that
477 the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal
478 consequences of any proposed course of conduct with a client and may counsel or assist a
479 client to make a good faith effort to determine the validity, scope, meaning or application
480 of the law.

481
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Comment

483 Allocation of Authority between Client and Lawyer

484 [1] Paragraph (a) confers upon the client the ultimate authority to determine the
485 purposes to be served by legal representation, within the limits imposed by law and the
486 lawyer's professional obligations. The decisions specified in paragraph (a), such as
487 whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the
488 lawyer's duty to communicate with the client about such decisions. With respect to the
489 means by which the client's objectives are to be pursued, the lawyer shall consult with
490 the client as required by Rule 1.4(a)(2) and may take such action as is impliedly
491 authorized to carry out the representation.

492 [2] On occasion, however, a lawyer and a client may disagree about the means to be
493 used to accomplish the client's objectives. Clients normally defer to the special
494 knowledge and skill of their lawyer with respect to the means to be used to accomplish
495 their objectives, particularly with respect to technical, legal and tactical matters.
496 Conversely, lawyers usually defer to the client regarding such questions as the expense to
497 be incurred and concern for third persons who might be adversely affected. Because of
498 the varied nature of the matters about which a lawyer and client might disagree and
499 because the actions in question may implicate the interests of a tribunal or other persons,
500 this Rule does not prescribe how such disagreements are to be resolved. Other law,
501 however, may be applicable and should be consulted by the lawyer. The lawyer should
502 also consult with the client and seek a mutually acceptable resolution of the
503 disagreement. If such efforts are unavailing and the lawyer has a fundamental
504 disagreement with the client, the lawyer may withdraw from the representation. See Rule
505 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the
506 lawyer. See Rule 1.16(a)(3).

507 [3] At the outset of a representation, the client may authorize the lawyer to take
508 specific action on the client's behalf without further consultation. Absent a material
509 change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance
510 authorization. The client may, however, revoke such authority at any time.

511 [4] In a case in which the client appears to be suffering from diminished capacity, the
512 lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

513 Independence from Client's Views or Activities

514 [5] Legal representation should not be denied to people who are unable to afford
515 legal services, or whose cause is controversial or the subject of popular disapproval. By
516 the same token, representing a client does not constitute approval of the client's views or
517 activities.

518

519 **Agreements Limiting Scope of Representation**
520

521 [6] The objectives or scope of services to be provided by a lawyer may be limited by
522 agreement with the client or by the terms under which the lawyer’s services are made
523 available to the client. When a lawyer has been retained by an insurer to represent an
524 insured, for example, the representation may be limited to matters related to the insurance
525 coverage. A limited representation may be appropriate because the client has limited
526 objectives for the representation. In addition, the terms upon which representation is
527 undertaken may exclude specific means that might otherwise be used to accomplish the
528 client’s objectives. Such limitations may exclude actions that the client thinks are too
529 costly or that the lawyer regards as repugnant or imprudent.
530

531 [7] Although this Rule affords the lawyer and client substantial latitude to limit the
532 representation, the limitation must be reasonable under the circumstances. If, for
533 example, a client’s objective is limited to securing general information about the law the
534 client needs in order to handle a common and typically uncomplicated legal problem, the
535 lawyer and client may agree that the lawyer’s services will be limited to a brief telephone
536 consultation. Such a limitation, however, would not be reasonable if the time allotted was
537 not sufficient to yield advice upon which the client could rely. Although an agreement for
538 a limited representation does not exempt a lawyer from the duty to provide competent
539 representation, the limitation is a factor to be considered when determining the legal
540 knowledge, skill, thoroughness and preparation reasonably necessary for the
541 representation. See Rule 1.1.

542 [8] All agreements concerning a lawyer’s representation of a client must accord with
543 the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

544 **Criminal, Fraudulent and Prohibited Transactions**

545 [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client
546 to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from
547 giving an honest opinion about the actual consequences that appear likely to result from a
548 client’s conduct. Nor does the fact that a client uses advice in a course of action that is
549 criminal or fraudulent of itself make a lawyer a party to the course of action. There is a
550 critical distinction between presenting an analysis of legal aspects of questionable
551 conduct and recommending the means by which a crime or fraud might be committed
552 with impunity.

553 [10] When the client’s course of action has already begun and is continuing, the
554 lawyer’s responsibility is especially delicate. The lawyer is required to avoid assisting the
555 client, for example, by drafting or delivering documents that the lawyer knows are
556 fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not
557 continue assisting a client in conduct that the lawyer originally supposed was legally
558 proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw
559 from the representation of the client in the matter. See Rule 1.16(a). In some cases,
560 withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice
561 of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like.
562 See Rule 4.1.

563 [11] Where the client is a fiduciary, the lawyer may be charged with special
564 obligations in dealings with a beneficiary.

565 [12] Paragraph (d) applies whether or not the defrauded party is a party to the
566 transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or
567 fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a

568 criminal defense incident to a general retainer for legal services to a lawful enterprise.
569 The last clause of paragraph (d) recognizes that determining the validity or interpretation
570 of a statute or regulation may require a course of action involving disobedience of the
571 statute or regulation or of the interpretation placed upon it by governmental authorities.

572 [13] If a lawyer comes to know or reasonably should know that a client expects
573 assistance not permitted by the Rules of Professional Conduct or other law or if the
574 lawyer intends to act contrary to the client's instructions, the lawyer must consult with
575 the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

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578 **RULE 1.3: DILIGENCE**

579

580 A lawyer shall act with reasonable diligence and promptness in representing a client.

581

582

Comment

583 [1] A lawyer should pursue a matter on behalf of a client despite opposition,
584 obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical
585 measures are required to vindicate a client's cause or endeavor. A lawyer must also act
586 with commitment and dedication to the interests of the client and with zeal in advocacy
587 upon the client's behalf. A lawyer is not bound, however, to press for every advantage
588 that might be realized for a client. For example, a lawyer may have authority to exercise
589 professional discretion in determining the means by which a matter should be pursued.
590 See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use
591 of offensive tactics or preclude the treating of all persons involved in the legal process
592 with courtesy and respect.

593 [2] A lawyer's work load must be controlled so that each matter can be handled
594 competently.

595 [3] Perhaps no professional shortcoming is more widely resented than
596 procrastination. A client's interests often can be adversely affected by the passage of time
597 or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of
598 limitations, the client's legal position may be destroyed. Even when the client's interests
599 are not affected in substance, however, unreasonable delay can cause a client needless
600 anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act
601 with reasonable promptness, however, does not preclude the lawyer from agreeing to a
602 reasonable request for a postponement that will not prejudice the lawyer's client.

603 [4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should
604 carry through to conclusion all matters undertaken for a client. If a lawyer's employment
605 is limited to a specific matter, the relationship terminates when the matter has been
606 resolved. If a lawyer has served a client over a substantial period in a variety of matters,
607 the client sometimes may assume that the lawyer will continue to serve on a continuing
608 basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer
609 relationship still exists should be clarified by the lawyer, preferably in writing, so that the
610 client will not mistakenly suppose the lawyer is looking after the client's affairs when the
611 lawyer has ceased to do so. For example, if a lawyer has handled a judicial or
612 administrative proceeding that produced a result adverse to the client and the lawyer and
613 the client have not agreed that the lawyer will handle the matter on appeal, the lawyer
614 must consult with the client about the possibility of appeal before relinquishing

615 responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to
616 prosecute the appeal for the client depends on the scope of the representation the lawyer
617 has agreed to provide to the client. See Rule 1.2.

618
619 [5] To prevent neglect of client matters in the event of a sole practitioner's death or
620 disability, the duty of diligence may require that each sole practitioner prepare a plan, in
621 conformity with applicable rules, that designates another competent lawyer to review
622 client files, notify each client of the lawyer's death or disability, and determine whether
623 there is a need for immediate protective action. Cf. Rule 28 of the American Bar
624 Association Model Rules for Lawyer Disciplinary Enforcement (providing for court
625 appointment of a lawyer to inventory files and take other protective action in absence of a
626 plan providing for another lawyer to protect the interests of the clients of a deceased or
627 disabled lawyer).

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630 **RULE 1.4: COMMUNICATION**

631

632 (a) A lawyer shall:

- 633 (1) promptly inform the client of any decision or circumstance with respect to which
634 the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
635 (2) reasonably consult with the client about the means by which the client's
636 objectives are to be accomplished;
637 (3) keep the client reasonably informed about the status of the matter;
638 (4) promptly comply with reasonable requests for information; and
639 (5) consult with the client about any relevant limitation on the lawyer's conduct
640 when the lawyer knows that the client expects assistance not permitted by the Rules of
641 Professional Conduct or other law.

642

643 (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the
644 client to make informed decisions regarding the representation.

645

646 **Comment**

647

648 [1] Reasonable communication between the lawyer and the client is necessary for the
649 client effectively to participate in the representation.

650

651 **Communicating with Client**

652

653 [2] If these Rules require that a particular decision about the representation be made
654 by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure
655 the client's consent prior to taking action unless prior discussions with the client have
656 resolved what action the client wants the lawyer to take. For example, a lawyer who
657 receives from opposing counsel an offer of settlement in a civil controversy or a proffered
658 plea bargain in a criminal case must promptly inform the client of its substance unless the
659 client has previously indicated that the proposal will be acceptable or unacceptable or has
660 authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

661

662 [3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about
663 the means to be used to accomplish the client's objectives. In some situations —
664 depending on both the importance of the action under consideration and the feasibility of
665 consulting with the client — this duty will require consultation prior to taking action. In

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other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client’s behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer’s regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer’s staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer’s own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

720 **RULE 1.5: FEES**

721
722 (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee
723 or an unreasonable amount for expenses. The factors to be considered in determining the
724 reasonableness of a fee include the following:

- 725 (1) the time and labor required, the novelty and difficulty of the questions involved,
726 and the skill requisite to perform the legal service properly;
727 (2) the likelihood, if apparent to the client, that the acceptance of the particular
728 employment will preclude other employment by the lawyer;
729 (3) the fee customarily charged in the locality for similar legal services;
730 (4) the amount involved and the results obtained;
731 (5) the time limitations imposed by the client or by the circumstances;
732 (6) the nature and length of the professional relationship with the client;
733 (7) the experience, reputation, and ability of the lawyer or lawyers performing the
734 services; and
735 (8) whether the fee is fixed or contingent.

736
737 (b) The scope of the representation and the basis or rate of the fee and expenses for
738 which the client will be responsible shall be communicated to the client, preferably in
739 writing, before or within a reasonable time after commencing the representation, except
740 when the lawyer will charge a regularly represented client on the same basis or rate. Any
741 changes in the basis or rate of the fee or expenses shall also be communicated to the
742 client. All agreements for the advance payment of nonrefundable fees to secure a
743 lawyer's availability for a specific period of time or a specific service shall be reasonable
744 in amount and clearly communicated in a writing signed by the client.

745
746 (c) A fee may be contingent on the outcome of the matter for which the service is
747 rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or
748 other law. A contingent fee agreement shall be in a writing signed by the client and shall
749 state the method by which the fee is to be determined, including the percentage or
750 percentages that shall accrue to the lawyer in the event of settlement, trial or appeal;
751 litigation and other expenses to be deducted from the recovery; and whether such
752 expenses are to be deducted before or after the contingent fee is calculated. The
753 agreement must clearly notify the client of any expenses for which the client will be
754 liable whether or not the client is the prevailing party. Upon conclusion of a contingent
755 fee matter, the lawyer shall provide the client with a written statement stating the
756 outcome of the matter and, if there is a recovery, showing the remittance to the client and
757 the method of its determination.

758
759 (d) A lawyer shall not enter into an arrangement for, charge, or collect:
760 (1) any fee in a domestic relations matter, the payment or amount of which is
761 contingent upon the securing of a divorce or upon the amount of alimony or support, or
762 property settlement in lieu thereof; or
763 (2) a contingent fee for representing a defendant in a criminal case.

- 765 (e) A division of a fee between lawyers who are not in the same firm may be made
766 only if:
- 767 (1) the division is in proportion to the services performed by each lawyer or each
768 lawyer assumes joint responsibility for the representation;
 - 769 (2) the client agrees to the arrangement, including the share each lawyer will receive,
770 and the agreement is confirmed in writing; and
 - 771 (3) the total fee is reasonable.

772
773

Comment

Reasonableness of Fee and Expenses

775 [1] Paragraph (a) requires that lawyers charge fees that are reasonable under the
776 circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each
777 factor be relevant in each instance. Paragraph (a) also requires that expenses for which
778 the client will be charged must be reasonable. A lawyer may seek reimbursement for the
779 cost of services performed in-house, such as copying, or for other expenses incurred in-
780 house, such as telephone charges, either by charging a reasonable amount to which the
781 client has agreed in advance or by charging an amount that reasonably reflects the cost
782 incurred by the lawyer.

Basis or Rate of Fee

784 [2] When the lawyer has regularly represented a client, they ordinarily will have
785 evolved an understanding concerning the basis or rate of the fee and the expenses for
786 which the client will be responsible. In a new client-lawyer relationship, however, an
787 understanding as to fees and expenses must be promptly established. Generally, it is
788 desirable to furnish the client with at least a simple memorandum or copy of the lawyer's
789 customary fee arrangements that states the general nature of the legal services to be
790 provided, the basis, rate or total amount of the fee and whether and to what extent the
791 client will be responsible for any costs, expenses or disbursements in the course of the
792 representation. A written statement concerning the terms of the engagement reduces the
793 possibility of misunderstanding.

794 [3] Contingent fees, like any other fees, are subject to the reasonableness standard of
795 paragraph (a) of this Rule. In determining whether a particular contingent fee is
796 reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer
797 must consider the factors that are relevant under the circumstances. Applicable law may
798 impose limitations on contingent fees, such as a ceiling on the percentage allowable, or
799 may require a lawyer to offer clients an alternative basis for the fee. Applicable law also
800 may apply to situations other than a contingent fee, for example, government regulations
801 regarding fees in certain tax matters.

Terms of Payment

803 [4] A lawyer may require advance payment of a fee, but is obliged to return any
804 unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for
805 services, such as an ownership interest in an enterprise, providing this does not involve
806 acquisition of a proprietary interest in the cause of action or subject matter of the
807 litigation contrary to Rule 1.8 (i). However, a fee paid in property instead of money may
808 be subject to the requirements of Rule 1.8(a) because such fees often have the essential
809 qualities of a business transaction with the client.

810 [5] An agreement may not be made whose terms might induce the lawyer improperly
811 to curtail services for the client or perform them in a way contrary to the client's interest.
812 For example, a lawyer should not enter into an agreement whereby services are to be
813 provided only up to a stated amount when it is foreseeable that more extensive services
814 probably will be required, unless the situation is adequately explained to the client.
815 Otherwise, the client might have to bargain for further assistance in the midst of a
816 proceeding or transaction. However, it is proper to define the extent of services in light of
817 the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily
818 on hourly charges by using wasteful procedures.

819 **Prohibited Contingent Fees**

820 [6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic
821 relations matter when payment is contingent upon the securing of a divorce or upon the
822 amount of alimony or support or property settlement to be obtained. This provision does
823 not preclude a contract for a contingent fee for legal representation in connection with the
824 recovery of post-judgment balances due under support, alimony or other financial orders
825 because such contracts do not implicate the same policy concerns.

826 **Division of Fee**

827 [7] A division of fee is a single billing to a client covering the fee of two or more
828 lawyers who are not in the same firm. A division of fee facilitates association of more
829 than one lawyer in a matter in which neither alone could serve the client as well, and
830 most often is used when the fee is contingent and the division is between a referring
831 lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on
832 the basis of the proportion of services they render or if each lawyer assumes
833 responsibility for the representation as a whole. In addition, the client must agree to the
834 arrangement, including the share that each lawyer is to receive, and the agreement must
835 be confirmed in writing. Contingent fee agreements must be in a writing signed by the
836 client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for
837 the representation entails financial and ethical responsibility for the representation as if
838 the lawyers were associated in a partnership. A lawyer should only refer a matter to a
839 lawyer whom the referring lawyer reasonably believes is competent to handle the matter.
840 See Rule 1.1.

841 [8] Paragraph (e) does not prohibit or regulate division of fees to be received in the
842 future for work done when lawyers were previously associated in a law firm.

843 **Disputes over Fees**

844 [9] If a procedure has been established for resolution of fee disputes, such as an
845 arbitration or mediation procedure established by the bar, the lawyer must comply with
846 the procedure when it is mandatory, and, even when it is voluntary, the lawyer should
847 conscientiously consider submitting to it. Law may prescribe a procedure for determining
848 a lawyer's fee, for example, in representation of an executor or administrator, a class or a
849 person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled
850 to such a fee and a lawyer representing another party concerned with the fee should
851 comply with the prescribed procedure.

852

853 **RULE 1.6: CONFIDENTIALITY OF INFORMATION**

854
855 (a) ~~A~~ Except when permitted under paragraph (b), a lawyer shall not
856 knowingly reveal information relating to the representation of a client
857 unless.

858
859 (b) A lawyer may reveal information relating to the representation of a
860 client if:

861 (1) the client gives informed consent;

862 (2) the information is not protected by the attorney-client privilege under applicable law,
863 the client has not requested that the information be held inviolate, and the lawyer
864 reasonably believes the disclosure would not be embarrassing or likely detrimental to the
865 client;

866 (3) the lawyer reasonably believes the disclosure is impliedly authorized in order to carry
867 out the representation or the disclosure is permitted by paragraph (b);

868
869 ~~(b) — A lawyer may reveal information relating to the representation of a client~~
870 ~~to the extent the lawyer reasonably believes necessary;~~

871 (4) the lawyer reasonably believes the disclosure is necessary to prevent the commission
872 of a crime;

873 (5) the lawyer reasonably believes the disclosure is necessary to rectify the consequences
874 of a client's criminal or fraudulent act in the furtherance of which the lawyer's services
875 were used;

876 ~~(1) —————~~ (6) the lawyer reasonably believes the disclosure is necessary to
877 prevent reasonably certain death or substantial bodily harm;

878 ~~(2) — 7)~~ (7) the lawyer reasonably believes the disclosure is necessary to secure legal advice
879 about the lawyer's compliance with these Rules;

880 ~~(3) — 8)~~ (8) the lawyer reasonably believes the disclosure is necessary to establish a claim or
881 defense on behalf of the lawyer in an actual or potential controversy between the lawyer
882 and the client, to establish a defense to in a criminal charge or civil claim, criminal or
883 disciplinary proceeding against the lawyer based upon conduct in which the client was
884 involved, or to respond to allegations in any proceeding to allegations by the client
885 concerning the lawyer's representation of the client; ~~or~~

886 ~~(4) — 9)~~ (9) the lawyer reasonably believes the disclosure is necessary to comply with other
887 law or a court order; or

888 (10) the lawyer reasonably believes the disclosure is necessary to inform the Office of
889 Lawyers Professional Responsibility of knowledge of another lawyer's violation of the
890 Rules of Professional Conduct that raises a substantial question as to that lawyer's
891 honesty, trustworthiness or fitness as a lawyer in other respects. See Rule 8.3.

892
893 **Comment**

894 [1] This Rule governs the disclosure by a lawyer of information relating to the
895 representation of a client during the lawyer's representation of the client. See Rule 1.18
896 for the lawyer's duties with respect to information provided to the lawyer by a
897 prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating
898 to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for

899 the lawyer's duties with respect to the use of such information to the disadvantage of
900 clients and former clients.

901 [2] A fundamental principle in the client-lawyer relationship is that, in the absence of
902 the client's informed consent, the lawyer must not reveal information relating to the
903 representation. See Rule 1.0(e) for the definition of informed consent. This contributes
904 to the trust that is the hallmark of the client-lawyer relationship. The client is thereby
905 encouraged to seek legal assistance and to communicate fully and frankly with the lawyer
906 even as to embarrassing or legally damaging subject matter. The lawyer needs this
907 information to represent the client effectively and, if necessary, to advise the client to
908 refrain from wrongful conduct. Almost without exception, clients come to lawyers in
909 order to determine their rights and what is, in the complex of laws and regulations,
910 deemed to be legal and correct. Based upon experience, lawyers know that almost all
911 clients follow the advice given, and the law is upheld.

912 [3] The principle of client-lawyer confidentiality is given effect by related bodies of
913 law: the attorney-client privilege, the work product doctrine and the rule of
914 confidentiality established in professional ethics. The attorney-client privilege and work-
915 product doctrine apply in judicial and other proceedings in which a lawyer may be called
916 as a witness or otherwise required to produce evidence concerning a client. The rule of
917 client-lawyer confidentiality applies in situations other than those where evidence is
918 sought from the lawyer through compulsion of law. The confidentiality rule, for example,
919 applies not only to matters communicated in confidence by the client but also to all
920 information relating to the representation, whatever its source. A lawyer may not disclose
921 such information except as authorized or required by the Rules of Professional Conduct
922 or other law. See also Scope.

923 [4] Paragraph (a) prohibits a lawyer from revealing information relating to the
924 representation of a client. This prohibition also applies to disclosures by a lawyer that do
925 not in themselves reveal protected information but could reasonably lead to the discovery
926 of such information by a third person. A lawyer's use of a hypothetical to discuss issues
927 relating to the representation is permissible so long as there is no reasonable likelihood
928 that the listener will be able to ascertain the identity of the client or the situation involved.

929 **Authorized Disclosure**

930 [5] Except to the extent that the client's instructions or special circumstances limit
931 that authority, a lawyer is impliedly authorized to make disclosures about a client when
932 appropriate in carrying out the representation. In some situations, for example, a lawyer
933 may be impliedly authorized to admit a fact that cannot properly be disputed or to make a
934 disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in
935 the course of the firm's practice, disclose to each other information relating to a client of
936 the firm, unless the client has instructed that particular information be confined to
937 specified lawyers.

938 **Disclosure Adverse to Client**

939 [6] Although the public interest is usually best served by a strict rule requiring
940 lawyers to preserve the confidentiality of information relating to the representation of
941 their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(4)
942 recognizes the overriding value of life and physical integrity and permits disclosure
943 reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such
944 harm is reasonably certain to occur if it will be suffered imminently or if there is a
945 present and substantial threat that a person will suffer such harm at a later date if the

946 lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows
947 that a client has accidentally discharged toxic waste into a town's water supply may
948 reveal this information to the authorities if there is a present and substantial risk that a
949 person who drinks the water will contract a life-threatening or debilitating disease and the
950 lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

951 [7] A lawyer's confidentiality obligations do not preclude a lawyer from securing
952 confidential legal advice about the lawyer's personal responsibility to comply with these
953 Rules. In most situations, disclosing information to secure such advice will be impliedly
954 authorized for the lawyer to carry out the representation. Even when the disclosure is not
955 impliedly authorized, paragraph (b)(~~27~~) permits such disclosure because of the
956 importance of a lawyer's compliance with the Rules of Professional Conduct.

957 [8] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a
958 client's conduct or other misconduct of the lawyer involving representation of the client,
959 the lawyer may respond to the extent the lawyer reasonably believes necessary to
960 establish a defense. The same is true with respect to a claim involving the conduct or
961 representation of a former client. Such a charge can arise in a civil, criminal, disciplinary
962 or other proceeding and can be based on a wrong allegedly committed by the lawyer
963 against the client or on a wrong alleged by a third person, for example, a person claiming
964 to have been defrauded by the lawyer and client acting together. The lawyer's right to
965 respond arises when an assertion of such complicity has been made. Paragraph (b)(~~38~~)
966 does not require the lawyer to await the commencement of an action or proceeding that
967 charges such complicity, so that the defense may be established by responding directly to
968 a third party who has made such an assertion. The right to defend also applies, of course,
969 where a proceeding has been commenced.

970 [9] A lawyer entitled to a fee is permitted by paragraph (b)(~~38~~) to prove the services
971 rendered in an action to collect it. This aspect of the rule expresses the principle that the
972 beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

973 [10] Other law may require that a lawyer disclose information about a client. Whether
974 such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules.
975 When disclosure of information relating to the representation appears to be required by
976 other law, the lawyer must discuss the matter with the client to the extent required by
977 Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure,
978 paragraph (b)(~~49~~) permits the lawyer to make such disclosures as are necessary to comply
979 with the law.

980 [11] A lawyer may be ordered to reveal information relating to the representation of a
981 client by a court or by another tribunal or governmental entity claiming authority
982 pursuant to other law to compel the disclosure. Absent informed consent of the client to
983 do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that
984 the order is not authorized by other law or that the information sought is protected against
985 disclosure by the attorney-client privilege or other applicable law. In the event of an
986 adverse ruling, the lawyer must consult with the client about the possibility of appeal to
987 the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(~~49~~)
988 permits the lawyer to comply with the court's order.

989 [12] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes
990 the disclosure is necessary to accomplish one of the purposes specified. Where
991 practicable, the lawyer should first seek to persuade the client to take suitable action to
992 obviate the need for disclosure. In any case, a disclosure adverse to the client's interest
993 should be no greater than the lawyer reasonably believes necessary to accomplish the
994 purpose. If the disclosure will be made in connection with a judicial proceeding, the

995 disclosure should be made in a manner that limits access to the information to the tribunal
996 or other persons having a need to know it and appropriate protective orders or other
997 arrangements should be sought by the lawyer to the fullest extent practicable.

998 [13] Paragraph (b) permits but does not require the disclosure of information relating
999 to a client's representation to accomplish the purposes specified in paragraphs (b)(1)
1000 through (b)(4~~10~~). In exercising the discretion conferred by this Rule, the lawyer may
1001 consider such factors as the nature of the lawyer's relationship with the client and with
1002 those who might be injured by the client, the lawyer's own involvement in the transaction
1003 and factors that may extenuate the conduct in question. A lawyer's decision not to
1004 disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be
1005 required, however, by other Rules. Some Rules require disclosure only if such disclosure
1006 would be permitted by paragraph (b). See Rules ~~1.2(d)~~, 4.1(b), 8.1 and 8.3. Rule 3.3, on
1007 the other hand, requires disclosure in some circumstances regardless of whether such
1008 disclosure is permitted by this Rule. See Rule 3.3(c).

1009 **Withdrawal**

1010 [14] If the lawyer's services will be used by the client in materially furthering a course
1011 of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).
1012 After withdrawal the lawyer is required to refrain from making disclosure of the client's
1013 confidences, except as otherwise permitted ~~by~~ in Rule 1.6. Neither this Rule nor Rule
1014 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal,
1015 and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the
1016 like. Where the client is an organization, the lawyer may be in doubt whether
1017 contemplated conduct will actually be carried out by the organization. Where necessary
1018 to guide conduct in connection with this Rule, the lawyer may make inquiry within the
1019 organization as indicated in Rule 1.13(b).

1020 **Acting Competently to Preserve Confidentiality**

1021 [15] A lawyer must act competently to safeguard information relating to the
1022 representation of a client against inadvertent or unauthorized disclosure by the lawyer or
1023 other persons who are participating in the representation of the client or who are subject
1024 to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

1025 [16] When transmitting a communication that includes information relating to the
1026 representation of a client, the lawyer must take reasonable precautions to prevent the
1027 information from coming into the hands of unintended recipients. This duty, however,
1028 does not require that the lawyer use special security measures if the method of
1029 communication affords a reasonable expectation of privacy. Special circumstances,
1030 however, may warrant special precautions. Factors to be considered in determining the
1031 reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the
1032 information and the extent to which the privacy of the communication is protected by law
1033 or by a confidentiality agreement. A client may require the lawyer to implement special
1034 security measures not required by this Rule or may give informed consent to the use of a
1035 means of communication that would otherwise be prohibited by this Rule.

1036 **Former Client**

1037 [17] The duty of confidentiality continues after the client-lawyer relationship has
1038 terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such
1039 information to the disadvantage of the former client.

1040
1041 **RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS**
1042

1043 (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the
1044 representation involves a concurrent conflict of interest. A concurrent conflict of interest
1045 exists if:

- 1046 (1) the representation of one client will be directly adverse to another client; or
1047 (2) there is a significant risk that the representation of one or more clients will
1048 be materially limited by the lawyer's responsibilities to another client, a former client or a
1049 third person or by a personal interest of the lawyer.

1050
1051 (b) Notwithstanding the existence of a concurrent conflict of interest under
1052 paragraph (a), a lawyer may represent a client if:

- 1053 (1) the lawyer reasonably believes that the lawyer will be able to provide
1054 competent and diligent representation to each affected client;
1055 (2) the representation is not prohibited by law;
1056 (3) the representation does not involve the assertion of a claim by one client against
1057 another client represented by the lawyer in the same litigation or other proceeding before
1058 a tribunal; and
1059 (4) each affected client gives informed consent, confirmed in writing.

1060
1061 **Comment**

1062 **General Principles**

1063 [1] Loyalty and independent judgment are essential elements in the lawyer's
1064 relationship to a client. Concurrent conflicts of interest can arise from the lawyer's
1065 responsibilities to another client, a former client or a third person or from the lawyer's
1066 own interests. For specific Rules regarding certain concurrent conflicts of interest, see
1067 Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest
1068 involving prospective clients, see Rule 1.18. For definitions of "informed consent" and
1069 "confirmed in writing," see Rule 1.0(ef) and (b).

1070 [2] Resolution of a conflict of interest problem under this Rule requires the lawyer to:
1071 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists;
1072 3) decide whether the representation may be undertaken despite the existence of a
1073 conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients
1074 affected under paragraph (a) and obtain their informed consent, confirmed in writing. The
1075 clients affected under paragraph (a) include both of the clients referred to in paragraph
1076 (a)(1) and the one or more clients whose representation might be materially limited under
1077 paragraph (a)(2).

1078 [3] A conflict of interest may exist before representation is undertaken, in which
1079 event the representation must be declined, unless the lawyer obtains the informed consent
1080 of each client under the conditions of paragraph (b). To determine whether a conflict of
1081 interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and
1082 type of firm and practice, to determine in both litigation and non-litigation matters the
1083 persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a
1084 failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to
1085 whether a client-lawyer relationship exists or, having once been established, is
1086 continuing, see Comment to Rule 1.3 and Scope.

1087 [4] If a conflict arises after representation has been undertaken, the lawyer ordinarily
1088 must withdraw from the representation, unless the lawyer has obtained the informed
1089 consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more
1090 than one client is involved, whether the lawyer may continue to represent any of the
1091 clients is determined both by the lawyer's ability to comply with duties owed to the
1092 former client and by the lawyer's ability to represent adequately the remaining client or
1093 clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments
1094 [5] and [29].

1095 [5] Unforeseeable developments, such as changes in corporate and other
1096 organizational affiliations or the addition or realignment of parties in litigation, might
1097 create conflicts in the midst of a representation, as when a company sued by the lawyer
1098 on behalf of one client is bought by another client represented by the lawyer in an
1099 unrelated matter. Depending on the circumstances, the lawyer may have the option to
1100 withdraw from one of the representations in order to avoid the conflict. The lawyer must
1101 seek court approval where necessary and take steps to minimize harm to the clients. See
1102 Rule 1.16. The lawyer must continue to protect the confidences of the client from whose
1103 representation the lawyer has withdrawn. See Rule 1.9(c).

1104 **Identifying Conflicts of Interest: Directly Adverse**

1105 [6] Loyalty to a current client prohibits undertaking representation directly adverse to
1106 that client without that client's informed consent. Thus, absent consent, a lawyer may not
1107 act as an advocate in one matter against a person the lawyer represents in some other
1108 matter, even when the matters are wholly unrelated. The client as to whom the
1109 representation is directly adverse is likely to feel betrayed, and the resulting damage to
1110 the client-lawyer relationship is likely to impair the lawyer's ability to represent the client
1111 effectively. In addition, the client on whose behalf the adverse representation is
1112 undertaken reasonably may fear that the lawyer will pursue that client's case less
1113 effectively out of deference to the other client, i.e., that the representation may be
1114 materially limited by the lawyer's interest in retaining the current client. Similarly, a
1115 directly adverse conflict may arise when a lawyer is required to cross-examine a client
1116 who appears as a witness in a lawsuit involving another client, as when the testimony will
1117 be damaging to the client who is represented in the lawsuit. On the other hand,
1118 simultaneous representation in unrelated matters of clients whose interests are only
1119 economically adverse, such as representation of competing economic enterprises in
1120 unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not
1121 require consent of the respective clients.

1122 [7] Directly adverse conflicts can also arise in transactional matters. For example, if a
1123 lawyer is asked to represent the seller of a business in negotiations with a buyer
1124 represented by the lawyer, not in the same transaction but in another, unrelated matter,
1125 the lawyer could not undertake the representation without the informed consent of each
1126 client.

1127 **Identifying Conflicts of Interest: Material Limitation**

1128 [8] Even where there is no direct adverseness, a conflict of interest exists if there is a
1129 significant risk that a lawyer's ability to consider, recommend or carry out an appropriate
1130 course of action for the client will be materially limited as a result of the lawyer's other
1131 responsibilities or interests. For example, a lawyer asked to represent several individuals
1132 seeking to form a joint venture is likely to be materially limited in the lawyer's ability to
1133 recommend or advocate all possible positions that each might take because of the
1134 lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that
1135 would otherwise be available to the client. The mere possibility of subsequent harm does

1136 not itself require disclosure and consent. The critical questions are the likelihood that a
1137 difference in interests will eventuate and, if it does, whether it will materially interfere
1138 with the lawyer's independent professional judgment in considering alternatives or
1139 foreclose courses of action that reasonably should be pursued on behalf of the client.

1140 **Lawyer's Responsibilities to Former Clients and Other Third Persons**

1141 [9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and
1142 independence may be materially limited by responsibilities to former clients under Rule
1143 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising
1144 from a lawyer's service as a trustee, executor or corporate director.

1145 **Personal Interest Conflicts**

1146 [10] The lawyer's own interests should not be permitted to have an adverse effect on
1147 representation of a client. For example, if the probity of a lawyer's own conduct in a
1148 transaction is in serious question, it may be difficult or impossible for the lawyer to give a
1149 client detached advice. Similarly, when a lawyer has discussions concerning possible
1150 employment with an opponent of the lawyer's client, or with a law firm representing the
1151 opponent, such discussions could materially limit the lawyer's representation of the
1152 client. In addition, a lawyer may not allow related business interests to affect
1153 representation, for example, by referring clients to an enterprise in which the lawyer has
1154 an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number
1155 of personal interest conflicts, including business transactions with clients. See also Rule
1156 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other
1157 lawyers in a law firm).

1158 [11] When lawyers representing different clients in the same matter or in substantially
1159 related matters are closely related by blood or marriage, there may be a significant risk
1160 that client confidences will be revealed and that the lawyer's family relationship will
1161 interfere with both loyalty and independent professional judgment. As a result, each
1162 client is entitled to know of the existence and implications of the relationship between the
1163 lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related
1164 to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a
1165 client in a matter where that lawyer is representing another party, unless each client gives
1166 informed consent. The disqualification arising from a close family relationship is
1167 personal and ordinarily is not imputed to members of firms with whom the lawyers are
1168 associated. See Rule 1.10.

1169 [12] A lawyer is prohibited from engaging in sexual relationships with a client unless
1170 the sexual relationship predates the formation of the client-lawyer relationship. See Rule
1171 1.8(j).

1172 **Interest of Person Paying for a Lawyer's Service**

1173 [13] A lawyer may be paid from a source other than the client, including a co-client, if
1174 the client is informed of that fact and consents and the arrangement does not compromise
1175 the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If
1176 acceptance of the payment from any other source presents a significant risk that the
1177 lawyer's representation of the client will be materially limited by the lawyer's own
1178 interest in accommodating the person paying the lawyer's fee or by the lawyer's
1179 responsibilities to a payer who is also a co-client, then the lawyer must comply with the
1180 requirements of paragraph (b) before accepting the representation, including determining

1181 whether the conflict is consentable and, if so, that the client has adequate information
1182 about the material risks of the representation.

1183 **Prohibited Representations**

1184 [14] Ordinarily, clients may consent to representation notwithstanding a conflict.
1185 However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that
1186 the lawyer involved cannot properly ask for such agreement or provide representation on
1187 the basis of the client's consent. When the lawyer is representing more than one client,
1188 the question of consentability must be resolved as to each client.

1189 [15] Consentability is typically determined by considering whether the interests of the
1190 clients will be adequately protected if the clients are permitted to give their informed
1191 consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1),
1192 representation is prohibited if in the circumstances the lawyer cannot reasonably
1193 conclude that the lawyer will be able to provide competent and diligent representation.
1194 See Rule 1.1 (competence) and Rule 1.3 (diligence).

1195 [16] Paragraph (b)(2) describes conflicts that are nonconsentable because the
1196 representation is prohibited by applicable law. ~~For example, in some states substantive~~
1197 ~~law provides that the same lawyer may not represent more than one defendant in a capital~~
1198 ~~case, even with the consent of the clients, and under federal criminal statutes certain~~
1199 ~~representations by a former government lawyer are prohibited, despite the informed~~
1200 ~~consent of the former client. In addition, decisional law in some states limits the ability of~~
1201 ~~a governmental client, such as a municipality, to consent to a conflict of interest.~~

1202 [17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the
1203 institutional interest in vigorous development of each client's position when the clients
1204 are aligned directly against each other in the same litigation or other proceeding before a
1205 tribunal. Whether clients are aligned directly against each other within the meaning of
1206 this paragraph requires examination of the context of the proceeding. Although this
1207 paragraph does not preclude a lawyer's multiple representation of adverse parties to a
1208 mediation (because mediation is not a proceeding before a "tribunal" under Rule
1209 1.0(~~mn~~)), such representation may be precluded by paragraph (b)(1).

1210 **Informed Consent**

1211 [18] Informed consent requires that each affected client be aware of the relevant
1212 circumstances and of the material and reasonably foreseeable ways that the conflict could
1213 have adverse effects on the interests of that client. See Rule 1.0(~~ef~~) (informed consent).
1214 The information required depends on the nature of the conflict and the nature of the risks
1215 involved. When representation of multiple clients in a single matter is undertaken, the
1216 information must include the implications of the common representation, including
1217 possible effects on loyalty, confidentiality and the attorney-client privilege and the
1218 advantages and risks involved. See Comments [30] and [31] (effect of common
1219 representation on confidentiality).

1220 [19] Under some circumstances it may be impossible to make the disclosure necessary
1221 to obtain consent. For example, when the lawyer represents different clients in related
1222 matters and one of the clients refuses to consent to the disclosure necessary to permit the
1223 other client to make an informed decision, the lawyer cannot properly ask the latter to
1224 consent. In some cases the alternative to common representation can be that each party
1225 may have to obtain separate representation with the possibility of incurring additional
1226 costs. These costs, along with the benefits of securing separate representation, are factors

1227 that may be considered by the affected client in determining whether common
1228 representation is in the client's interests.

1229 **Consent Confirmed in Writing**

1230 [20] Paragraph (b) requires the lawyer to obtain the informed consent of the client,
1231 confirmed in writing. Such a writing may consist of a document executed by the client or
1232 one that the lawyer promptly records and transmits to the client following an oral
1233 consent. See Rule 1.0(b). See also Rule 1.0(~~h~~o) (writing includes electronic
1234 transmission). If it is not feasible to obtain or transmit the writing at the time the client
1235 gives informed consent, then the lawyer must obtain or transmit it within a reasonable
1236 time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need
1237 in most cases for the lawyer to talk with the client, to explain the risks and advantages, if
1238 any, of representation burdened with a conflict of interest, as well as reasonably available
1239 alternatives, and to afford the client a reasonable opportunity to consider the risks and
1240 alternatives and to raise questions and concerns. Rather, the writing is required in order to
1241 impress upon clients the seriousness of the decision the client is being asked to make and
1242 to avoid disputes or ambiguities that might later occur in the absence of a writing.

1243 **Revoking Consent**

1244 [21] A client who has given consent to a conflict may revoke the consent to the
1245 client's own representation and, like any other client, may terminate the lawyer's
1246 representation at any time. Whether revoking consent to the client's own representation
1247 precludes the lawyer from continuing to represent other clients depends on the
1248 circumstances, including the nature of the conflict, whether the client revoked consent
1249 because of a material change in circumstances, the reasonable expectations of the other
1250 ~~clients~~client and whether material detriment to the other clients or the lawyer would
1251 result.

1252 **Consent to Future Conflict**

1253 [22] Whether a lawyer may properly request a client to waive conflicts that might arise
1254 in the future is subject to the test of paragraph (b). The effectiveness of such waivers is
1255 generally determined by the extent to which the client reasonably understands the
1256 material risks that the waiver entails. The more comprehensive the explanation of the
1257 types of future representations that might arise and the actual and reasonably foreseeable
1258 adverse consequences of those representations, the greater the likelihood that the client
1259 will have the requisite understanding. Thus, if the client agrees to consent to a particular
1260 type of conflict with which the client is already familiar, then the consent ordinarily will
1261 be effective with regard to that type of conflict. If the consent is general and open-ended,
1262 then the consent ordinarily will be ineffective, because it is not reasonably likely that the
1263 client will have understood the material risks involved. On the other hand, if the client is
1264 an experienced user of the legal services involved and is reasonably informed regarding
1265 the risk that a conflict may arise, such consent is more likely to be effective, particularly
1266 if, e.g., the client is independently represented by other counsel in giving consent and the
1267 consent is limited to future conflicts unrelated to the subject of the representation. In any
1268 case, advance consent cannot be effective if the circumstances that materialize in the
1269 future are such as would make the conflict nonconsentable under paragraph (b).

1270 **Conflicts in Litigation**

1271 [23] Paragraph (b)(3) prohibits representation of opposing parties in the same
1272 litigation, regardless of the clients' consent. On the other hand, simultaneous

1273 representation of parties whose interests in litigation may conflict, such as coplaintiffs or
1274 codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of
1275 substantial discrepancy in the parties' testimony, incompatibility in positions in relation
1276 to an opposing party or the fact that there are substantially different possibilities of
1277 settlement of the claims or liabilities in question. Such conflicts can arise in criminal
1278 cases as well as civil. The potential for conflict of interest in representing multiple
1279 defendants in a criminal case is so grave that ordinarily a lawyer should decline to
1280 represent more than one codefendant. On the other hand, common representation of
1281 persons having similar ~~interests in civil litigation~~interest is proper if the risk of adverse
1282 effect is minimal and the requirements of paragraph (b) are met.

1283 [24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at
1284 different times on behalf of different clients. The mere fact that advocating a legal
1285 position on behalf of one client might create precedent adverse to the interests of a client
1286 represented by the lawyer in an unrelated matter does not create a conflict of interest. A
1287 conflict of interest exists, however, if there is a significant risk that a lawyer's action on
1288 behalf of one client will materially limit under Rule 1.7 (a)(2) the lawyer's effectiveness
1289 in representing another client in a different case; ~~for example, when a decision favoring~~
1290 ~~one client will create a precedent likely to seriously weaken the position taken on behalf~~
1291 ~~of the other client. Factors relevant in determining whether the clients need to be advised~~
1292 ~~of the risk include: where the cases are pending, whether the issue is substantive or~~
1293 ~~procedural, the temporal relationship between the matters, the significance of the issue to~~
1294 ~~the immediate and long-term interests of the clients involved and the clients' reasonable~~
1295 ~~expectations in retaining the lawyer. If there is significant risk of material limitation, then~~
1296 ~~absent informed consent of the affected clients, the lawyer must refuse one of the~~
1297 ~~representations or withdraw from one or both matters.~~

1298 [25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants
1299 in a class-action lawsuit, unnamed members of the class are ordinarily not considered to
1300 be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the
1301 lawyer does not typically need to get the consent of such a person before representing a
1302 client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an
1303 opponent in a class action does not typically need the consent of an unnamed member of
1304 the class whom the lawyer represents in an unrelated matter.

1305 **Nonlitigation Conflicts**

1306 [26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other
1307 than litigation. For a discussion of directly adverse conflicts in transactional matters, see
1308 Comment [7]. Relevant factors in determining whether there is significant potential for
1309 material limitation include the duration and intimacy of the lawyer's relationship with the
1310 client or clients involved, the functions being performed by the lawyer, the likelihood that
1311 disagreements will arise and the likely prejudice to the client from the conflict. The
1312 question is often one of proximity and degree. See Comment [8].

1313 [27] For example, conflict questions may arise in estate planning and estate
1314 administration. A lawyer may be called upon to prepare wills for several family
1315 members, such as husband and wife, and, depending upon the circumstances, a conflict of
1316 interest may be present. In estate administration the identity of the client may be unclear
1317 ~~under~~to the law of a particular jurisdiction. Under one view, the client is the fiduciary;
1318 ~~under another view the client is the estate or trust, including its beneficiaries~~parties
1319 involved. In order to comply with conflict of interest rules, the lawyer should make clear
1320 the lawyer's relationship to the parties involved.

1321 [28] Whether a conflict is consentable depends on the circumstances. For example, a
1322 lawyer may not represent multiple parties to a negotiation whose interests are
1323 fundamentally antagonistic to each other, but common representation is permissible
1324 where the clients are generally aligned in interest even though there is some difference in
1325 interest among them. Thus, a lawyer may seek to establish or adjust a relationship
1326 between clients on an amicable and mutually advantageous basis; for example, in helping
1327 to organize a business in which two or more clients are entrepreneurs, working out the
1328 financial reorganization of an enterprise in which two or more clients have an interest or
1329 arranging a property distribution in settlement of an estate. The lawyer seeks to resolve
1330 potentially adverse interests by developing the parties' mutual interests. Otherwise, each
1331 party might have to obtain separate representation, with the possibility of incurring
1332 additional cost, complication or even litigation. Given these and other relevant factors,
1333 the clients may prefer that the lawyer act for all of them.

1334 **Special Considerations in Common Representation**

1335 [29] In considering whether to represent multiple clients in the same matter, a lawyer
1336 should be mindful that if the common representation fails because the potentially adverse
1337 interests cannot be reconciled, the result can be additional cost, embarrassment and
1338 recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of
1339 the clients if the common representation fails. In some situations, the risk of failure is so
1340 great that multiple representation is plainly impossible. For example, a lawyer cannot
1341 undertake common representation of clients where contentious litigation or negotiations
1342 between them are imminent or contemplated. Moreover, because the lawyer is required to
1343 be impartial between commonly represented clients, representation of multiple clients is
1344 improper when it is unlikely that impartiality can be maintained. Generally, if the
1345 relationship between the parties has already assumed antagonism, the possibility that the
1346 clients' interests can be adequately served by common representation is not very good.
1347 Other relevant factors are whether the lawyer subsequently will represent both parties on
1348 a continuing basis and whether the situation involves creating or terminating a
1349 relationship between the parties.

1350 [30] A particularly important factor in determining the appropriateness of common
1351 representation is the effect on client-lawyer confidentiality and the attorney-client
1352 privilege. With regard to the attorney-client privilege, the prevailing rule is that, as
1353 between commonly represented clients, the privilege does not attach. Hence, it must be
1354 assumed that if litigation eventuates between the clients, the privilege will not protect any
1355 such communications, and the clients should be so advised.

1356 [31] As to the duty of confidentiality, continued common representation will almost
1357 certainly be inadequate if one client asks the lawyer not to disclose to the other client
1358 information relevant to the common representation. This is so because the lawyer has an
1359 equal duty of loyalty to each client, and each client has the right to be informed of
1360 anything bearing on the representation that might affect that client's interests and the
1361 right to expect that the lawyer will use that information to that client's benefit. See Rule
1362 1.4. The lawyer should, at the outset of the common representation and as part of the
1363 process of obtaining each client's informed consent, advise each client that information
1364 will be shared and that the lawyer will have to withdraw if one client decides that some
1365 matter material to the representation should be kept from the other. In limited
1366 circumstances, it may be appropriate for the lawyer to proceed with the representation
1367 when the clients have agreed, after being properly informed, that the lawyer will keep
1368 certain information confidential. For example, the lawyer may reasonably conclude that
1369 failure to disclose one client's trade secrets to another client will not adversely affect
1370 representation involving a joint venture between the clients and agree to keep that
1371 information confidential with the informed consent of both clients.

1372 [32] When seeking to establish or adjust a relationship between clients, the lawyer
1373 should make clear that the lawyer's role is not that of partisanship normally expected in
1374 other circumstances and, thus, that the clients may be required to assume greater
1375 responsibility for decisions than when each client is separately represented. Any
1376 limitations on the scope of the representation made necessary as a result of the common
1377 representation should be fully explained to the clients at the outset of the representation.
1378 See Rule 1.2(c).

1379 [33] Subject to the above limitations, each client in the common representation has the
1380 right to loyal and diligent representation and the protection of Rule 1.9 concerning the
1381 obligations to a former client. The client also has the right to discharge the lawyer as
1382 stated in Rule 1.16.

1383 **Organizational Clients**

1384 [34] A lawyer who represents a corporation or other organization does not, by virtue
1385 of that representation, necessarily represent any constituent or affiliated organization,
1386 such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is
1387 not barred from accepting representation adverse to an affiliate in an unrelated matter,
1388 unless the circumstances are such that the affiliate should also be considered a client of
1389 the lawyer, there is an understanding between the lawyer and the organizational client
1390 that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's
1391 obligations to either the organizational client or the new client are likely to limit
1392 materially the lawyer's representation of the other client.

1393 [35] A lawyer for a corporation or other organization who is also a member of its
1394 board of directors should determine whether the responsibilities of the two roles may
1395 conflict. The lawyer may be called on to advise the corporation in matters involving
1396 actions of the directors. Consideration should be given to the frequency with which such
1397 situations may arise, the potential intensity of the conflict, the effect of the lawyer's
1398 resignation from the board and the possibility of the corporation's obtaining legal advice
1399 from another lawyer in such situations. If there is material risk that the dual role will
1400 compromise the lawyer's independence of professional judgment, the lawyer should not
1401 serve as a director or should cease to act as the corporation's lawyer when conflicts of
1402 interest arise. The lawyer should advise the other members of the board that in some
1403 circumstances matters discussed at board meetings while the lawyer is present in the
1404 capacity of director might not be protected by the attorney-client privilege and that
1405 conflict of interest considerations might require the lawyer's recusal as a director or
1406 might require the lawyer and the lawyer's firm to decline representation of the
1407 corporation in a matter.

1408 **RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC** 1409 **RULES** 1410

1411
1412 (a) A lawyer shall not enter into a business transaction with a client or knowingly
1413 acquire an ownership, possessory, security or other pecuniary interest adverse to a client
1414 unless:
1415 (1) the transaction and terms on which the lawyer acquires the interest are fair and
1416 reasonable to the client and are fully disclosed and transmitted in writing in a manner that
1417 can be ~~reasonably~~reasonably understood by the client;

1418 (2) the client is advised in writing of the desirability of seeking and is given a
1419 reasonable opportunity to seek the advice of independent legal counsel on the transaction;
1420 and
1421 (3) the client gives informed consent, in a writing document signed by the client separate
1422 from the transaction documents, to the essential terms of the transaction and the lawyer's
1423 role in the transaction, including whether the lawyer is representing the client in the
1424 transaction.
1425
1426 (b) A lawyer shall not use information relating to representation of a client to the
1427 disadvantage of the client unless the client gives informed consent, except as permitted or
1428 required by these Rules.
1429
1430 (c) A lawyer shall not ~~solicit any substantial gift from a client, including a testamentary~~
1431 ~~gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to~~
1432 ~~the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to~~
1433 ~~the client. For purposes of this paragraph, related persons include a spouse, child,~~
1434 ~~grandchild as parent, child, sibling, parent, grandparent or other relative or individual with~~
1435 ~~whom spouse any substantial gift from a client, including a testamentary gift, except~~
1436 ~~where the lawyer or the client maintains a close, familial relationship is related to the~~
1437 donee.
1438
1439 (d) Prior to the conclusion of representation of a client, a lawyer shall not make or
1440 negotiate an agreement giving the lawyer literary or media rights to a portrayal or account
1441 based in substantial part on information relating to the representation.
1442
1443 (e) A lawyer shall not provide financial assistance to a client in connection with
1444 pending or contemplated litigation, except that:
1445 (1) a lawyer may advance court costs and expenses of litigation, the repayment of which
1446 may be contingent on the outcome of the matter; ~~and~~
1447 (2) a lawyer representing an indigent client may pay court costs and expenses of
1448 litigation on behalf of the client; ~~and~~
1449 (3) a lawyer may guarantee a loan reasonably needed to enable the client to withstand
1450 delay in litigation that would otherwise put substantial pressure on the client to settle a
1451 case because of financial hardship rather than on the merits, provided the client remains
1452 ultimately liable for repayment of the loan without regard to the outcome of the litigation
1453 and, further provided, that no promise of such financial assistance was made to the client
1454 by the lawyer, or by another in the lawyer's behalf, prior to the employment of that
1455 lawyer by that client.
1456
1457 (f) A lawyer shall not accept compensation for representing a client from one other than
1458 the client unless:
1459 (1) the client gives informed consent; or the
1460 acceptance of compensation from another is impliedly authorized by the nature of the
1461 representation;
1462 (2) there is no interference with the lawyer's independence of professional judgment or
1463 with the client-lawyer relationship; and

1464 (3) information relating to representation of a client is protected as required by Rule 1.6.

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1466 (g) A lawyer who represents two or more clients shall not participate in making an
1467 aggregate settlement of the claims of or against the clients, ~~or in a criminal case an~~
1468 ~~aggregated agreement as to guilty or nolo contendere pleas~~, unless each client gives
1469 informed consent, in a writing signed by the client. The lawyer's disclosure shall include
1470 the existence and nature of all the claims ~~or pleas~~ involved and of the participation of
1471 each person in the settlement.

1472

1473 (h) A lawyer shall not:

1474 (1) make an agreement prospectively limiting the lawyer's liability to a client for
1475 malpractice unless the client is independently represented in making the agreement; or
1476 (2) settle a claim or potential claim for such liability with an unrepresented client or
1477 former client unless that person is advised in writing of the desirability of seeking and is
1478 given a reasonable opportunity to seek the advice of independent legal counsel in
1479 connection therewith.

1480

1481 (i) A lawyer shall not acquire a proprietary interest in the cause of action or subject
1482 matter of litigation the lawyer is conducting for a client, except that the lawyer may:

1483 (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
1484 (2) contract with a client for a reasonable contingent fee in a civil case.

1485

1486 (j) A lawyer shall not have sexual relations with a client unless a consensual sexual
1487 relationship existed between them when the client-lawyer relationship commenced. For
1488 purposes of this paragraph:

1489 (1) "Sexual relations" means sexual intercourse or any other intentional touching of the
1490 intimate parts of a person or causing the person to touch the intimate parts of the lawyer.

1491 (2) if the client is an organization, any individual who oversees the representation and
1492 gives instructions to the lawyer on behalf of the organization shall be deemed to be the
1493 client. In-house attorneys while representing governmental or corporate entities are
1494 governed by Rule 1.7 rather than by this rule with respect to sexual relations with other
1495 employees of the entity they represent.

1496 (3) this paragraph does not prohibit a lawyer from engaging in sexual relations with a
1497 client of the lawyer's firm provided that the lawyer has no involvement in the
1498 performance of the legal work for the client.

1499 (4) if a party other than the client alleges violation of this paragraph, and the complaint is
1500 not summarily dismissed, the Director, in determining whether to investigate the
1501 allegation and whether to charge any violation based on the allegations, shall consider the
1502 client's statement regarding whether the client would be unduly burdened by the
1503 investigation or charge.

1504

1505 (k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a)
1506 through (i) that applies to any one of them shall apply to all of them.

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Comment

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Business Transactions Between Client and Lawyer

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[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

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[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a ~~written document~~ separate from the transaction documents, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

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[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

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[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

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Use of Information Related to Representation

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[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

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Gifts to Lawyers

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[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, ~~which treats client gifts as presumptively fraudulent~~. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

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[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

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[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

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Literary Rights

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[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

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Financial Assistance

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[10] Lawyers may not subsidize lawsuits ~~or administrative proceedings~~ brought on behalf of their clients, ~~including such as by~~ making ~~or guaranteeing~~ loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted. A lawyer may guarantee a loan to enable the client to withstand delay in litigation under the circumstances stated in Rule 1.8 (e)(3).

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Person Paying for a Lawyer's Services

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[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client, or acceptance of compensation from another is impliedly authorized by the nature of the representation. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

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[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

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Aggregate Settlements

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[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement ~~and in deciding whether to enter a guilty or nolo contendere plea in a criminal case.~~ The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer ~~or plea bargain~~ is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement ~~or plea~~

1650 ~~offer~~ is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers
1651 representing a class of plaintiffs or defendants, or those proceeding derivatively, may not
1652 have a full client-lawyer relationship with each member of the class; nevertheless, such
1653 lawyers must comply with applicable rules regulating notification of class members and
1654 other procedural requirements designed to ensure adequate protection of the entire class.

1655 **Limiting Liability and Settling Malpractice Claims**

1656 [14] Agreements prospectively limiting a lawyer's liability for malpractice are
1657 prohibited unless the client is independently represented in making the agreement
1658 because they are likely to undermine competent and diligent representation. Also, many
1659 clients are unable to evaluate the desirability of making such an agreement before a
1660 dispute has arisen, particularly if they are then represented by the lawyer seeking the
1661 agreement. This paragraph does not, however, prohibit a lawyer from entering into an
1662 agreement with the client to arbitrate legal malpractice claims, provided such agreements
1663 are enforceable and the client is fully informed of the scope and effect of the agreement.
1664 Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-
1665 liability entity, where permitted by law, provided that each lawyer remains personally
1666 liable to the client for his or her own conduct and the firm complies with any conditions
1667 required by law, such as provisions requiring client notification or maintenance of
1668 adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule
1669 1.2 that defines the scope of the representation, although a definition of scope that makes
1670 the obligations of representation illusory will amount to an attempt to limit liability.

1671 [15] Agreements settling a claim or a potential claim for malpractice are not
1672 prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair
1673 advantage of an unrepresented client or former client, the lawyer must first advise such a
1674 person in writing of the appropriateness of independent representation in connection with
1675 such a settlement. In addition, the lawyer must give the client or former client a
1676 reasonable opportunity to find and consult independent counsel.

1677 **Acquiring Proprietary Interest in Litigation**

1678 [16] Paragraph (i) states the traditional general rule that lawyers are prohibited from
1679 acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its
1680 basis in common law champerty and maintenance and is designed to avoid giving the
1681 lawyer too great an interest in the representation. In addition, when the lawyer acquires
1682 an ownership interest in the subject of the representation, it will be more difficult for a
1683 client to discharge the lawyer if the client so desires. The Rule is subject to specific
1684 exceptions developed in decisional law and continued in these Rules. The exception for
1685 certain advances of the costs of litigation is set forth in paragraph (e). In addition,
1686 paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees
1687 or expenses and contracts for reasonable contingent fees. The law of each jurisdiction
1688 determines which liens are authorized by law. These may include liens granted by statute,
1689 liens originating in common law and liens acquired by contract with the client. When a
1690 lawyer acquires by contract a security interest in property other than that recovered
1691 through the lawyer's efforts in the litigation, such an acquisition is a business or financial
1692 transaction with a client and is governed by the requirements of paragraph (a). Contracts
1693 for contingent fees in civil cases are governed by Rule 1.5.

1694 **Client-Lawyer Sexual Relationships**

1695 [17] The relationship between lawyer and client is a fiduciary one in which the lawyer
1696 occupies the highest position of trust and confidence. The relationship is almost always

1697 unequal; thus, a sexual relationship between lawyer and client can involve unfair
1698 exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical
1699 obligation not to use the trust of the client to the client's disadvantage. In addition, such a
1700 relationship presents a significant danger that, because of the lawyer's emotional
1701 involvement, the lawyer will be unable to represent the client without impairment of the
1702 exercise of independent professional judgment. Moreover, a blurred line between the
1703 professional and personal relationships may make it difficult to predict to what extent
1704 client confidences will be protected by the attorney-client evidentiary privilege, since
1705 client confidences are protected by privilege only when they are imparted in the context
1706 of the client-lawyer relationship. Because of the significant danger of harm to client
1707 interests and because the client's own emotional involvement renders it unlikely that the
1708 client could give adequate informed consent, this Rule prohibits the lawyer from having
1709 sexual relations with a client regardless of whether the relationship is consensual and
1710 regardless of the absence of prejudice to the client.

1711 [18] Sexual relationships that predate the client-lawyer relationship are not prohibited.
1712 Issues relating to the exploitation of the fiduciary relationship and client dependency are
1713 diminished when the sexual relationship existed prior to the commencement of the client-
1714 lawyer relationship. However, before proceeding with the representation in these
1715 circumstances, the lawyer should consider whether the lawyer's ability to represent the
1716 client will be materially limited by the relationship. See Rule 1.7(a)(2).

1717 [19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer
1718 for the organization (~~whether inside counsel or outside counsel~~) from having a sexual
1719 relationship with a ~~constituent of the organization who supervises, directs or regularly~~
1720 ~~consults with that person who oversees the representation and gives instructions to the~~
1721 ~~lawyer concerning on behalf of the organization's legal matters.~~

1722 **Imputation of Prohibitions**

1723 [20] Under paragraph (k), a prohibition on conduct by an individual lawyer in
1724 paragraphs (a) through (i) also applies to all lawyers associated in a firm with the
1725 personally prohibited lawyer. For example, one lawyer in a firm may not enter into a
1726 business transaction with a client of another member of the firm without complying with
1727 paragraph (a), even if the first lawyer is not personally involved in the representation of
1728 the client. The prohibition set forth in paragraph (j) is personal and is not applied to
1729 associated lawyers.

1730

1731 **RULE 1.9: DUTIES TO FORMER CLIENTS**

1732 (a) A lawyer who has formerly represented a client in a matter shall not thereafter
1733 represent another person in the same or a substantially related matter in which that
1734 person's interests are materially adverse to the interests of the former client unless the
1735 former client gives informed consent, confirmed in writing.

1736 (b) A lawyer shall not knowingly represent a person in the same or a substantially
1737 related matter in which a firm with which the lawyer formerly was associated had
1738 previously represented a client~~(1)~~— whose interests are materially adverse to that person;
1739 and~~(2)~~— about whom the lawyer had acquired information protected by ~~Rules~~rules 1.6

1740 and 1.9 (c) ~~that is material to the matter~~; unless the former client gives informed consent,
1741 confirmed in writing.

1742

1743 (c) A lawyer who has formerly represented a client in a matter or whose present or
1744 former firm has formerly represented a client in a matter shall not thereafter:

1745 (1) use information relating to the representation to the disadvantage of the former
1746 client except as these Rules would permit or require with respect to a client, or when the
1747 information has become generally known; or

1748 (2) reveal information relating to the representation except as these Rules would permit
1749 or require with respect to a client.

1750

Comment

1751 [1] After termination of a client-lawyer relationship, a lawyer has certain continuing
1752 duties with respect to confidentiality and conflicts of interest and thus may not represent
1753 another client except in conformity with this Rule. Under this Rule, for example, a lawyer
1754 could not properly seek to rescind on behalf of a new client a contract drafted on behalf
1755 of the former client. So also a lawyer who has prosecuted an accused person could not
1756 properly represent the accused in a subsequent civil action against the government
1757 concerning the same transaction. Nor could a lawyer who has represented multiple clients
1758 in a matter represent one of the clients against the others in the same or a substantially
1759 related matter after a dispute arose among the clients in that matter, unless all affected
1760 clients give informed consent. See Comment [9]. Current and former government lawyers
1761 must comply with this Rule to the extent required by Rule 1.11.

1762 [2] The scope of a "matter" for purposes of this Rule depends on the facts of a
1763 particular situation or transaction. The lawyer's involvement in a matter can also be a
1764 question of degree. When a lawyer has been directly involved in a specific transaction,
1765 subsequent representation of other clients with materially adverse interests in that
1766 transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a
1767 type of problem for a former client is not precluded from later representing another client
1768 in a factually distinct problem of that type even though the subsequent representation
1769 involves a position adverse to the prior client. Similar considerations can apply to the
1770 reassignment of military lawyers between defense and prosecution functions within the
1771 same military jurisdictions. The underlying question is whether the lawyer was so
1772 involved in the matter that the subsequent representation can be justly regarded as a
1773 changing of sides in the matter in question.

1774 [3] Matters are "substantially related" for purposes of this Rule if they involve the
1775 same transaction or legal dispute or if there otherwise is a substantial risk that
1776 confidential factual information as would normally have been obtained in the prior
1777 representation would materially advance the client's position in the subsequent matter.
1778 For example, a lawyer who has represented a businessperson and learned extensive
1779 private financial information about that person may not then represent that person's
1780 spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client
1781 in securing environmental permits to build a shopping center would be precluded from
1782 representing neighbors seeking to oppose rezoning of the property on the basis of
1783 environmental considerations; however, the lawyer would not be precluded, on the
1784 grounds of substantial relationship, from defending a tenant of the completed shopping
1785 center in resisting eviction for nonpayment of rent. Information that has been disclosed to
1786 the public or to other parties adverse to the former client ordinarily will not be
1787 disqualifying. Information acquired in a prior representation may have been rendered
1788 obsolete by the passage of time, a circumstance that may be relevant in determining

1789 whether two representations are substantially related. In the case of an organizational
1790 client, general knowledge of the client's policies and practices ordinarily will not
1791 preclude a subsequent representation; on the other hand, knowledge of specific facts
1792 gained in a prior representation that are relevant to the matter in question ordinarily will
1793 preclude such a representation. A former client is not required to reveal the confidential
1794 information learned by the lawyer in order to establish a substantial risk that the lawyer
1795 has confidential information to use in the subsequent matter. A conclusion about the
1796 possession of such information may be based on the nature of the services the lawyer
1797 provided the former client and information that would in ordinary practice be learned by
1798 a lawyer providing such services.

1799 **Lawyers Moving Between Firms**

1800 [4] When lawyers have been associated within a firm but then end their association,
1801 the question of whether a lawyer should undertake representation is more complicated.
1802 There are several competing considerations. First, the client previously represented by the
1803 former firm must be reasonably assured that the principle of loyalty to the client is not
1804 compromised. Second, the rule should not be so broadly cast as to preclude other persons
1805 from having reasonable choice of legal counsel. Third, the rule should not unreasonably
1806 hamper lawyers from forming new associations and taking on new clients after having
1807 left a previous association. In this connection, it should be recognized that today many
1808 lawyers practice in firms, that many lawyers to some degree limit their practice to one
1809 field or another, and that many move from one association to another several times in
1810 their careers. If the concept of imputation were applied with unqualified rigor, the result
1811 would be radical curtailment of the opportunity of lawyers to move from one practice
1812 setting to another and of the opportunity of clients to change counsel.

1813 [5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved
1814 has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer
1815 while with one firm acquired no knowledge or information relating to a particular client
1816 of the firm, and that lawyer later joined another firm, neither the lawyer individually nor
1817 the second firm is disqualified from representing another client in the same or a related
1818 matter even though the interests of the two clients conflict. See Rule 1.10(b) for the
1819 restrictions on a firm once a lawyer has terminated association with the firm.

1820 [6] Application of paragraph (b) depends on a situation's particular facts, aided by
1821 inferences, deductions or working presumptions that reasonably may be made about the
1822 way in which lawyers work together. A lawyer may have general access to files of all
1823 clients of a law firm and may regularly participate in discussions of their affairs; it should
1824 be inferred that such a lawyer in fact is privy to all information about all the firm's
1825 clients. In contrast, another lawyer may have access to the files of only a limited number
1826 of clients and participate in discussions of the affairs of no other clients; in the absence of
1827 information to the contrary, it should be inferred that such a lawyer in fact is privy to
1828 information about the clients actually served but not those of other clients. In such an
1829 inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

1830 [7] Independent of the question of disqualification of a firm, a lawyer changing
1831 professional association has a continuing duty to preserve confidentiality of information
1832 about a client formerly represented. See Rules 1.6 and 1.9(c).

1833 [8] Paragraph (c) provides that information acquired by the lawyer in the course of
1834 representing a client may not subsequently be used or revealed by the lawyer to the
1835 disadvantage of the client. However, the fact that a lawyer has once served a client does
1836 not preclude the lawyer from using generally known information about that client when
1837 later representing another client.

1838 [9] The provisions of this Rule are for the protection of former clients and can be
1839 waived if the client gives informed consent, which consent must be confirmed in writing
1840 under paragraphs (a) and (b). See Rule 1.0(e)(f). With regard to the effectiveness of an
1841 advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm
1842 with which a lawyer is or was formerly associated, see Rule 1.10.

1843

1844 **RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE**

1845

1846 (a) While lawyers are associated in a firm, none of them shall knowingly represent a
1847 client when any one of them practicing alone would be prohibited from doing so by Rules
1848 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer
1849 and does not present a significant risk of materially limiting the representation of the
1850 client by the remaining lawyers in the firm.

1851

1852 (b) When a lawyer becomes associated with a firm, and the lawyer is prohibited from
1853 representing a client pursuant to Rule 1.9 (b), other lawyers in the firm may represent that
1854 client if there is no reasonably apparent risk that confidential information of the
1855 previously represented client will be used with material adverse effect on that client
1856 because:

1857 (1) any confidential information communicated to the lawyer is unlikely to be significant
1858 in the subsequent matter;

1859 (2) the lawyer is subject to screening measures adequate to prevent disclosure of the
1860 confidential information and to prevent involvement by that lawyer in the representation;
1861 and

1862 (3) timely and adequate notice of the screening has been provided to all affected clients.

1863

1864 ~~(b)~~ (c) When a lawyer has terminated an association with a firm, the firm is not
1865 prohibited from thereafter representing a person with interests materially adverse to those
1866 of a client represented by the formerly associated lawyer and not currently represented by
1867 the firm, unless:

1868 (1) the matter is the same or substantially related to that in which the formerly
1869 associated lawyer represented the client; and

1870 (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c)
1871 that is material to the matter.

1872

1873 ~~(e)~~ A disqualification prescribed by this rule may be waived by the affected client under
1874 the conditions stated in Rule 1.7.

1875

1876 ~~(d)~~ The disqualification of lawyers associated in a firm with former or current
1877 government lawyers is governed by Rule 1.11.

1878

Comment

1879

Definition of "Firm"

1880

1881 [1] For purposes of the Rules of Professional Conduct, the term "firm" denotes
lawyers in a law partnership, professional corporation, sole proprietorship or other

1882 association authorized to practice law; or lawyers employed in a legal services
1883 organization or the legal department of a corporation or other organization. See Rule
1884 1.0(ed). Whether two or more lawyers constitute a firm within this definition can depend
1885 on the specific facts. See Rule 1.0, Comments [2] - [4].

1886 **Principles of Imputed Disqualification**

1887 [2] The rule of imputed disqualification stated in paragraph (a) gives effect to the
1888 principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such
1889 situations can be considered from the premise that a firm of lawyers is essentially one
1890 lawyer for purposes of the rules governing loyalty to the client, or from the premise that
1891 each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with
1892 whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently
1893 associated in a firm. When a lawyer moves from one firm to another, the situation is
1894 governed by Rules 1.9(b) and 1.10(b) and (c).

1895 [3] The rule in paragraph (a) does not prohibit representation where neither questions
1896 of client loyalty nor protection of confidential information are presented. Where one
1897 lawyer in a firm could not effectively represent a given client because of strong political
1898 beliefs, for example, but that lawyer will do no work on the case and the personal beliefs
1899 of the lawyer will not materially limit the representation by others in the firm, the firm
1900 should not be disqualified. On the other hand, if an opposing party in a case were owned
1901 by a lawyer in the law firm, and others in the firm would be materially limited in
1902 pursuing the matter because of loyalty to that lawyer, the personal disqualification of the
1903 lawyer would be imputed to all others in the firm.

1904 [4] The rule in paragraph (a) also does not prohibit representation by others in the
1905 law firm where the person prohibited from involvement in a matter is a nonlawyer, such
1906 as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the
1907 lawyer is prohibited from acting because of events before the person became a lawyer,
1908 for example, work that the person did while a law student. Such persons, however,
1909 ordinarily must be screened from any personal participation in the matter to avoid
1910 communication to others in the firm of confidential information that both the nonlawyers
1911 and the firm have a legal duty to protect. See Rules 1.0(~~k~~) and 5.3.

1912 [5] Rule 1.10(~~b~~c) operates to permit a law firm, under certain circumstances, to
1913 represent a person with interests directly adverse to those of a client represented by a
1914 lawyer who formerly was associated with the firm. The Rule applies regardless of when
1915 the formerly associated lawyer represented the client. However, the law firm may not
1916 represent a person with interests adverse to those of a present client of the firm, which
1917 would violate Rule 1.7. Moreover, the firm may not represent the person where the
1918 matter is the same or substantially related to that in which the formerly associated lawyer
1919 represented the client and any other lawyer currently in the firm has material information
1920 protected by Rules 1.6 and 1.9(c).

1921 [6] Rule 1.10(ed) removes imputation with the informed consent of the affected
1922 client or former client under the conditions stated in Rule 1.7. The conditions stated in
1923 Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule
1924 1.7(b) and that each affected client or former client has given informed consent to the
1925 representation, confirmed in writing. In some cases, the risk may be so severe that the
1926 conflict may not be cured by client consent. For a discussion of the effectiveness of client
1927 waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a
1928 definition of informed consent, see Rule 1.0(ef).

1929 [7] Where a lawyer has joined a private firm after having represented the
1930 government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule
1931 1.11(d), where a lawyer represents the government after having served clients in private
1932 practice, nongovernmental employment or in another government agency, former-client
1933 conflicts are not imputed to government lawyers associated with the individually
1934 disqualified lawyer.

1935 [8] Where a lawyer is prohibited from engaging in certain transactions under Rule
1936 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition
1937 also applies to other lawyers associated in a firm with the personally prohibited lawyer.

1938

1939 **RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND**
1940 **CURRENT GOVERNMENT OFFICERS AND EMPLOYEES**

1941 (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as
1942 a public officer or employee of the government:

1943 (1) is subject to Rule 1.9(c); and

1944 (2) shall not otherwise represent a client in connection with a matter in which the
1945 lawyer participated personally and substantially as a public officer or employee, unless
1946 the appropriate government agency gives its informed consent, confirmed in writing, to
1947 the representation.

1948

1949 (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in
1950 a firm with which that lawyer is associated may knowingly undertake or continue
1951 representation in such a matter unless:

1952 (1) the disqualified lawyer is timely screened from any participation in the matter and is
1953 apportioned no part of the fee therefrom; and

1954 (2) written notice is promptly given to the appropriate government agency to enable it
1955 to ascertain compliance with the provisions of this rule.

1956 (c) Except as law may otherwise expressly permit, a lawyer having information that the
1957 lawyer knows is confidential government information about a person acquired when the
1958 lawyer was a public officer or employee, may not represent a private client whose
1959 interests are adverse to that person in a matter in which the information could be used to
1960 the material disadvantage of that person. As used in this Rule, the term "confidential
1961 government information" means information that has been obtained under governmental
1962 authority and which, at the time this Rule is applied, the government is prohibited by law
1963 from disclosing to the public or has a legal privilege not to disclose and which is not
1964 otherwise available to the public. A firm with which that lawyer is associated may
1965 undertake or continue representation in the matter only if the disqualified lawyer is timely
1966 screened from any participation in the matter and is apportioned no part of the fee
1967 therefrom.

1968 (d) Except as law may otherwise expressly permit, a lawyer currently serving as a
1969 public officer or employee:

1970 (1) is subject to Rules 1.7 and 1.9; and

- 1971 (2) shall not:
1972 (i) participate in a matter in which the lawyer participated personally and substantially
1973 while in private practice or nongovernmental employment, unless the appropriate
1974 government agency gives its informed consent, confirmed in writing; or
1975 (ii) negotiate for private employment with any person who is involved as a party or as
1976 lawyer for a party in a matter in which the lawyer is participating personally and
1977 substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative
1978 officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b)
1979 and subject to the conditions stated in Rule 1.12(b).
1980
1981 (e) As used in this Rule, the term "matter" includes:
1982 (1) any judicial or other proceeding, application, request for a ruling or other
1983 determination, contract, claim, controversy, investigation, charge, accusation, arrest or
1984 other particular matter involving a specific party or parties, and
1985 (2) any other matter covered by the conflict of interest rules of the appropriate
1986 government agency.

1987

Comment

1988 [1] A lawyer who has served or is currently serving as a public officer or employee is
1989 personally subject to the Rules of Professional Conduct, including the prohibition against
1990 concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be
1991 subject to statutes and government regulations regarding conflict of interest. Such statutes
1992 and regulations may circumscribe the extent to which the government agency may give
1993 consent under this Rule. See Rule 1.0(e) for the definition of informed consent. It is
1994 generally improper for a county attorney to accept the defense of a criminal case in
1995 another county, and for a city attorney to accept a criminal case that arises within the
1996 boundaries of the city or municipality that he or she represents. In extraordinary
1997 circumstances, where the accused would otherwise be deprived of competent counsel, a
1998 county attorney may seek to represent a client accused of a crime in another county by
1999 obtaining permission from the court before which the matter will be tried. The
2000 disqualification of county and city attorneys is only imputed to those lawyers in the
2001 county or city attorney's law firm who actually participate in representing the county or
2002 the city.

2003 [2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer
2004 who has served or is currently serving as an officer or employee of the government
2005 toward a former government or private client. Rule 1.10 is not applicable to the conflicts
2006 of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation
2007 rule for former government lawyers that provides for screening and notice. Because of
2008 the special problems raised by imputation within a government agency, paragraph (d)
2009 does not impute the conflicts of a lawyer currently serving as an officer or employee of
2010 the government to other associated government officers or employees, although
2011 ordinarily it will be prudent to screen such lawyers.

2012 [3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a
2013 former client and are thus designed not only to protect the former client, but also to
2014 prevent a lawyer from exploiting public office for the advantage of another client. For
2015 example, a lawyer who has pursued a claim on behalf of the government may not pursue
2016 the same claim on behalf of a later private client after the lawyer has left government
2017 service, except when authorized to do so by the government agency under paragraph (a).
2018 Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue

2019 the claim on behalf of the government, except when authorized to do so by paragraph (d).
2020 As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of
2021 interest addressed by these paragraphs.

2022 [4] This Rule represents a balancing of interests. On the one hand, where the
2023 successive clients are a government agency and another client, public or private, the risk
2024 exists that power or discretion vested in that agency might be used for the special benefit
2025 of the other client. A lawyer should not be in a position where benefit to the other client
2026 might affect performance of the lawyer's professional functions on behalf of the
2027 government. Also, unfair advantage could accrue to the other client by reason of access to
2028 confidential government information about the client's adversary obtainable only through
2029 the lawyer's government service. On the other hand, the rules governing lawyers
2030 presently or formerly employed by a government agency should not be so restrictive as to
2031 inhibit transfer of employment to and from the government. The government has a
2032 legitimate need to attract qualified lawyers as well as to maintain high ethical standards.
2033 Thus a former government lawyer is disqualified only from particular matters in which
2034 the lawyer participated personally and substantially. The provisions for screening and
2035 waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing
2036 too severe a deterrent against entering public service. The limitation of disqualification in
2037 paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than
2038 extending disqualification to all substantive issues on which the lawyer worked, serves a
2039 similar function.

2040 [5] When a lawyer has been employed by one government agency and then moves to
2041 a second government agency, it may be appropriate to treat that second agency as another
2042 client for purposes of this Rule, as when a lawyer is employed by a city and subsequently
2043 is employed by a federal agency. However, because the conflict of interest is governed by
2044 paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b)
2045 requires a law firm to do. The question of whether two government agencies should be
2046 regarded as the same or different clients for conflict of interest purposes is beyond the
2047 scope of these Rules. See Rule 1.13 Comment [6].

2048 [6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(~~k~~)
2049 (requirements for screening procedures). These paragraphs do not prohibit a lawyer from
2050 receiving a salary or partnership share established by prior independent agreement, but
2051 that lawyer may not receive compensation directly relating the lawyer's compensation to
2052 the fee in the matter in which the lawyer is disqualified.

2053 [7] Notice, including a description of the screened lawyer's prior representation and
2054 of the screening procedures employed, generally should be given as soon as practicable
2055 after the need for screening becomes apparent.

2056 [8] Paragraph (c) operates only when the lawyer in question has knowledge of the
2057 information, which means actual knowledge; it does not operate with respect to
2058 information that merely could be imputed to the lawyer.

2059 [9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private
2060 party and a government agency when doing so is permitted by Rule 1.7 and is not
2061 otherwise prohibited by law.

2062 [10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another
2063 form. In determining whether two particular matters are the same, the lawyer should
2064 consider the extent to which the matters involve the same basic facts, the same or related
2065 parties, and the time elapsed.

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2067 **RULE 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER**
2068 **THIRD-PARTY NEUTRAL**

2069 (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection
2070 with a matter in which the lawyer participated personally and substantially as a judge or
2071 other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or
2072 other third-party neutral, unless all parties to the proceeding give informed consent,
2073 confirmed in writing.

2074

2075 (b) A lawyer shall not negotiate for employment with any person who is involved as a
2076 party or as lawyer for a party in a matter in which the lawyer is participating personally
2077 and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or
2078 other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative
2079 officer may negotiate for employment with a party or lawyer involved in a matter in
2080 which the clerk is participating personally and substantially, but only after the lawyer has
2081 notified the judge or other adjudicative officer.

2082

2083 (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that
2084 lawyer is associated may knowingly undertake or continue representation in the matter
2085 unless:

2086 (1) the disqualified lawyer is timely screened from any participation in the matter and is
2087 apportioned no part of the fee therefrom; and

2088 (2) written notice is promptly given to the parties and any appropriate tribunal to enable
2089 them to ascertain compliance with the provisions of this rule.

2090

2091 (d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is
2092 not prohibited from subsequently representing that party.

2093

Comment

2094 [1] This Rule generally parallels Rule 1.11. The term "personally and substantially"
2095 signifies that a judge who was a member of a multimember court, and thereafter left
2096 judicial office to practice law, is not prohibited from representing a client in a matter
2097 pending in the court, but in which the former judge did not participate. So also the fact
2098 that a former judge exercised administrative responsibility in a court does not prevent the
2099 former judge from acting as a lawyer in a matter where the judge had previously
2100 exercised remote or incidental administrative responsibility that did not affect the merits.
2101 Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such
2102 officials as judges pro tempore, referees, special masters, hearing officers and other
2103 parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons
2104 A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge,
2105 judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in
2106 any proceeding in which he served as a judge or in any other proceeding related thereto."
2107 Although phrased differently from this Rule, those Rules correspond in meaning.

2108 [2] Like former judges, lawyers who have served as arbitrators, mediators or other
2109 third-party neutrals may be asked to represent a client in a matter in which the lawyer

2110 participated personally and substantially. This Rule forbids such representation unless all
2111 of the parties to the proceedings give their informed consent, confirmed in writing. See
2112 Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may
2113 impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

2114 [3] Although lawyers who serve as third-party neutrals do not have information
2115 concerning the parties that is protected under Rule 1.6, they typically owe the parties an
2116 obligation of confidentiality under law or codes of ethics governing third-party neutrals.
2117 Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be
2118 imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

2119 [4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph
2120 (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share
2121 established by prior independent agreement, but that lawyer may not receive
2122 compensation directly related to the matter in which the lawyer is disqualified.

2123 [5] Notice, including a description of the screened lawyer's prior representation and
2124 of the screening procedures employed, generally should be given as soon as practicable
2125 after the need for screening becomes apparent.

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2127 **RULE 1.13: ORGANIZATION AS CLIENT**

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2129 (a) A lawyer employed or retained by an organization represents the organization
2130 acting through its duly authorized constituents.

2131 (b) If a lawyer for an organization knows that an officer, employee or other person
2132 associated with the organization is engaged in action, intends to act or refuses to act in a
2133 matter related to the representation that is a violation of a legal obligation to the
2134 organization, or a violation of law which reasonably might be imputed to the
2135 organization, and is likely to result in substantial injury to the organization, the lawyer
2136 shall proceed as is reasonably necessary in the best interest of the organization. In
2137 determining how to proceed, the lawyer shall give due consideration to the seriousness of
2138 the violation and its consequences, the scope and nature of the lawyer's representation,
2139 the responsibility in the organization and the apparent motivation of the person involved,
2140 the policies of the organization concerning such matters and any other relevant
2141 considerations. Any measures taken shall be designed to minimize disruption of the
2142 organization and the risk of revealing information relating to the representation to persons
2143 outside the organization. Such measures may include among others:

- 2144 (1) asking for reconsideration of the matter;
2145 (2) advising that a separate legal opinion on the matter be sought for presentation to
2146 appropriate authority in the organization; and
2147 (3) referring the matter to higher authority in the organization, including, if warranted
2148 by the seriousness of the matter, referral to the highest authority that can act on behalf of
2149 the organization as determined by applicable law.

2150 (c) If, despite the lawyer's efforts in accordance with paragraph (b), ~~the highest~~
2151 ~~authority that can act on behalf of the organization insists upon action, or a refusal to act,~~

2152 ~~that is clearly a violation of law and is appears likely to result in substantial injury to the~~
2153 ~~organization, the lawyer may resign in accordance with Rule 1.16.1.16 and may disclose~~
2154 ~~information in conformance with Rule 1.6.~~

2155 (d) In dealing with an organization's directors, officers, employees, members,
2156 shareholders or other constituents, a lawyer shall explain the identity of the client when
2157 the lawyer knows or reasonably should know that the organization's interests are adverse
2158 to those of the constituents with whom the lawyer is dealing.

2159 (e) A lawyer representing an organization may also represent any of its directors,
2160 officers, employees, members, shareholders or other constituents, subject to the
2161 provisions of Rule 1.7. If the organization's consent to the dual representation is required
2162 by Rule 1.7, the consent shall be given by an appropriate official of the organization other
2163 than the individual who is to be represented, or by the shareholders.

2164 **Comment**

2165 **The Entity as the Client**

2166 [1] An organizational client is a legal entity, but it cannot act except through its
2167 officers, directors, employees, shareholders and other constituents. Officers, directors,
2168 employees and shareholders are the constituents of the corporate organizational client.
2169 The duties defined in this Comment apply equally to unincorporated associations. "Other
2170 constituents" as used in this Comment means the positions equivalent to officers,
2171 directors, employees and shareholders held by persons acting for organizational clients
2172 that are not corporations.

2173 [2] When one of the constituents of an organizational client communicates with the
2174 organization's lawyer in that person's organizational capacity, the communication is
2175 protected by Rule 1.6. Thus, by way of example, if an organizational client requests its
2176 lawyer to investigate allegations of wrongdoing, interviews made in the course of that
2177 investigation between the lawyer and the client's employees or other constituents are
2178 covered by Rule 1.6. This does not mean, however, that constituents of an organizational
2179 client are the clients of the lawyer. The lawyer may not disclose to such constituents
2180 information relating to the representation except for disclosures explicitly or impliedly
2181 authorized by the organizational client in order to carry out the representation or as
2182 otherwise permitted by Rule 1.6.

2183 [3] When constituents of the organization make decisions for it, the decisions
2184 ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful.
2185 Decisions concerning policy and operations, including ones entailing serious risk, are not
2186 as such in the lawyer's province. However, different considerations arise when the lawyer
2187 knows that the organization may be substantially injured by action of a constituent that is
2188 in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer
2189 to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient
2190 seriousness and importance to the organization, it may be reasonably necessary for the
2191 lawyer to take steps to have the matter reviewed by a higher authority in the organization.
2192 ~~Clear justification should exist for seeking review over the head of the constituent~~
2193 ~~normally responsible for it.~~ The stated policy of the organization may define
2194 circumstances and prescribe channels for such review, and a lawyer should encourage the
2195 formulation of such a policy. Even in the absence of organization policy, however, the
2196 lawyer may have an obligation to refer a matter to higher authority, depending on the

2197 seriousness of the matter and whether the constituent in question has apparent motives to
2198 act at variance with the organization's interest. Review by the chief executive officer or
2199 by the board of directors may be required when the matter is of importance
2200 commensurate with their authority. At some point it may be useful or essential to obtain
2201 an independent legal opinion.

2202 [4] The organization's highest authority to whom a matter may be referred ordinarily
2203 will be the board of directors or similar governing body. However, applicable law may
2204 prescribe that under certain conditions the highest authority reposes elsewhere, for
2205 example, in the independent directors of a corporation.

2206 **Relation to Other Rules**

2207 [5] The authority and responsibility provided in this Rule are concurrent with the
2208 authority and responsibility provided in other Rules. In particular, this Rule does not limit
2209 or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's
2210 services are being used by an organization to further a crime or fraud by the organization,
2211 Rule 1.2(d) can be applicable.

2212 **Government Agency**

2213 [6] The duty defined in this Rule applies to governmental organizations. Defining
2214 precisely the identity of the client and prescribing the resulting obligations of such
2215 lawyers may be more difficult in the government context and is a matter beyond the
2216 scope of these Rules. See Scope [18]. Although in some circumstances the client may be
2217 a specific agency, it may also be a branch of government, such as the executive branch,
2218 or the government as a whole. For example, if the action or failure to act involves the
2219 head of a bureau, either the department of which the bureau is a part or the relevant
2220 branch of government may be the client for purposes of this Rule. Moreover, in a matter
2221 involving the conduct of government officials, a government lawyer may have authority
2222 under applicable law to question such conduct more extensively than that of a lawyer for
2223 a private organization in similar circumstances. Thus, when the client is a governmental
2224 organization, a different balance may be appropriate between maintaining confidentiality
2225 and assuring that the wrongful act is prevented or rectified, for public business is
2226 involved. In addition, duties of lawyers employed by the government or lawyers in
2227 military service may be defined by statutes and regulation. This Rule does not limit that
2228 authority. See Scope.

2229 **Clarifying the Lawyer's Role**

2230 [7] There are times when the organization's interest may be or become adverse to
2231 those of one or more of its constituents. In such circumstances the lawyer should advise
2232 any constituent, whose interest the lawyer finds adverse to that of the organization of the
2233 conflict or potential conflict of interest, that the lawyer cannot represent such constituent,
2234 and that such person may wish to obtain independent representation. Care must be taken
2235 to assure that the individual understands that, when there is such adversity of interest, the
2236 lawyer for the organization cannot provide legal representation for that constituent
2237 individual, and that discussions between the lawyer for the organization and the
2238 individual may not be privileged.

2239 [8] Whether such a warning should be given by the lawyer for the organization to
2240 any constituent individual may turn on the facts of each case.

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Dual Representation

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[9] Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

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Derivative Actions

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[10] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

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[11] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

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RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

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(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

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(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

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(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6 (ab) (3) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

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Comment

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[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the

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client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers ~~an disability~~impairment does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must ~~to~~ look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be

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more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client’s Condition

[8] Disclosure of the client’s diminished capacity could adversely affect the client’s interests. For example, raising the question of ~~diminished capacity~~ could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting ~~with~~ other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted ~~with~~ will act adversely to the client’s interests before discussing matters related to the client. The lawyer’s position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person’s behalf has consulted ~~with~~ the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

RULE 1.15: SAFEKEEPING PROPERTY

~~(a) A lawyer shall hold property~~ All funds of clients or third persons ~~that is in held by a lawyer’s possession~~ lawyer or law firm in connection with a representation ~~separate from~~ shall be deposited in one or more identifiable interest bearing trust accounts as set forth in paragraphs (d) through (g). No funds belonging to the lawyer’s own property. Funds lawyer or law firm shall be ~~kept in a separate account maintained in the state where the lawyer’s office is situated, or elsewhere with the consent of the client or third person.~~ Other property shall be identified as such and appropriately safeguarded.

2396 Complete records of such account funds and other property shall be kept by the lawyer
2397 and shall be preserved for a period of [five years] after termination of the
2398 representation deposited therein except as follows:

2399

2400 (b) — A lawyer may deposit the lawyer's own funds in a client trust account for
2401 the sole purpose of paying bank service charges on that account, but only in an amount
2402 necessary for that purpose.

2403 (1) funds of the lawyer or law firm reasonably sufficient to pay service charges may be
2404 deposited therein. (2) funds belonging in part to a client or third person and in part
2405 presently or potentially to the lawyer or law firm must be deposited therein.

2406

2407

2408 ~~(e)-b)~~ A lawyer shall deposit into a client trust account must withdraw earned fees and any other funds
2409 belonging to the lawyer or the law firm from the trust account legal fees and expenses
2410 that within a reasonable time after the fees have been paid in advance earned or
2411 entitlement to the funds has been established and the lawyer must provide the client or
2412 third person with: (i) written notice of the time, to amount and the purpose of the
2413 withdrawal; and (ii) an accounting of the client's or third person's funds in the trust
2414 account. If the right of the lawyer or law firm to receive funds from the account is
2415 disputed by the client or third person claiming entitlement to the funds, the disputed
2416 portion shall not be withdrawn by the lawyer only as fees are earned or expenses
2417 incurred until the dispute is finally resolved. If the right of the lawyer or law firm to
2418 receive funds from the account is disputed within a reasonable time after the funds have
2419 been withdrawn, the disputed portion must be restored to the account until the dispute is
2420 resolved.

2421

2422 (d) — Upon receiving funds or other property in which a client or third person has an
2423 interest, ~~ac)~~ A lawyer shall:

2424 (1) promptly notify the client or third person. Except as stated in this rule or otherwise
2425 permitted by law or by agreement with of the receipt of the client's or third person's
2426 funds, securities, a lawyer shall or other properties.

2427 (2) identify and label securities and properties of a client or third person promptly upon
2428 receipt and place them in a safe deposit box or other place of safekeeping as soon as
2429 practicable.

2430 (3) maintain complete records of all funds, securities, and other properties of a client or
2431 third person coming into the possession of the lawyer and render appropriate accounts to
2432 the client or third person regarding them.

2433 (4) promptly pay or deliver to the client or third person any as requested the funds,
2434 securities, or other property that properties in the possession of the lawyer which the client
2435 or third person is entitled to receive and, upon request by the client or third person, shall
2436 promptly render a full accounting regarding such property.

2437 (5) deposit all fees in advance of the legal services being performed into a trust account
2438 and withdraw the fees as earned, unless the lawyer and the client have entered into a
2439 written agreement pursuant to Rule 1.5(b).

2440

2441 (d) Each trust account referred to in paragraph (a) shall be an interest bearing account in a
2442 bank, savings bank, trust company, savings and loan association, savings association, or
2443 federally regulated investment company selected by a lawyer in the exercise of ordinary
2444 prudence.

2445
2446 (e) A lawyer who receives client or third person funds shall maintain a pooled interest
2447 bearing trust account for deposit of funds that are nominal in amount or expected to be
2448 held for a short period of time. The interest accruing on this account, net of any
2449 transaction costs, shall be paid to the Lawyer Trust Account Board established by the
2450 Minnesota Supreme Court.

2451
2452 (f) All client or third person funds shall be deposited in the account specified in
2453 paragraph (e) unless they are deposited in a:

2454 (1) separate interest bearing trust account for the particular third person, client or client's
2455 matter on which the interest, net of any transaction costs, will be paid to the client or third
2456 person; or

2457 (2) pooled interest bearing trust account with subaccounting which will provide for
2458 computation of interest earned by each client's or third person's funds and the payment
2459 thereof, net of any transaction costs, to the client.

2460
2461 (g) In determining whether to use the account specified in paragraph (e) or an account
2462 specified in paragraph (f), a lawyer shall take into consideration the following factors:

2463 (1) the amount of interest which the funds would earn during the period they are expected
2464 to be deposited;

2465 (2) the cost of establishing and administering the account, including the cost of the
2466 lawyer's services;

2467 (3) the capability of financial institutions described in paragraph (d) to calculate and pay
2468 interest to individual clients.

2469
2470 (h) Every lawyer engaged in private practice of law shall maintain or cause to be
2471 maintained on a current basis books and records sufficient to demonstrate income derived
2472 from, and expenses related to, the lawyer's private practice of law, and to establish
2473 compliance with paragraphs (a) through (f). Equivalent books and records demonstrating
2474 the same information in an easily accessible manner and in substantially the same detail
2475 are acceptable. The books and records shall be preserved for at least six years following
2476 the end of the taxable year to which they relate or, as to books and records relating to
2477 funds or property of clients or third persons, for at least six years after completion of the
2478 employment to which they relate.

2479
2480 (i) Every lawyer subject to paragraph (h) shall certify, in connection with the annual
2481 renewal of the lawyer's registration and in such form as the Clerk of the Appellate Court
2482 may prescribe, that the lawyer or the lawyer's law firm maintains books and records as
2483 required by paragraph (h). The Lawyers Professional Responsibility Board shall publish
2484 annually the books and records required by paragraph (h).

2485

2486 (j) Lawyer trust accounts shall be maintained only in financial institutions approved by
2487 the Office of Lawyers Professional Responsibility. Every check, draft, electronic
2488 transfer, or other withdrawal instrument or authorization shall be personally signed or, in
2489 the case of electronic, telephone, or wire transfer, directed by one or more lawyers
2490 authorized by the law firm.

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2492 (k) A financial institution shall be approved as a depository for lawyer trust accounts if it
2493 shall file with the Office of Lawyers Professional Responsibility an agreement, in a form
2494 provided by the Office, to report to the Office in the event any properly payable
2495 instrument is presented against a lawyer trust account containing insufficient funds,
2496 irrespective of whether or not the instrument is honored. The Lawyers Professional
2497 Responsibility Board shall establish rules governing approval and termination of
2498 approved status for financial institutions, and shall annually publish a list of approved
2499 financial institutions. No trust account shall be maintained in any financial institution
2500 which does not agree to make such reports. Any such agreement shall apply to all
2501 branches of the financial institution and shall not be canceled except upon three days
2502 notice in writing to the Office.

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2504 (l) The overdraft notification agreement shall provide that all reports made by the
2505 financial institution shall be in the following format:

2506 (1) In the case of a dishonored instrument, the report shall be identical to the overdraft
2507 notice customarily forwarded to the depositor, and should include a copy of the
2508 dishonored instrument, if such a copy is normally provided to depositors.

2509 (2) In the case of instruments that are presented against insufficient funds but which
2510 instruments are honored, the report shall identify the financial institution, the lawyer or
2511 law firm, the account number, the date of presentation for payment and the date paid, as
2512 well as the amount of overdraft created thereby.

2513 Such reports shall be made simultaneously with, and within the time provided by law for
2514 notice of dishonor, if any. If an instrument presented against insufficient funds is
2515 honored, then the report shall be made within five banking days of the date of
2516 presentation for payment against insufficient funds.

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2518 (m) Every lawyer practicing or admitted to practice in this jurisdiction shall, as a
2519 condition thereof, be conclusively deemed to have consented to the reporting and
2520 production requirements mandated by this rule.

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2522 (n) Nothing herein shall preclude a financial institution from charging a particular lawyer
2523 or law firm for the reasonable cost of producing the reports and records required by this
2524 rule.

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2527 (e) — When in the o) Definitions.

2528 "Financial Institution" includes banks, savings and loan associations, savings banks and
2529 any other business or person which accepts for deposit funds held in trust by lawyers.

2530 "Properly payable" refers to an instrument which, if presented in the normal course of
2531 representation a lawyer business, is in possession a form requiring payment under the

2532 ~~laws of property in which two or more persons (one of whom may be the lawyer) claim~~
2533 ~~interests, the property shall be kept separate by this jurisdiction.~~
2534 ~~"Notice of dishonor" refers to the notice which a financial institution is required to give,~~
2535 ~~under the lawyer until laws of this jurisdiction, upon presentation of an instrument which~~
2536 ~~the dispute is resolved. The lawyer shall promptly distribute all portions of the property~~
2537 ~~as to which the interests are not in dispute. institution dishonors.~~

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Comment

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[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. ~~A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., ABA Model Financial Recordkeeping Rule.~~

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[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph ~~(ba)~~ (1) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds ~~are~~ are the lawyer's.

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[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

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[4] Paragraph ~~(eb)~~ also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

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[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

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~~[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.~~

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RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

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(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

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(1) the representation will result in violation of the rules of professional conduct or other law;

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(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

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(3) the lawyer is discharged.

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(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

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(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

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(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

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(3) the client has used the lawyer's services to perpetrate a crime or fraud;

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(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

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(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

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(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

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(7) other good cause for withdrawal exists.

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(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

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(d) 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, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. ~~The lawyer may retain papers relating to the client to the extent permitted by other law.~~

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(e) Papers and property to which the client is entitled include the following, whether stored electronically or otherwise:

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(1) In all representations, the papers and property delivered to the lawyer by or on behalf of the client and the papers and property for which the client has paid the lawyer's fees and reimbursed the lawyer's costs.

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(2) In pending claims or litigation representations:

2631 (i) all pleadings, motions, discovery, memoranda, correspondence and other litigation
2632 materials which have been drafted and served or filed regardless of whether the client has
2633 paid the lawyer for drafting and serving the document(s), but shall not include pleadings,
2634 discovery, motion papers, memoranda and correspondence which have been drafted, but
2635 not served or filed if the client has not paid the lawyer's fee for drafting or creating the
2636 documents; and
2637 (ii) all items for which the lawyer has agreed to advance costs and expenses regardless of
2638 whether the client has reimbursed the lawyer for the costs and expenses including
2639 depositions, expert opinions and statements, business records, witness statements, and
2640 other materials which may have evidentiary value.
2641 (3) In non-litigation or transactional representations, client files, papers and property shall
2642 not include drafted but unexecuted estate plans, title opinions, articles of incorporation,
2643 contracts, partnership agreements, or any other unexecuted document which does not
2644 otherwise have legal effect, where the client has not paid the lawyer's fee for drafting the
2645 document(s).
2646
2647 (f) A lawyer may charge a client for the reasonable costs of duplicating or retrieving the
2648 client's papers and property after termination of the representation only if the client has,
2649 prior to termination of the lawyer's services, agreed in writing to such a charge.
2650 (g) A lawyer shall not condition the return of client papers and property on payment of
2651 the lawyer's fee or the cost of copying the files or papers.

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Comment

2654 [1] A lawyer should not accept representation in a matter unless it can be performed
2655 competently, promptly, without improper conflict of interest and to completion.
2656 Ordinarily, a representation in a matter is completed when the agreed-upon assistance
2657 has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

2658 **Mandatory Withdrawal**

2659 [2] A lawyer ordinarily must decline or withdraw from representation if the client
2660 demands that the lawyer engage in conduct that is illegal or violates the Rules of
2661 Professional Conduct or other law. The lawyer is not obliged to decline or withdraw
2662 simply because the client suggests such a course of conduct; a client may make such a
2663 suggestion in the hope that a lawyer will not be constrained by a professional obligation.

2664 [3] When a lawyer has been appointed to represent a client, withdrawal ordinarily
2665 requires approval of the appointing authority. See also Rule 6.2. Similarly, court
2666 approval or notice to the court is often required by applicable law before a lawyer
2667 withdraws from pending litigation. Difficulty may be encountered if withdrawal is based
2668 on the client's demand that the lawyer engage in unprofessional conduct. The court may
2669 request an explanation for the withdrawal, while the lawyer may be bound to keep
2670 confidential the facts that would constitute such an explanation. The lawyer's statement
2671 that professional considerations require termination of the representation ordinarily
2672 should be accepted as sufficient. Lawyers should be mindful of their obligations to both
2673 clients and the court under Rules 1.6 and 3.3.

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Discharge

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[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

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[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

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[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

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Optional Withdrawal

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[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

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[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

2701

~~Assisting the Client upon Withdrawal~~

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~~[9] — Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.~~

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RULE 1.17: SALE OF LAW PRACTICE

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~~(a) A lawyer or a law firm may~~shall not sell or ~~purchase~~buy a law practice, ~~or an area of law practice, including good will, if the following conditions are satisfied unless:~~
(1) The seller sells the practice as an entirety, as defined in paragraph (c) of this Rule, to a lawyer or firm of lawyers licensed to practice law in Minnesota;
(2) The seller sends a written notification that complies with paragraph (d) of this Rule to all clients whose files are currently active and all clients whose inactive files will be taken over by the buying lawyer or firm of lawyers.

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(b) The buying lawyer or firm of lawyers shall not increase the fees charged to clients by reason of the sale for a period of at least one year from the date of the sale. The buying lawyer or firm of lawyers shall honor all existing fee agreements for at least one year from the date of the sale and shall continue to completion, on the same terms agreed to by the selling lawyer and the client, any matters that the selling lawyer has agreed to do on a pro bono publico basis or for a reduced fee.

(c) For purposes of this Rule, a practice is sold as an entirety if the buying lawyer or firm of lawyers assumes responsibility for at least all of the currently active files except those that deal with matters that the buying lawyer or firm of lawyers would not be competent to handle, those that the buying lawyer or firm of lawyers would be barred from handling because of a conflict of interest, or those from which the selling lawyer is denied permission to withdraw by a tribunal in a matter subject to Rule 1.6(c).

(d) The written notification that the seller lawyer must send pursuant to paragraph (a)(2) of this Rule must include at a minimum:

(1) A statement that the law practice of the selling lawyer has been sold to the buying lawyer or law firm;

(2) A summary of the buying lawyer's or law firm's professional background, including education and experience and the length of time that the buying lawyer or members of the buying law firm has been in practice;

(3) A statement that the client has the right to continue to retain the buying lawyer under the same fee arrangement as the client had with the selling lawyer or to have the client's complete file sent to the client or to another lawyer of the client's choice.

(e) If the written notification described in paragraph (d) has actually reached the client through personal service or by certified mail, the notification may include a provision that states that if the client does not respond to the buying lawyer by ninety days from the date that the client receives the notification, the client's silence shall be deemed to be the client's waiver of confidentiality and the client's consent to the buying lawyer's representing the client in the matter that was the subject of the selling lawyer's representation. The client's failure to respond within that time shall be such a waiver and consent.

~~(a-f) The seller ceases to~~transaction may include a promise by the selling lawyer that the selling lawyer will not engage in the private practice of law, or in the area of practice that has been sold, [in the for a reasonable period of time within a reasonable geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted; and will not advertise for or solicit clients within that area for that time.

~~(b) — The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;~~

~~(c) — The seller gives written notice to each of the seller's clients regarding:~~

- 2765 (1) ~~the proposed sale;~~
2766
2767 (2) ~~the client's right to retain other counsel or to take possession of the~~
2768 ~~file; and~~
2769
2770 ~~(3) the fact that the client's consent to the transfer of the client's files~~
2771 ~~will be presumed if the client does not take any action or does not otherwise~~
2772 ~~object within ninety (90) days of receipt of the notice.~~

2773
2774 If a client cannot be given notice, the representation of that client may be
2775 transferred to

2776 (g) The selling lawyer shall retain responsibility for the proper management and
2777 disposition of all inactive files that are not transferred as part of the purchaser only upon
2778 entry of an order so authorizing by a court having jurisdiction. The seller may disclose
2779 to sale of the court in camera information relating to the representation only to the extent
2780 necessary to obtain an order authorizing the transfer of a file. law practice.

2781
2782 (d) ~~The fees charged clients shall not be increased by reason of the sale.~~

2783 (h) For purposes of this Rule, the term "lawyer" means an individual lawyer or a law firm
2784 that buys or sells a law practice.

2785
2786 **Comment**

2787
2788 ~~[1] The practice of law is a profession, not merely a business. Clients are~~
2789 ~~not commodities that can be purchased and sold at will. Pursuant to this Rule, when a~~
2790 ~~lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and~~
2791 ~~other lawyers or firms take over the representation, the selling lawyer or firm may obtain~~
2792 ~~compensation for the reasonable value of the practice as may withdrawing partners of law~~
2793 ~~firms. See Rules 5.4 and 5.6.~~

2794
2795 **Termination of Practice by the Seller**

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2797 ~~[2] The requirement that all of the private practice, or all of an area of~~
2798 ~~practice, be sold is satisfied if the seller in good faith makes the entire practice, or the~~
2799 ~~area of practice, available for sale to the purchasers. The fact that a number of the seller's~~
2800 ~~clients decide not to be represented by the purchasers but take their matters elsewhere,~~
2801 ~~therefore, does not result in a violation. Return to private practice as a result of an~~
2802 ~~unanticipated change in circumstances does not necessarily result in a violation. For~~
2803 ~~example, a lawyer who has sold the practice to accept an appointment to judicial office~~
2804 ~~does not violate the requirement that the sale be attendant to cessation of practice if the~~
2805 ~~lawyer later resumes private practice upon being defeated in a contested or a retention~~
2806 ~~election for the office or resigns from a judiciary position.~~

2807
2808 ~~[3] The requirement that the seller cease to engage in the private practice~~
2809 ~~of law does not prohibit employment as a lawyer on the staff of a public agency or a legal~~
2810 ~~services entity that provides legal services to the poor, or as in-house counsel to a~~
2811 ~~business.~~

2812
2813 ~~[4] The Rule permits a sale of an entire practice attendant upon retirement~~
2814 ~~from the private practice of law within the jurisdiction. Its provisions, therefore,~~
2815 ~~accommodate the lawyer who sells the practice on the occasion of moving to another~~
2816 ~~state. Some states are so large that a move from one locale therein to another is~~

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~~tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law. To also accommodate lawyers so situated, states may permit the sale of the practice when the lawyer leaves the geographical area rather than the jurisdiction. The alternative desired should be indicated by selecting one of the two provided for in Rule 1.17(a).~~

~~———— [5] ——— This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer’s right to continue practice in the areas of the practice that were not sold.~~

Sale of Entire Practice or Entire Area of Practice

~~———— [6] ——— The Rule requires that the seller’s entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.~~

Client Confidences, Consent and Notice

~~———— [7] ——— Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.~~

~~———— [8] ——— A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client’s legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist).~~

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~~———— [9] ——— All elements of client autonomy, including the client’s absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.~~

Fee Arrangements Between Client and Purchaser

~~———— [10] ——— The sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.~~

Other Applicable Ethical Standards

~~———— [11] ——— Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller’s obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser’s obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client’s informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).~~

~~———— [12] ——— If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).~~

Applicability of the Rule

~~———— [13] ——— This Rule applies to the sale of a~~
[1] A representative of a deceased, disabled or disappeared lawyer may sell the lawyer’s law practice of a deceased, disabled or disappeared lawyer. Thus, under the seller may be represented by a non lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the sellersame restrictions as well as the purchasing lawyer can be expected to see to it that they are met.imposed by this Rule. See Rule 5.4 (a)(4).

~~———— [14] ——— Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.~~

[2] Rule 1.6 on Confidentiality of Information limits the amount and type of information that the selling lawyer may give to the potential buying lawyer during negotiations. Before the prospective buyer could see the client’s files the selling lawyer would be required to obtain from the affected client a waiver of confidentiality.

~~———— [15] ——— This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to~~

[3] The selling lawyer should consider extending malpractice insurance for some reasonable period of time following the sale of a practice or an area of practice.to insure against losses arising from errors that might come to light after the sale.

2924 **RULE 1.18: DUTIES TO PROSPECTIVE CLIENT**

2925
2926 (a) A person who discusses with a lawyer the possibility of forming a client-lawyer
2927 relationship with respect to a matter is a prospective client.

2928
2929 (b) Even when no client-lawyer relationship ensues, a lawyer who has had
2930 discussions with a prospective client shall not use or reveal information learned in the
2931 consultation, except as Rule 1.9 would permit with respect to information of a former
2932 client.

2933
2934 (c) A lawyer subject to paragraph (b) shall not represent a client with interests
2935 materially adverse to those of a prospective client in the same or a substantially related
2936 matter if the lawyer received information from the prospective client that could be
2937 significantly harmful to that person in the matter, except as provided in paragraph (d). If a
2938 lawyer is disqualified from representation under this paragraph, no lawyer in a firm with
2939 which that lawyer is associated may knowingly undertake or continue representation in
2940 such a matter, except as provided in paragraph (d).

2941
2942 (d) When the lawyer has received disqualifying information as defined in paragraph
2943 (c), representation is permissible if:

2944 (1) both the affected client and the prospective client have given informed consent,
2945 confirmed in writing, or:

2946 (2) the lawyer who received the information took reasonable measures to avoid
2947 exposure to more disqualifying information than was reasonably necessary to determine
2948 whether to represent the prospective client; and

2949 (i) the disqualified lawyer is timely screened from any participation in the
2950 matter and is apportioned no part of the fee therefrom; and

2951 (ii) written notice is promptly given to the prospective client.

2952
2953 **Comment**

2954
2955 [1] Prospective clients, like clients, may disclose information to a lawyer, place
2956 documents or other property in the lawyer's custody, or rely on the lawyer's advice. A
2957 lawyer's discussions with a prospective client usually are limited in time and depth and
2958 leave both the prospective client and the lawyer free (and sometimes required) to proceed
2959 no further. Hence, prospective clients should receive some but not all of the protection
2960 afforded clients.

2961
2962 [2] Not all persons who communicate information to a lawyer are entitled to
2963 protection under this Rule. A person who communicates information unilaterally to a
2964 lawyer, without any reasonable expectation that the lawyer is willing to discuss the
2965 possibility of forming a client-lawyer relationship, is not a "prospective client" within the
2966 meaning of paragraph (a).

2967
2968 [3] It is often necessary for a prospective client to reveal information to the lawyer
2969 during an initial consultation prior to the decision about formation of a client-lawyer
2970 relationship. The lawyer often must learn such information to determine whether there is
2971 a conflict of interest with an existing client and whether the matter is one that the lawyer
2972 is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that
2973 information, except as permitted by Rule 1.9, even if the client or lawyer decides not to

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proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used against the prospective client in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if ~~the conditions of paragraph (d)(2) are met and~~ all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a ~~general~~ description of the ~~subject matter about which the lawyer was consulted,~~ screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the client, a reasonable delay may be justified.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

3020 **RULE 2.1: ADVISOR**

3021 In representing a client, a lawyer shall exercise independent professional judgment and
3022 render candid advice. In rendering advice, a lawyer may refer not only to law but to other
3023 considerations such as moral, economic, social and political factors, that may be relevant
3024 to the client's situation.

3025 **Comment**

3026 **Scope of Advice**

3027 [1] A client is entitled to straightforward advice expressing the lawyer's honest
3028 assessment. Legal advice often involves unpleasant facts and alternatives that a client
3029 may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the
3030 client's morale and may put advice in as acceptable a form as honesty permits. However,
3031 a lawyer should not be deterred from giving candid advice by the prospect that the advice
3032 will be unpalatable to the client.

3033 [2] Advice couched in narrow legal terms may be of little value to a client, especially
3034 where practical considerations, such as cost or effects on other people, are predominant.
3035 Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a
3036 lawyer to refer to relevant moral and ethical considerations in giving advice. Although a
3037 lawyer is not a moral advisor as such, moral and ethical considerations impinge upon
3038 most legal questions and may decisively influence how the law will be applied.

3039 [3] A client may expressly or impliedly ask the lawyer for purely technical advice.
3040 When such a request is made by a client experienced in legal matters, the lawyer may
3041 accept it at face value. When such a request is made by a client inexperienced in legal
3042 matters, however, the lawyer's responsibility as advisor may include indicating that more
3043 may be involved than strictly legal considerations.

3044 [4] Matters that go beyond strictly legal questions may also be in the domain of
3045 another profession. Family matters can involve problems within the professional
3046 competence of psychiatry, clinical psychology or social work; business matters can
3047 involve problems within the competence of the accounting profession or of financial
3048 specialists. Where consultation with a professional in another field is itself something a
3049 competent lawyer would recommend, the lawyer should make such a recommendation.
3050 At the same time, a lawyer's advice at its best often consists of recommending a course
3051 of action in the face of conflicting recommendations of experts.

3052 **Offering Advice**

3053 [5] In general, a lawyer is not expected to give advice until asked by the client.
3054 However, when a lawyer knows that a client proposes a course of action that is likely to
3055 result in substantial adverse legal consequences to the client, the lawyer's duty to the
3056 client under Rule 1.4 may require that the lawyer offer advice if the client's course of
3057 action is related to the representation. Similarly, when a matter is likely to involve
3058 litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute
3059 resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily
3060 has no duty to initiate investigation of a client's affairs or to give advice that the client
3061 has indicated is unwanted, but a lawyer may initiate advice to a client when doing so
3062 appears to be in the client's interest.

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3064 **RULE 2.2 (Deleted)**

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3066 **RULE 2.3: EVALUATION FOR USE BY THIRD PERSONS**

3067 (a) A lawyer may provide an evaluation of a matter affecting a client for the use of
3068 someone other than the client if the lawyer reasonably believes that making the
3069 evaluation is compatible with other aspects of the lawyer's relationship with the client.

3070 (b) When the lawyer knows or reasonably should know that the evaluation is likely to
3071 affect the client's interests materially and adversely, the lawyer shall not provide the
3072 evaluation unless the client gives informed consent.

3073 (c) Except as disclosure is authorized in connection with a report of an evaluation,
3074 information relating to the evaluation is otherwise protected by Rule 1.6.

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Comment

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Definition

3077 [1] An evaluation may be performed at the client's direction or when impliedly
3078 authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may
3079 be for the primary purpose of establishing information for the benefit of third parties; for
3080 example, an opinion concerning the title of property rendered at the behest of a vendor
3081 for the information of a prospective purchaser, or at the behest of a borrower for the
3082 information of a prospective lender. In some situations, the evaluation may be required
3083 by a government agency; for example, an opinion concerning the legality of the securities
3084 registered for sale under the securities laws. In other instances, the evaluation may be
3085 required by a third person, such as a purchaser of a business.

3086 [2] A legal evaluation should be distinguished from an investigation of a person with
3087 whom the lawyer does not have a client-lawyer relationship. For example, a lawyer
3088 retained by a purchaser to analyze a vendor's title to property does not have a client-
3089 lawyer relationship with the vendor. So also, an investigation into a person's affairs by a
3090 government lawyer, or by special counsel by a government lawyer, or by special counsel
3091 employed by the government, is not an evaluation as that term is used in this Rule. The
3092 question is whether the lawyer is retained by the person whose affairs are being
3093 examined. When the lawyer is retained by that person, the general rules concerning
3094 loyalty to client and preservation of confidences apply, which is not the case if the lawyer
3095 is retained by someone else. For this reason, it is essential to identify the person by whom
3096 the lawyer is retained. This should be made clear not only to the person under
3097 examination, but also to others to whom the results are to be made available.

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Duties Owed to Third Person and Client

3099 [3] When the evaluation is intended for the information or use of a third person, a
3100 legal duty to that person may or may not arise. That legal question is beyond the scope of
3101 this Rule. However, since such an evaluation involves a departure from the normal client-

3102 lawyer relationship, careful analysis of the situation is required. The lawyer must be
3103 satisfied as a matter of professional judgment that making the evaluation is compatible
3104 with other functions undertaken in behalf of the client. For example, if the lawyer is
3105 acting as advocate in defending the client against charges of fraud, it would normally be
3106 incompatible with that responsibility for the lawyer to perform an evaluation for others
3107 concerning the same or a related transaction. Assuming no such impediment is apparent,
3108 however, the lawyer should advise the client of the implications of the evaluation,
3109 particularly the lawyer's responsibilities to third persons and the duty to disseminate the
3110 findings.

3111 **Access to and Disclosure of Information**

3112 [4] The quality of an evaluation depends on the freedom and extent of the
3113 investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of
3114 investigation seems necessary as a matter of professional judgment. Under some
3115 circumstances, however, the terms of the evaluation may be limited. For example, certain
3116 issues or sources may be categorically excluded, or the scope of search may be limited by
3117 time constraints or the noncooperation of persons having relevant information. Any such
3118 limitations that are material to the evaluation should be described in the report. If after a
3119 lawyer has commenced an evaluation, the client refuses to comply with the terms upon
3120 which it was understood the evaluation was to have been made, the lawyer's obligations
3121 are determined by law, having reference to the terms of the client's agreement and the
3122 surrounding circumstances. In no circumstances is the lawyer permitted to knowingly
3123 make a false statement of material fact or law in providing an evaluation under this Rule.
3124 See Rule 4.1.

3125 **Obtaining Client's Informed Consent**

3126 [5] Information relating to an evaluation is protected by Rule 1.6. In many situations,
3127 providing an evaluation to a third party poses no significant risk to the client; thus, the
3128 lawyer may be impliedly authorized to disclose information to carry out the
3129 representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the
3130 evaluation will affect the client's interests materially and adversely, the lawyer must first
3131 obtain the client's consent after the client has been adequately informed concerning the
3132 important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).

3133 **Financial Auditors' Requests for Information**

3134 [6] When a question concerning the legal situation of a client arises at the instance of
3135 the client's financial auditor and the question is referred to the lawyer, the lawyer's
3136 response may be made in accordance with procedures recognized in the legal profession.
3137 Such a procedure is set forth in the American Bar Association Statement of Policy
3138 Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

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3140 **RULE 2.4: LAWYER SERVING AS THIRD-PARTY NEUTRAL**

3141 (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons
3142 who are not clients of the lawyer to reach a resolution of a dispute or other matter that has
3143 arisen between them. Service as a third-party neutral may include service as an arbitrator,

3144 a mediator or in such other capacity as will enable the lawyer to assist the parties to
3145 resolve the matter.

3146 (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the
3147 lawyer is not representing them. When the lawyer knows or reasonably should know that
3148 a party does not understand the lawyer's role in the matter, the lawyer shall explain the
3149 difference between the lawyer's role as a third-party neutral and a lawyer's role as one
3150 who represents a client.

3151 **Comment**

3152 [1] Alternative dispute resolution has become a substantial part of the civil justice
3153 system. Aside from representing clients in dispute-resolution processes, lawyers often
3154 serve as third-party neutrals. A third-party neutral is a person, such as a mediator,
3155 arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented,
3156 in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party
3157 neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the
3158 particular process that is either selected by the parties or mandated by a court.

3159 [2] The role of a third-party neutral is not unique to lawyers, although, in some court-
3160 connected contexts, only lawyers are allowed to serve in this role or to handle certain
3161 types of cases. In performing this role, the lawyer may be subject to court rules or other
3162 law that apply either to third-party neutrals generally or to lawyers serving as third-party
3163 neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code
3164 of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the
3165 American Bar Association and the American Arbitration Association or the Model
3166 Standards of Conduct for Mediators jointly prepared by the American Bar Association,
3167 the American Arbitration Association and the Society of Professionals in Dispute
3168 Resolution.

3169 [3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role
3170 may experience unique problems as a result of differences between the role of a third-
3171 party neutral and a lawyer's service as a client representative. The potential for confusion
3172 is significant when the parties are unrepresented in the process. Thus, paragraph (b)
3173 requires a lawyer-neutral to inform unrepresented parties that the lawyer is not
3174 representing them. For some parties, particularly parties who frequently use dispute-
3175 resolution processes, this information will be sufficient. For others, particularly those
3176 who are using the process for the first time, more information will be required. Where
3177 appropriate, the lawyer should inform unrepresented parties of the important differences
3178 between the lawyer's role as third-party neutral and a lawyer's role as a client
3179 representative, including the inapplicability of the attorney-client evidentiary privilege.
3180 The extent of disclosure required under this paragraph will depend on the particular
3181 parties involved and the subject matter of the proceeding, as well as the particular
3182 features of the dispute-resolution process selected.

3183 [4] A lawyer who serves as a third-party neutral subsequently may be asked to serve
3184 as a lawyer representing a client in the same matter. The conflicts of interest that arise for
3185 both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

3186 [5] Lawyers who represent clients in alternative dispute-resolution processes are
3187 governed by the Rules of Professional Conduct. When the dispute-resolution process
3188 takes place before a tribunal, as in binding arbitration (see Rule 1.0(~~mn~~)), the lawyer's

3189 duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward
3190 both the third-party neutral and other parties is governed by Rule 4.1.

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RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law’s ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients’ cases and the applicable law and determine that they can make good faith arguments in support of their clients’ positions. Such action is not frivolous even though the lawyer believes that the client’s position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer’s obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

RULE 3.2: EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

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RULE 3.3: CANDOR TOWARD THE TRIBUNAL

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(~~mm~~) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client’s case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate’s duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

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Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

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[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

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Offering Evidence

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[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

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[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

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[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. ~~In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].~~

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[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(fg). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

3337 [9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the
3338 lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof
3339 that the lawyer reasonably believes is false. Offering such proof may reflect adversely on
3340 the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's
3341 effectiveness as an advocate. Because of the special protections historically provided
3342 criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the
3343 testimony of such a client where the lawyer reasonably believes but does not know that
3344 the testimony will be false. Unless the lawyer knows the testimony will be false, the
3345 lawyer must honor the client's decision to testify. See also Comment [7].

3346 **Remedial Measures**

3347 [10] Having offered material evidence in the belief that it was true, a lawyer may
3348 subsequently come to know that the evidence is false. Or, a lawyer may be surprised
3349 when the lawyer's client, or another witness called by the lawyer, offers testimony the
3350 lawyer knows to be false, either during the lawyer's direct examination or in response to
3351 cross-examination by the opposing lawyer. In such situations or if the lawyer knows of
3352 the falsity of testimony elicited from the client during a deposition, the lawyer must take
3353 reasonable remedial measures. In such situations, the advocate's proper course is to
3354 remonstrate with the client confidentially, advise the client of the lawyer's duty of candor
3355 to the tribunal and seek the client's cooperation with respect to the withdrawal or
3356 correction of the false statements or evidence. If that fails, the advocate must take further
3357 remedial action. If withdrawal from the representation is not permitted or will not undo
3358 the effect of the false evidence, the advocate must make such disclosure to the tribunal as
3359 is reasonably necessary to remedy the situation, even if doing so requires the lawyer to
3360 reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal
3361 then to determine what should be done — making a statement about the matter to the trier
3362 of fact, ordering a mistrial or perhaps nothing.

3363 [11] The disclosure of a client's false testimony can result in grave consequences to the
3364 client, including not only a sense of betrayal but also loss of the case and perhaps a
3365 prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the
3366 court, thereby subverting the truth-finding process which the adversary system is
3367 designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that
3368 the lawyer will act upon the duty to disclose the existence of false evidence, the client can
3369 simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer
3370 keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on
3371 the court.

3372 **Preserving Integrity of Adjudicative Process**

3373 [12] Lawyers have a special obligation to protect a tribunal against criminal or
3374 fraudulent conduct that undermines the integrity of the adjudicative process, such as
3375 bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court
3376 official or other participant in the proceeding, unlawfully destroying or concealing
3377 documents or other evidence or failing to disclose information to the tribunal when
3378 required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable
3379 remedial measures, including disclosure if necessary, whenever the lawyer knows that a
3380 person, including the lawyer's client, intends to engage, is engaging or has engaged in
3381 criminal or fraudulent conduct related to the proceeding.

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Duration of Obligation

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[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

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Ex Parte Proceedings

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[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

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Withdrawal

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[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

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RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

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A lawyer shall not:

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(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

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(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

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(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

3420 (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably
3421 diligent effort to comply with a legally proper discovery request by an opposing party;

3422 (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant
3423 or that will not be supported by admissible evidence, assert personal knowledge of facts
3424 in issue except when testifying as a witness, or state a personal opinion as to the justness
3425 of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or
3426 innocence of an accused; or

3427 (f) request a person other than a client to refrain from voluntarily giving relevant
3428 information to another party unless:
3429 (1) the person is a relative or an employee or other agent of a client; and
3430 (2) the lawyer reasonably believes that the person's interests will not be adversely
3431 affected by refraining from giving such information.

3432 **Comment**

3433 [1] The procedure of the adversary system contemplates that the evidence in a case is
3434 to be marshalled competitively by the contending parties. Fair competition in the
3435 adversary system is secured by prohibitions against destruction or concealment of
3436 evidence, improperly influencing witnesses, obstructive tactics in discovery procedure,
3437 and the like.

3438 [2] Documents and other items of evidence are often essential to establish a claim or
3439 defense. Subject to evidentiary privileges, the right of an opposing party, including the
3440 government, to obtain evidence through discovery or subpoena is an important procedural
3441 right. The exercise of that right can be frustrated if relevant material is altered, concealed
3442 or destroyed. ~~Applicable law in many jurisdictions makes it an offense to destroy material
3443 for purpose of impairing its availability in a pending proceeding or one whose
3444 commencement can be foreseen. Falsifying evidence is also generally a criminal offense.
3445 Paragraph (a) applies to evidentiary material generally, including computerized
3446 information. Applicable law may permit a lawyer to take temporary possession of
3447 physical evidence of client crimes for the purpose of conducting a limited examination
3448 that will not alter or destroy material characteristics of the evidence. In such a case,
3449 applicable law may require the lawyer to turn the evidence over to the police or other
3450 prosecuting authority, depending on the circumstances.~~

3451 [3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to
3452 compensate an expert witness on terms permitted by law. ~~The common law rule in most
3453 jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and
3454 that it is improper to pay an expert witness a contingent fee.~~

3455 [4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from
3456 giving information to another party, for the employees may identify their interests with
3457 those of the client. See also Rule 4.2.

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3459 **RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL**

3460 A

3461 (a) Before the trial of a case, a lawyer connected therewith shall not:

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3463 ~~(a) seek to influence a judge, juror, prospective juror or other~~except in the
3464 course of official by means prohibited by law;

3465
3466 ~~(b) proceedings, communicate ex parte with such a person during the proceeding~~
3467 unless authorized to do so by law or court order;

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3469 ~~(c) or cause another to communicate with a juror or prospective juror after~~
3470 discharge of the jury if:

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3472 ~~(1) the communication is prohibited by law or court order;~~

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3474 ~~(2) the juror has made known to anyone the lawyer a desire not~~
3475 ~~to know to be a member of the venire from which the jury will be selected~~
3476 for the trial of the case.

3477 (b) During the trial of the case:

3478 (1) a lawyer connected therewith shall not, except in the course of official proceedings,
3479 communicate;~~or~~

3480
3481 ~~(3) the communication involves misrepresentation, coercion, duress or~~
3482 ~~harassment; or with or cause another to communicate with any member of the~~
3483 jury.

3484 (2) a lawyer who is not connected therewith shall not, except in the course of official
3485 proceedings, communicate with or cause another to communicate with a juror concerning
3486 the case.

3487
3488 (c) After discharge of the jury from further consideration of a case with which the lawyer
3489 was connected, the lawyer shall not ask questions of or make comments to a member of
3490 that jury that are calculated merely to harass or embarrass the juror or to influence the
3491 juror's actions in future jury service.

3492 (d) A lawyer shall not conduct or cause another, by financial support or otherwise, to
3493 conduct a vexatious or harassing investigation of a juror or prospective juror.

3494 (e) All restrictions imposed by this rule apply also to communications with or
3495 investigations of members of a family of a juror or prospective juror.

3496 (f) A lawyer shall reveal promptly to the court improper conduct by, or by another
3497 toward, a juror or prospective juror or a member of the family thereof, of which the
3498 lawyer has knowledge.

3499 (g) In an adversary proceeding a lawyer shall not communicate or cause another to
3500 communicate as to the merits of the case with the judge or an official before whom a
3501 proceeding is pending except:
3502 (1) in the course of official proceedings.
3503 (2) in writing, if the lawyer promptly delivers a copy of the writing to opposing counsel
3504 or to the adverse party if the party is not represented by a lawyer.
3505 (3) orally upon adequate notice to opposing counsel or to the adverse party if the adverse
3506 party is not represented by a lawyer.
3507 (4) as otherwise authorized by law.

3508 ~~(d)~~ (h) A lawyer shall not engage in conduct intended to disrupt a tribunal.

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Comment

3510 [1] Many forms of improper influence upon a tribunal are proscribed by criminal
3511 law. Others are specified in the ABA Model Code of Judicial Conduct, with which an
3512 advocate should be familiar. A lawyer is required to avoid contributing to a violation of
3513 such provisions.

3514

3515 [2] ~~During a proceeding a lawyer may not communicate ex parte with~~
3516 ~~persons serving in an official capacity in the proceeding, such as judges, masters or~~
3517 ~~jurors, unless authorized to do so by law or court order.~~

3518

3519 [3] ~~A lawyer may on occasion want to communicate with a juror or~~
3520 ~~prospective juror after the jury has been discharged. The lawyer may do so unless the~~
3521 ~~communication is prohibited by law or a court order but must respect the desire of the~~
3522 ~~juror not to talk with the lawyer. The lawyer may not engage in improper conduct during~~
3523 ~~the communication.~~

3524

3525 [4] The advocate's function is to present evidence and argument so that the cause
3526 may be decided according to law. Refraining from abusive or obstreperous conduct is a
3527 corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm
3528 against abuse by a judge but should avoid reciprocation; the judge's default is no
3529 justification for similar dereliction by an advocate. An advocate can ~~present~~ prevent the
3530 cause, protect the record for subsequent review and preserve professional integrity by
patient firmness no less effectively than by belligerence or theatrics.

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3532 [5] ~~The duty to refrain from disruptive conduct applies to any proceeding~~
3533 ~~of a tribunal, including a deposition. See Rule 1.0(m).~~

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3536 **RULE 3.6: TRIAL PUBLICITY**

3537 (a) A lawyer who is participating or has participated in the investigation or litigation of
3538 a criminal matter shall not make an extrajudicial statement about the matter that the
3539 lawyer knows or reasonably should know will be disseminated by means of public
3540 communication and will have a substantial likelihood of materially prejudicing ~~an~~
3541 ~~adjudicative proceeding~~ a jury trial in the a pending criminal matter.

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~~(b) — Notwithstanding paragraph (a), a lawyer may state:~~

~~(1) — the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;~~

~~(2) — information contained in a public record;~~

~~(3) — that an investigation of a matter is in progress;~~

~~(4) — the scheduling or result of any step in litigation;~~

~~(5) — a request for assistance in obtaining evidence and information necessary thereto;~~

~~(6) — a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and~~

~~(7) — in a criminal case, in addition to subparagraphs (1) through (6):~~

~~(i) — the identity, residence, occupation and family status of the accused;~~

~~(ii) — if the accused has not been apprehended, information necessary to aid in apprehension of that person;~~

~~(iii) — the fact, time and place of arrest; and~~

~~(iv) — the identity of investigating and arresting officers or agencies and the length of the investigation.~~

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~~(e)~~(b) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

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~~(d)~~(c) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

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Comment

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[1] It is difficult to strike a balance between [1] protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result

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would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

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~~[2] — Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.~~

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[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing ~~an adjudicative proceeding~~ a pending criminal jury trial. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

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~~[4] — Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).~~

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[5] — There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

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(1) — ~~the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;~~

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(2) — ~~in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;~~

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(3) — ~~the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;~~

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(4) — ~~any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;~~

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(5) — ~~information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or~~

3637 ~~(6) — the fact that a defendant has been charged with a crime, unless there is~~
3638 ~~included therein a statement explaining that the charge is merely an accusation and that~~
3639 ~~the defendant is presumed innocent until and unless proven guilty.~~

3641 ~~[6] — Another relevant factor in determining prejudice is the nature of the~~
3642 ~~proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech.~~
3643 ~~Civil trials may be less sensitive. Non jury hearings and arbitration proceedings may be~~
3644 ~~even less affected. The Rule will still place limitations on prejudicial comments in these~~
3645 ~~cases, but the likelihood of prejudice may be different depending on the type of~~
3646 ~~proceeding.~~

3647 ~~[7] — Finally, extrajudicial~~^[3] ~~Extrajudicial~~ statements that might otherwise raise a
3648 question under this Rule may be permissible when they are made in response to
3649 statements made publicly by another party, another party’s lawyer, or third persons,
3650 where a reasonable lawyer would believe a public response is required in order to avoid
3651 prejudice to the lawyer’s client. When prejudicial statements have been publicly made by
3652 others, responsive statements may have the salutary effect of lessening any resulting
3653 adverse impact on the adjudicative proceeding. Such responsive statements should be
3654 limited to contain only such information as is necessary to mitigate undue prejudice
3655 created by the statements made by others.

3656 ^[8] See Rule 3.8(f) for additional duties of prosecutors in connection with
3657 extrajudicial statements about criminal proceedings.

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3659 **RULE 3.7: LAWYER AS WITNESS**

3660 (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a
3661 necessary witness unless:

- 3662 (1) the testimony relates to an uncontested issue;
3663 (2) the testimony relates to the nature and value of legal services rendered in the case;
3664 or
3665 (3) disqualification of the lawyer would work substantial hardship on the client.

3666 (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s
3667 firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule
3668 1.9.

3669 **Comment**

3670 [1] Combining the roles of advocate and witness can prejudice the tribunal and the
3671 opposing party and can also involve a conflict of interest between the lawyer and client.

3672 **Advocate-Witness Rule**

3673 [2] The tribunal has proper objection when the trier of fact may be confused or
3674 misled by a lawyer serving as both advocate and witness. The opposing party has proper
3675 objection where the combination of roles may prejudice that party’s rights in the
3676 litigation. A witness is required to testify on the basis of personal knowledge, while an
3677 advocate is expected to explain and comment on evidence given by others. It may not be
3678 clear whether a statement by an advocate-witness should be taken as proof or as an
3679 analysis of the proof.

3680 [3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously
3681 serving as advocate and necessary witness except in those circumstances specified in
3682 paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be
3683 uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2)
3684 recognizes that where the testimony concerns the extent and value of legal services
3685 rendered in the action in which the testimony is offered, permitting the lawyers to testify
3686 avoids the need for a second trial with new counsel to resolve that issue. Moreover, in
3687 such a situation the judge has firsthand knowledge of the matter in issue; hence, there is
3688 less dependence on the adversary process to test the credibility of the testimony.

3689 [4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is
3690 required between the interests of the client and those of the tribunal and the opposing
3691 party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer
3692 prejudice depends on the nature of the case, the importance and probable tenor of the
3693 lawyer's testimony, and the probability that the lawyer's testimony will conflict with that
3694 of other witnesses. Even if there is risk of such prejudice, in determining whether the
3695 lawyer should be disqualified, due regard must be given to the effect of disqualification
3696 on the lawyer's client. It is relevant that one or both parties could reasonably foresee that
3697 the lawyer would probably be a witness. The conflict of interest principles stated in Rules
3698 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

3699 [5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a
3700 trial in which another lawyer in the lawyer's firm will testify as a necessary witness,
3701 paragraph (b) permits the lawyer to do so except in situations involving a conflict of
3702 interest.

3703 **Conflict of Interest**

3704 [6] In determining if it is permissible to act as advocate in a trial in which the lawyer
3705 will be a necessary witness, the lawyer must also consider that the dual role may give rise
3706 to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if
3707 there is likely to be substantial conflict between the testimony of the client and that of the
3708 lawyer the representation involves a conflict of interest that requires compliance with
3709 Rule 1.7. This would be true even though the lawyer might not be prohibited by
3710 paragraph (a) from simultaneously serving as advocate and witness because the lawyer's
3711 disqualification would work a substantial hardship on the client. Similarly, a lawyer who
3712 might be permitted to simultaneously serve as an advocate and a witness by paragraph
3713 (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the
3714 lawyer is called as a witness on behalf of the client or is called by the opposing party.
3715 Determining whether or not such a conflict exists is primarily the responsibility of the
3716 lawyer involved. If there is a conflict of interest, the lawyer must secure the client's
3717 informed consent, confirmed in writing. In some cases, the lawyer will be precluded from
3718 seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of
3719 "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

3720 [7] Paragraph (b) provides that a lawyer is not disqualified from serving as an
3721 advocate because a lawyer with whom the lawyer is associated in a firm is precluded
3722 from doing so by paragraph (a). If, however, the testifying lawyer would also be
3723 disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other
3724 lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the
3725 client gives informed consent under the conditions stated in Rule 1.7.

3726

3727 **RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR**

3728 The prosecutor in a criminal case shall:

3729 (a) refrain from prosecuting a charge that the prosecutor knows is not supported by
3730 probable cause;

3731 (b) make reasonable efforts to assure that the accused has been advised of the right to,
3732 and the procedure for obtaining, counsel and has been given reasonable opportunity to
3733 obtain counsel;

3734 (c) not seek to obtain from an unrepresented accused a waiver of important pretrial
3735 rights, such as the right to a preliminary hearing;

3736 (d) make timely disclosure to the defense of all evidence or information known to the
3737 prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in
3738 connection with sentencing, disclose to the defense and to the tribunal all unprivileged
3739 mitigating information known to the prosecutor, except when the prosecutor is relieved of
3740 this responsibility by a protective order of the tribunal;

3741 (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present
3742 evidence about a past or present client unless the prosecutor reasonably believes:
3743 (1) the information sought is not protected from disclosure by any applicable privilege;
3744 (2) the evidence sought is essential to the successful completion of an ongoing
3745 investigation or prosecution; and
3746 (3) there is no other feasible alternative to obtain the information;

3747 ~~(f) except for statements that are necessary to inform the public of the nature and extent~~
3748 ~~of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain~~
3749 ~~from making extrajudicial comments that have a substantial likelihood of heightening~~
3750 ~~public condemnation of the accused and exercise reasonable care to prevent investigators,~~
3751 ~~law enforcement personnel, employees or other persons assisting or associated with the~~
3752 ~~prosecutor in a criminal case and over whom the prosecutor has direct control from~~
3753 ~~making an extrajudicial statement that the prosecutor would be prohibited from making~~
3754 ~~under Rule 3.6 or this Rule. 3.6.~~

3755 **Comment**

3756 [1] A prosecutor has the responsibility of a minister of justice and not simply that of
3757 an advocate. This responsibility carries with it specific obligations to see that the
3758 defendant is accorded procedural justice and that guilt is decided upon the basis of
3759 sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a
3760 matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the
3761 ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn
3762 are the product of prolonged and careful deliberation by lawyers experienced in both
3763 criminal prosecution and defense. Applicable law may require other measures by the
3764 prosecutor and knowing disregard of those obligations or a systematic abuse of
3765 prosecutorial discretion could constitute a violation of Rule 8.4.

3766 [2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby
3767 lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should
3768 not seek to obtain waivers of preliminary hearings or other important pretrial rights from
3769 unrepresented accused persons. Paragraph (c) does not apply, however, to an accused
3770 appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful
3771 questioning of an uncharged suspect who has knowingly waived the rights to counsel and
3772 silence.

3773 [3] The exception in paragraph (d) recognizes that a prosecutor may seek an
3774 appropriate protective order from the tribunal if disclosure of information to the defense
3775 could result in substantial harm to an individual or to the public interest.

3776 [4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury
3777 and other criminal proceedings to those situations in which there is a genuine need to
3778 intrude into the client-lawyer relationship.

3779 [5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that
3780 have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of
3781 a criminal prosecution, a prosecutor's extrajudicial statement can create the additional
3782 problem of increasing public condemnation of the accused. Although the announcement
3783 of an indictment, for example, will necessarily have severe consequences for the accused,
3784 a prosecutor can, and should, avoid comments which have no legitimate law enforcement
3785 purpose and have a substantial likelihood of increasing public opprobrium of the accused.
3786 Nothing in this Comment is intended to restrict the statements which a prosecutor may
3787 make which comply with Rule 3.6(b) or 3.6(c).

3788 [6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to
3789 responsibilities regarding lawyers and nonlawyers who work for or are associated with
3790 the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these
3791 obligations in connection with the unique dangers of improper extrajudicial statements in
3792 a criminal case. ~~In addition, paragraph (f) requires a prosecutor to exercise reasonable
3793 care to prevent persons assisting or associated with the prosecutor from making improper
3794 extrajudicial statements, even when such persons are not under the direct supervision of
3795 the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor
3796 issues the appropriate cautions to law enforcement personnel and other relevant
3797 individuals.~~

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3799 **RULE 3.9: ADVOCATE IN NONADJUDICATIVE PROCEEDINGS**

3800 A lawyer representing a client before a legislative body or administrative agency in a
3801 nonadjudicative proceeding shall disclose that the appearance is in a representative
3802 capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through
3803 (c), and 3.5.

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Comment

3805 [1] In representation before bodies such as legislatures, municipal councils, and
3806 executive and administrative agencies acting in a rule-making or policy-making capacity,
3807 lawyers present facts, formulate issues and advance argument in the matters under
3808 consideration. The decision-making body, like a court, should be able to rely on the
3809 integrity of the submissions made to it. A lawyer appearing before such a body must deal

3810 with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a)
3811 through (c), 3.4(a) through (c) and 3.5.

3812 [2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they
3813 do before a court. The requirements of this Rule therefore may subject lawyers to
3814 regulations inapplicable to advocates who are not lawyers. However, legislatures and
3815 administrative agencies have a right to expect lawyers to deal with them as they deal with
3816 courts.

3817 [3] This Rule only applies when a lawyer represents a client in connection with an
3818 official hearing or meeting of a governmental agency or a legislative body to which the
3819 lawyer or the lawyer's client is presenting evidence or argument. It does not apply to
3820 representation of a client in a negotiation or other bilateral transaction with a
3821 governmental agency or in connection with an application for a license or other privilege
3822 or the client's compliance with generally applicable reporting requirements, such as the
3823 filing of income-tax returns. Nor does it apply to the representation of a client in
3824 connection with an investigation or examination of the client's affairs conducted by
3825 government investigators or examiners. Representation in such matters is governed by
3826 Rules 4.1 through 4.4.

3827

3827 **RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS**

3828 In the course of representing a client a lawyer shall not knowingly:~~(a)~~— make a
3829 false statement of ~~material fact or law to a third person; or,~~

3830
3831 ~~(b)~~— ~~fail to disclose a material fact when disclosure is necessary to avoid~~
3832 ~~assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule~~
3833 ~~1.6.~~

3834 **Comment**

3835 **Misrepresentation**

3836 [1] A lawyer is required to be truthful when dealing with others on a client’s
3837 behalf, but generally has no affirmative duty to inform an opposing party of
3838 relevant facts. A misrepresentation can occur if the lawyer incorporates or
3839 affirms a statement of another person that the lawyer knows is false.
3840 Misrepresentations can also occur by partially true but misleading statements or
3841 omissions that are the equivalent of affirmative false statements. For dishonest
3842 conduct that does not amount to a false statement or for misrepresentations by a
3843 lawyer other than in the course of representing a client, see Rule 8.4.

3844 **Statements of Fact**

3845 [2] This Rule refers to statements of fact. Whether a particular statement
3846 should be regarded as one of fact can depend on the circumstances. Under
3847 generally accepted conventions in negotiation, certain types of statements
3848 ordinarily are not taken as statements of material fact. Estimates of price or
3849 value placed on the subject of a transaction and a party’s intentions as to an
3850 acceptable settlement of a claim are ordinarily in this category, and so is the
3851 existence of an undisclosed principal except where nondisclosure of the
3852 principal would constitute fraud. Lawyers should be mindful of their obligations
3853 under applicable law to avoid criminal and tortious misrepresentation.

3854 **~~Crime or Fraud by Client~~**

3855 ~~[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or~~
3856 ~~assisting a client in conduct that the lawyer knows is criminal or fraudulent.~~
3857 ~~Paragraph (b) states a specific application of the principle set forth in Rule~~
3858 ~~1.2(d) and addresses the situation where a client’s crime or fraud takes the form~~
3859 ~~of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client’s~~
3860 ~~crime or fraud by withdrawing from the representation. Sometimes it may be~~
3861 ~~necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm~~
3862 ~~an opinion, document, affirmation or the like. In extreme cases, substantive law~~
3863 ~~may require a lawyer to disclose information relating to the representation to~~
3864 ~~avoid being deemed to have assisted the client’s crime or fraud. If the lawyer~~
3865 ~~can avoid assisting a client’s crime or fraud only by disclosing this information,~~
3866 ~~then under paragraph (b) the lawyer is required to do so, unless the disclosure is~~
3867 ~~prohibited by Rule 1.6.~~
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3872 **RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY**
3873 **COUNSEL**

3874 In representing a client, a lawyer shall not communicate about the subject of the
3875 representation with a person the lawyer knows to be represented by another lawyer in the
3876 matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by
3877 law or a court order.

3878

Comment

3879 [1] This Rule contributes to the proper functioning of the legal system by protecting a
3880 person who has chosen to be represented by a lawyer in a matter against possible
3881 overreaching by other lawyers who are participating in the matter, interference by those
3882 lawyers with the client-lawyer relationship and the uncounselled disclosure of
3883 information relating to the representation.

3884 [2] This Rule applies to communications with any person who is represented by
3885 counsel concerning the matter to which the communication relates.

3886 [3] The Rule applies even though the represented person initiates or consents to the
3887 communication. A lawyer must immediately terminate communication with a person if,
3888 after commencing communication, the lawyer learns that the person is one with whom
3889 communication is not permitted by this Rule.

3890 [4] This Rule does not prohibit communication with a represented person, or an
3891 employee or agent of such a person, concerning matters outside the representation. For
3892 example, the existence of a controversy between a government agency and a private
3893 party, or between two organizations, does not prohibit a lawyer for either from
3894 communicating with nonlawyer representatives of the other regarding a separate matter.
3895 Nor does this Rule preclude communication with a represented person who is seeking
3896 advice from a lawyer who is not otherwise representing a client in the matter. A lawyer
3897 may not make a communication prohibited by this Rule through the acts of another. See
3898 Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer
3899 is not prohibited from advising a client concerning a communication that the client is
3900 legally entitled to make. Also, a lawyer having independent justification or legal
3901 authorization for communicating with a represented person is permitted to do so.

3902 [5] Communications authorized by law may include communications by a lawyer on
3903 behalf of a client who is exercising a constitutional or other legal right to communicate
3904 with the government. Communications authorized by law may also include investigative
3905 activities of lawyers representing governmental entities, directly or through investigative
3906 agents, prior to the commencement of criminal or civil enforcement proceedings. When
3907 communicating with the accused in a criminal matter, a government lawyer must comply
3908 with this Rule in addition to honoring the constitutional rights of the accused. The fact
3909 that a communication does not violate a state or federal constitutional right is insufficient
3910 to establish that the communication is permissible under this Rule.

3911 [6] A lawyer who is uncertain whether a communication with a represented person is
3912 permissible may seek a court order. A lawyer may also seek a court order in exceptional
3913 circumstances to authorize a communication that would otherwise be prohibited by this

3914 Rule, for example, where communication with a person represented by counsel is
3915 necessary to avoid reasonably certain injury.

3916

3917 [7] In the case of a represented organization, this Rule prohibits communications
3918 with a constituent of the organization who supervises, directs or regularly consults with
3919 the organization's lawyer concerning the matter or has authority to obligate the
3920 organization with respect to the matter or whose act or omission in connection with the
3921 matter may be imputed to the organization for purposes of civil or criminal liability. The
3922 term "constituent" is defined in Comment [1] to Rule 1.13. Consent of the organization's
3923 lawyer is not required for communication with a former constituent. If a constituent of
3924 the organization is represented in the matter by his or her own counsel, the consent by
3925 that counsel to a communication will be sufficient for purposes of this Rule. Compare
3926 Rule 3.4(f). In communicating with a current or former constituent of an organization, a
3927 lawyer must not use methods of obtaining evidence that violate the legal rights of the
3928 organization. See Rule 4.4.

3929 [8] The prohibition on communications with a represented person only applies in
3930 circumstances where the lawyer knows that the person is in fact represented in the matter
3931 to be discussed. This means that the lawyer has actual knowledge of the fact of the
3932 representation; but such actual knowledge may be inferred from the circumstances. See
3933 Rule 1.0(~~fg~~). Thus, the lawyer cannot evade the requirement of obtaining the consent of
3934 counsel by closing eyes to the obvious.

3935 [9] In the event the person with whom the lawyer communicates is not known to be
3936 represented by counsel in the matter, the lawyer's communications are subject to Rule
3937 4.3.

3938

3939

3940 **RULE 4.3: DEALING WITH UNREPRESENTED PERSON**

3941 (a) In dealing on behalf of a client with a person who is not represented by counsel, a
3942 lawyer shall not state or imply that the lawyer is disinterested. ~~When;~~

3943 (b) a lawyer shall clearly disclose that the client's interests are adverse to the interests of
3944 the unrepresented person, if the lawyer knows or reasonably should know that the
3945 interests are adverse;

3946

3947 (c) when the lawyer knows or reasonably should know that the unrepresented person
3948 misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts
3949 to correct the misunderstanding. ~~The; and~~

3950

3951 (d) the lawyer shall not give legal advice to ~~an~~the unrepresented person, other than the
3952 advice to secure counsel, if the lawyer knows or reasonably should know that the
3953 interests of ~~such~~the unrepresented person are or have a reasonable possibility of being in
3954 conflict with the interests of the client.

3955

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Comment

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[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where

3962 ~~necessary~~ the lawyer knows or reasonably should know that the interests are adverse,
3963 explain disclose that the client has interests opposed to those of the unrepresented person.
3964 For misunderstandings that sometimes arise when a lawyer for an organization deals with
3965 an unrepresented constituent, see Rule 1.13(d).

3966
3967 [2] The Rule distinguishes between situations involving unrepresented persons
3968 whose interests may be adverse to those of the lawyer's client and those in which the
3969 person's interests are not in conflict with the client's. In the former situation, the
3970 possibility that the lawyer will compromise the unrepresented person's interests is so
3971 great that the Rule prohibits the giving of any advice, apart from the advice to obtain
3972 counsel. Whether a lawyer is giving impermissible advice may depend on the experience
3973 and sophistication of the unrepresented person, as well as the setting in which the
3974 behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the
3975 terms of a transaction or settling a dispute with an unrepresented person. So long as the
3976 lawyer has explained that the lawyer represents ~~an~~ a party whose interests are adverse
3977 ~~party~~ and is not representing the person, the lawyer may inform the person of the terms
3978 on which the lawyer's client will enter into an agreement or settle a matter, prepare
3979 documents that require the person's signature and explain the lawyer's own view of the
3980 meaning of the document or the lawyer's view of the underlying legal obligations.

3981

3982 **RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS**

3983 (a) In representing a client, a lawyer shall not use means that have no substantial
3984 purpose other than to embarrass, delay, or burden a third person, or use methods
3985 of obtaining evidence that violate the legal rights of such a person.

3986 (b) A lawyer who receives a document relating to the representation of the
3987 lawyer's client and knows or reasonably should know that the document was
3988 inadvertently sent shall promptly notify the sender.

3989 **Comment**

3990 [1] Responsibility to a client requires a lawyer to subordinate the interests of others
3991 to those of the client, but that responsibility does not imply that a lawyer may disregard
3992 the rights of third persons. It is impractical to catalogue all such rights, but they include
3993 legal restrictions on methods of obtaining evidence from third persons and unwarranted
3994 intrusions into privileged relationships, such as the client-lawyer relationship.

3995 [2] Paragraph (b) recognizes that lawyers sometimes receive documents that were
3996 mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or
3997 reasonably should know that such a document was sent inadvertently, then this Rule
3998 requires the lawyer to promptly notify the sender in order to permit that person to take
3999 protective measures. Whether the lawyer is required to take additional steps, such as
4000 returning the original document, is a matter of law beyond the scope of these Rules, as is
4001 the question of whether the privileged status of a document has been waived. Similarly,
4002 this Rule does not address the legal duties of a lawyer who receives a document that the
4003 lawyer knows or reasonably should know may have been wrongfully obtained by the
4004 sending person. For purposes of this Rule, "document" includes e-mail or other
4005 electronic modes of transmission subject to being read or put into readable form.

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[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

4011
4012

4012 **RULE 5.1: RESPONSIBILITIES OF PARTNERS, MANAGERS, AND A**
4013 **PARTNER OR SUPERVISORY LAWYERS/LAWYER**

4014 (a) A partner in a law firm, and a lawyer who individually or together with other
4015 lawyers possesses comparable managerial authority in a law firm, shall make reasonable
4016 efforts to ensure that the firm has in effect measures giving reasonable assurance that all
4017 lawyers in the firm conform to the Rules of Professional Conduct.

4018 (b) A lawyer having direct supervisory authority over another lawyer shall make
4019 reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional
4020 Conduct.

4021 (c) A lawyer shall be responsible for another lawyer's violation of the Rules of
4022 Professional Conduct if:

4023 (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct
4024 involved; or

4025 (2) the lawyer is a partner or has comparable managerial authority in the law firm in
4026 which the other lawyer practices, or has direct supervisory authority over the other
4027 lawyer, and knows of the conduct at a time when its consequences can be avoided or
4028 mitigated but fails to take reasonable remedial action.

4029
4030

Comment

4031 [1] Paragraph (a) applies to lawyers who have managerial authority over the
4032 professional work of a firm. See Rule 1.0(ed). This includes members of a partnership,
4033 the shareholders in a law firm organized as a professional corporation, and members of
4034 other associations authorized to practice law; lawyers having comparable managerial
4035 authority in a legal services organization or a law department of an enterprise or
4036 government agency; and lawyers who have intermediate managerial responsibilities in a
4037 firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of
4038 other lawyers in a firm.

4039 [2] Paragraph (a) requires lawyers with managerial authority within a firm to make
4040 reasonable efforts to establish internal policies and procedures designed to provide
4041 reasonable assurance that all lawyers in the firm will conform to the Rules of Professional
4042 Conduct. Such policies and procedures include those designed to detect and resolve
4043 conflicts of interest, identify dates by which actions must be taken in pending matters,
4044 account for client funds and property and ensure that inexperienced lawyers are properly
4045 supervised.

4046 [3] Other measures that may be required to fulfill the responsibility prescribed in
4047 paragraph (a) can depend on the firm's structure and the nature of its practice. In a small
4048 firm of experienced lawyers, informal supervision and periodic review of compliance
4049 with the required systems ordinarily will suffice. In a large firm, or in practice situations
4050 in which difficult ethical problems frequently arise, more elaborate measures may be
4051 necessary. Some firms, for example, have a procedure whereby junior lawyers can make
4052 confidential referral of ethical problems directly to a designated senior partner or special
4053 committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal
4054 education in professional ethics. In any event, the ethical atmosphere of a firm can
4055 influence the conduct of all its members and the partners may not assume that all lawyers
4056 associated with the firm will inevitably conform to the Rules.

4057 [4] Paragraph (c) expresses a general principle of personal responsibility for acts of
4058 another. See also Rule 8.4(a).

4059 [5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable
4060 managerial authority in a law firm, as well as a lawyer who has direct supervisory
4061 authority over performance of specific legal work by another lawyer. Whether a lawyer
4062 has supervisory authority in particular circumstances is a question of fact. Partners and
4063 lawyers with comparable authority have at least indirect responsibility for all work being
4064 done by the firm, while a partner or manager in charge of a particular matter ordinarily
4065 also has supervisory responsibility for the work of other firm lawyers engaged in the
4066 matter. Appropriate remedial action by a partner or managing lawyer would depend on
4067 the immediacy of that lawyer's involvement and the seriousness of the misconduct. A
4068 supervisor is required to intervene to prevent avoidable consequences of misconduct if
4069 the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows
4070 that a subordinate misrepresented a matter to an opposing party in negotiation, the
4071 supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

4072 [6] Professional misconduct by a lawyer under supervision could reveal a violation of
4073 paragraph (b) on the part of the supervisory lawyer even though it does not entail a
4074 violation of paragraph (c) because there was no direction, ratification or knowledge of the
4075 violation.

4076 [7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability
4077 for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable
4078 civilly or criminally for another lawyer's conduct is a question of law beyond the scope
4079 of these Rules.

4080 [8] The duties imposed by this Rule on managing and supervising lawyers do not
4081 alter the personal duty of each lawyer in a firm to abide by the Rules of Professional
4082 Conduct. See Rule 5.2(a).

4083

4084 **RULE 5.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER**

4085 (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that
4086 the lawyer acted at the direction of another person.

4087 (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that
4088 lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an
4089 arguable question of professional duty.

4090

Comment

4091 [1] Although a lawyer is not relieved of responsibility for a violation by the fact that
4092 the lawyer acted at the direction of a supervisor, that fact may be relevant in determining
4093 whether a lawyer had the knowledge required to render conduct a violation of the Rules.
4094 For example, if a subordinate filed a frivolous pleading at the direction of a supervisor,
4095 the subordinate would not be guilty of a professional violation unless the subordinate
4096 knew of the document's frivolous character.

4097 [2] When lawyers in a supervisor-subordinate relationship encounter a matter
4098 involving professional judgment as to ethical duty, the supervisor may assume

4099 responsibility for making the judgment. Otherwise a consistent course of action or
4100 position could not be taken. If the question can reasonably be answered only one way, the
4101 duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if
4102 the question is reasonably arguable, someone has to decide upon the course of action.
4103 That authority ordinarily reposes in the supervisor, and a subordinate may be guided
4104 accordingly. For example, if a question arises whether the interests of two clients conflict
4105 under Rule 1.7, the supervisor's reasonable resolution of the question should protect the
4106 subordinate professionally if the resolution is subsequently challenged.

4107

4108 **RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS**

4109 With respect to a nonlawyer employed or retained by or associated with a lawyer:

4110 (a) a partner, and a lawyer who individually or together with other lawyers
4111 possesses comparable managerial authority in a law firm shall make reasonable efforts to
4112 ensure that the firm has in effect measures giving reasonable assurance that the person's
4113 conduct is compatible with the professional obligations of the lawyer;

4114 (b) a lawyer having direct supervisory authority over the nonlawyer shall make
4115 reasonable efforts to ensure that the person's conduct is compatible with the professional
4116 obligations of the lawyer; and

4117 (c) a lawyer shall be responsible for conduct of such a person that would be a violation
4118 of the Rules of Professional Conduct if engaged in by a lawyer if:
4119 (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct
4120 involved; or
4121 (2) the lawyer is a partner or has comparable managerial authority in the law firm in
4122 which the person is employed, or has direct supervisory authority over the person, and
4123 knows of the conduct at a time when its consequences can be avoided or mitigated but
4124 fails to take reasonable remedial action.

4125

Comment

4126 [1] Lawyers generally employ assistants in their practice, including secretaries,
4127 investigators, law student interns, and paraprofessionals. Such assistants, whether
4128 employees or independent contractors, act for the lawyer in rendition of the lawyer's
4129 professional services. A lawyer must give such assistants appropriate instruction and
4130 supervision concerning the ethical aspects of their employment, particularly regarding the
4131 obligation not to disclose information relating to representation of the client, and should
4132 be responsible for their work product. The measures employed in supervising nonlawyers
4133 should take account of the fact that they do not have legal training and are not subject to
4134 professional discipline.

4135 [2] Paragraph (a) requires lawyers with managerial authority within a law firm to
4136 make reasonable efforts to establish internal policies and procedures designed to provide
4137 reasonable assurance that nonlawyers in the firm will act in a way compatible with the
4138 Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to
4139 lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c)

4140 specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer
4141 that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

4142

4143 **RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER**

4144

4145 (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

4146 (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide
4147 for the payment of money, over a reasonable period of time after the lawyer's death, to
4148 the lawyer's estate or to one or more specified persons;

4149 (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer
4150 may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of
4151 that lawyer the agreed-upon purchase price;

4152 (3) a lawyer or law firm may include nonlawyer employees in a compensation or
4153 retirement plan, even though the plan is based in whole or in part on a profit-sharing
4154 arrangement; ~~and~~

4155 (4) subject to full disclosure and court approval a lawyer may share court-awarded legal
4156 fees with a nonprofit organization that employed, retained or recommended employment
4157 of the lawyer in the matter; and

4158 (5) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer
4159 may pay to the estate of the deceased lawyer the proportion of the total compensation
4160 which fairly represents the services rendered by the deceased lawyer.

4161

4162 (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the
4163 partnership consist of the practice of law.

4164

4165 (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to
4166 render legal services for another to direct or regulate the lawyer's professional judgment
4167 in rendering such legal services.

4168

4169 (d) A lawyer shall not practice with or in the form of a professional corporation or
4170 association authorized to practice law for a profit, if:

4171 (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the
4172 estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time
4173 during administration;

4174

4175 (2) —

4176 (2) a nonlawyer is a corporate director possesses governance authority, unless permitted
4177 by the Minnesota Professional Firms Act; or officer thereof or occupies the position of
4178 similar responsibility in any form of association other than a corporation; or

4179 (3) a nonlawyer has the right to direct or control the professional judgment of a
4180 lawyer.

4181

4182 **Comment**

4183
4184 [1] The provisions of this Rule express traditional limitations on sharing fees.
4185 These limitations are to protect the lawyer's professional independence of judgment.
4186 Where someone other than the client pays the lawyer's fee or salary, or recommends
4187 employment of the lawyer, that arrangement does not modify the lawyer's obligation to
4188 the client. As stated in paragraph (c), such arrangements should not interfere with the
4189 lawyer's professional judgment.

4190
4191 [2] This ~~Rule~~rule also expresses traditional limitations on permitting a third party to
4192 direct or regulate the lawyer's professional judgment in rendering legal services to
4193 another. See also Rule 1.8 (f) ~~(lawyer may accept compensation from a third party as~~
4194 ~~long as there is no interference with the lawyer's independent professional judgment and~~
4195 ~~the client gives informed consent).~~

4196
4197
4198 **RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL**
4199 **PRACTICE OF LAW**

4200
4201 (a) A lawyer shall not practice law in a jurisdiction in violation of the
4202 regulation of the legal profession in that jurisdiction, or assist another in doing so, except
4203 that a lawyer admitted to practice in Minnesota does not violate this rule by conduct in
4204 another jurisdiction that is permitted in Minnesota under Rule 5.5 (c) and (d) for lawyers
4205 not admitted to practice in Minnesota.

4206
4207 (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
4208 (1) except as authorized by these Rules or other law, establish an office or other
4209 systematic and continuous presence in this jurisdiction for the practice of law; or
4210 (2) hold out to the public or otherwise represent that the lawyer is admitted to practice
4211 law in this jurisdiction.

4212
4213 (c) A lawyer admitted in another United States jurisdiction, and not disbarred or
4214 suspended from practice in any jurisdiction, may provide legal services on a temporary
4215 basis in this jurisdiction that:

- 4216 (1) are undertaken in association with a lawyer who is admitted to practice in this
4217 jurisdiction and who actively participates in the matter;
4218 (2) are in or reasonably related to a pending or potential proceeding before a tribunal in
4219 this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized
4220 by law or order to appear in such proceeding or reasonably expects to be so authorized;
4221 (3) are in or reasonably related to a pending or potential arbitration, mediation, or other
4222 alternative dispute resolution proceeding in this or another jurisdiction, if the services
4223 arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the
4224 lawyer is admitted to practice and are not services for which the forum requires pro hac
4225 vice admission; or
4226 (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to
4227 the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
4228

4229 (d) A lawyer admitted in another United States jurisdiction, and not disbarred or
4230 suspended from practice in any jurisdiction, may provide legal services in this
4231 jurisdiction that:

4232

4233 ~~(1)are provided to the lawyer's employer or its organizational affiliates~~
4234 ~~and are not services for which the forum requires pro hac vice admission; or(2)~~
4235 – are services that the lawyer is authorized to provide by federal law or other law
4236 of this jurisdiction.

4237

Comment

4238 [1] A lawyer may practice law only in a jurisdiction in which the lawyer is
4239 authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a
4240 regular basis or may be authorized by court rule or order or by law to practice for a
4241 limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of
4242 law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting
4243 another person. The exception is intended to permit a Minnesota lawyer, without
4244 violating this Rule, to engage in practice in another jurisdiction as Rule 5.5 (c) and (d)
4245 permit a lawyer admitted to practice in another jurisdiction to engage in practice in
4246 Minnesota. A lawyer who does so in another jurisdiction in violation of its law or rules
4247 may be subject to discipline or other sanctions in that jurisdiction.

4248 [2] The definition of the practice of law is established by law and varies from one
4249 jurisdiction to another. Whatever the definition, limiting the practice of law to members
4250 of the bar protects the public against rendition of legal services by unqualified persons.
4251 This Rule does not prohibit a lawyer from employing the services of paraprofessionals
4252 and delegating functions to them, so long as the lawyer supervises the delegated work
4253 and retains responsibility for their work. See Rule 5.3.

4254 [3] A lawyer may provide professional advice and instruction to nonlawyers whose
4255 employment requires knowledge of the law; for example, claims adjusters, employees of
4256 financial or commercial institutions, social workers, accountants and persons employed in
4257 government agencies. Lawyers also may assist independent nonlawyers, such as
4258 paraprofessionals, who are authorized by the law of a jurisdiction to provide particular
4259 law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed
4260 pro se.

4261 [4] Other than as authorized by law or this Rule, a lawyer who is not admitted to
4262 practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an
4263 office or other systematic and continuous presence in this jurisdiction for the practice of
4264 law. Presence may be systematic and continuous even if the lawyer is not physically
4265 present here. Such a lawyer must not hold out to the public or otherwise represent that the
4266 lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

4267 [5] There are occasions in which a lawyer admitted to practice in another United
4268 States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may
4269 provide legal services on a temporary basis in this jurisdiction under circumstances that
4270 do not create an unreasonable risk to the interests of their clients, the public or the courts.
4271 Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified
4272 does not imply that the conduct is or is not authorized. With the exception of
4273 ~~paragraphs paragraph (d)(1) and (d)(2)~~, this Rule does not authorize a lawyer to establish
4274 an office or other systematic and continuous presence in this jurisdiction without being
4275 admitted to practice generally here.

4276 [6] There is no single test to determine whether a lawyer's services are provided on a
4277 "temporary basis" in this jurisdiction, and may therefore be permissible under
4278 paragraph (c). Services may be "temporary" even though the lawyer provides services
4279 in this jurisdiction on a recurring basis, or for an extended period of time, as when the
4280 lawyer is representing a client in a single lengthy negotiation or litigation.

4281 [7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any
4282 United States jurisdiction, which includes the District of Columbia and any state, territory
4283 or commonwealth of the United States. The word "admitted" in paragraph (c)
4284 contemplates that the lawyer is authorized to practice in the jurisdiction in which the
4285 lawyer is admitted and excludes a lawyer who while technically admitted is not
4286 authorized to practice, because, for example, the lawyer is on inactive status.

4287 [8] Paragraph (c)(1) recognizes that the interests of clients and the public are
4288 protected if a lawyer admitted only in another jurisdiction associates with a lawyer
4289 licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer
4290 admitted to practice in this jurisdiction must actively participate in and share
4291 responsibility for the representation of the client.

4292 [9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by
4293 law or order of a tribunal or an administrative agency to appear before the tribunal or
4294 agency. This authority may be granted pursuant to formal rules governing admission pro
4295 hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph
4296 (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or
4297 agency pursuant to such authority. To the extent that a court rule or other law of this
4298 jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain
4299 admission pro hac vice before appearing before a tribunal or administrative agency, this
4300 Rule requires the lawyer to obtain that authority.

4301 [10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction
4302 on a temporary basis does not violate this Rule when the lawyer engages in conduct in
4303 anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized
4304 to practice law or in which the lawyer reasonably expects to be admitted pro hac vice.
4305 Examples of such conduct include meetings with the client, interviews of potential
4306 witnesses, and the review of documents. Similarly, a lawyer admitted only in another
4307 jurisdiction may engage in conduct temporarily in this jurisdiction in connection with
4308 pending litigation in another jurisdiction in which the lawyer is or reasonably expects to
4309 be authorized to appear, including taking depositions in this jurisdiction.

4310 [11] When a lawyer has been or reasonably expects to be admitted to appear before a
4311 court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are
4312 associated with that lawyer in the matter, but who do not expect to appear before the
4313 court or administrative agency. For example, subordinate lawyers may conduct research,
4314 review documents, and attend meetings with witnesses in support of the lawyer
4315 responsible for the litigation.

4316 [12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction
4317 to perform services on a temporary basis in this jurisdiction if those services are in or
4318 reasonably related to a pending or potential arbitration, mediation, or other alternative
4319 dispute resolution proceeding in this or another jurisdiction, if the services arise out of or
4320 are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is
4321 admitted to practice. The lawyer, however, must obtain admission pro hac vice in the
4322 case of a court-annexed arbitration or mediation or otherwise if court rules or law so
4323 require.

4324 [13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide
4325 certain legal services on a temporary basis in this jurisdiction that arise out of or are
4326 reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is
4327 admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal
4328 services and services that nonlawyers may perform but that are considered the practice of
4329 law when performed by lawyers.

4330 [14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably
4331 related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety
4332 of factors evidence such a relationship. The lawyer's client may have been previously
4333 represented by the lawyer, or may be resident in or have substantial contacts with the
4334 jurisdiction in which the lawyer is admitted. The matter, although involving other
4335 jurisdictions, may have a significant connection with that jurisdiction. In other cases,
4336 significant aspects of the lawyer's work might be conducted in that jurisdiction or a
4337 significant aspect of the matter may involve the law of that jurisdiction. The necessary
4338 relationship might arise when the client's activities or the legal issues involve multiple
4339 jurisdictions, such as when the officers of a multinational corporation survey potential
4340 business sites and seek the services of their lawyer in assessing the relative merits of
4341 each. In addition, the services may draw on the lawyer's recognized expertise developed
4342 through the regular practice of law on behalf of clients in matters involving a particular
4343 body of federal, nationally-uniform, foreign, or international law.

4344 [15] Paragraph (d) identifies ~~two~~ circumstances ~~circumstance~~ in which a lawyer who
4345 is admitted to practice in another United States jurisdiction, and is not disbarred or
4346 suspended from practice in any jurisdiction, may establish an office or other systematic
4347 and continuous presence in this jurisdiction for the practice of law as well as provide
4348 legal services on a temporary basis. Except as provided in ~~paragraphs~~ paragraph (d)(1)
4349 ~~and (d)(2)~~, a lawyer who is admitted to practice law in another jurisdiction and who
4350 establishes an office or other systematic or continuous presence in this jurisdiction must
4351 become admitted to practice law generally in this jurisdiction.

4352 [16] Paragraph (d)(1) ~~applies to a lawyer who is employed by a client to provide legal~~
4353 ~~services to the client or its organizational affiliates, i.e., entities that control, are~~
4354 ~~controlled by, or are under common control with the employer. This paragraph does not~~
4355 ~~authorize the provision of personal legal services to the employer's officers or~~
4356 ~~employees. The paragraph applies to in-house corporate lawyers, government lawyers~~
4357 ~~and others who are employed to render legal services to the employer. The lawyer's~~
4358 ~~ability to represent the employer outside the jurisdiction in which the lawyer is licensed~~
4359 ~~generally serves the interests of the employer and does not create an unreasonable risk to~~
4360 ~~the client and others because the employer is well situated to assess the lawyer's~~
4361 ~~qualifications and the quality of the lawyer's work.~~

4362 [17] ~~If an employed lawyer establishes an office or other systematic presence in this~~
4363 ~~jurisdiction for the purpose of rendering legal services to the employer, the lawyer may~~
4364 ~~be subject to registration or other requirements, including assessments for client~~
4365 ~~protection funds and mandatory continuing legal education.~~ [18] Paragraph (d)(2)
4366 recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer
4367 is not licensed when authorized to do so by federal or other law, which includes statute,
4368 court rule, executive regulation or judicial precedent.

4369 [19] [17] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d)
4370 or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

4371 [20] [18] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to
4372 paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to
4373 practice law in this jurisdiction. For example, that may be required when the

4374 representation occurs primarily in this jurisdiction and requires knowledge of the law of
4375 this jurisdiction. See Rule 1.4(b).

4376 [2+19] Paragraphs (c) and (d) do not authorize communications advertising legal
4377 services to prospective clients in this jurisdiction by lawyers who are admitted to practice
4378 in other jurisdictions. Whether and how lawyers may communicate the availability of
4379 their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

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4381 **RULE 5.6: RESTRICTIONS ON RIGHT TO PRACTICE**

4382 A lawyer shall not participate in offering or making:

4383

4384 (a) a partnership, shareholders, operating, employment, or other similar type of
4385 agreement that restricts the right of a lawyer to practice after termination of the
4386 relationship, except an agreement concerning benefits upon retirement; or

4387

4388 (b) an agreement in which a restriction on the lawyer's right to practice is part of the
4389 settlement of a client controversy.

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4391

Comment

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4393 [1] An agreement restricting the right of lawyers to practice after leaving a firm not
4394 only limits their professional autonomy but also limits the freedom of clients to choose a
4395 lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to
4396 provisions concerning retirement benefits for service with the firm.

4397

4398 [2] ~~Paragraph paragraph~~ (b) prohibits a lawyer from ~~agreeing agreement~~ not to represent
4399 other persons in connection with settling a claim on behalf of a client.

4400

4401 [3] This Rule does not apply to prohibit restrictions that may be included in the terms
4402 of the sale of a law practice pursuant to Rule 1.17.

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4405 **RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES**

4406

4407 (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the
4408 provision of law-related services, as defined in paragraph (b), if the law-related services
4409 are provided:

4410 (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of
4411 legal services to clients; or

4412 (2) in other ~~circumstances~~ circumstance by an entity controlled by the lawyer
4413 individually or with others if the lawyer fails to take reasonable measures to assure that a
4414 person obtaining the law-related services knows that the services are not legal services
4415 and that the protections of the client-lawyer relationship do not exist.

4416

4417 (b) The term "law-related services" denotes services that might reasonably be
4418 performed in conjunction with and in substance are related to the provision of legal

4419 services, and that are not prohibited as unauthorized practice of law when provided by a
4420 nonlawyer.

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Comment

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[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

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[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

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[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

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[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

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[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

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[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be

4474 made before entering into an agreement for provision of or providing law-related
4475 services, and preferably should be in writing.

4476
4477 [7] The burden is upon the lawyer to show that the lawyer has taken reasonable
4478 measures under the circumstances to communicate the desired understanding. For
4479 instance, a sophisticated user of law-related services, such as a publicly held corporation,
4480 may require a lesser explanation than someone unaccustomed to making distinctions
4481 between legal services and law-related services, such as an individual seeking tax advice
4482 from a lawyer-accountant or investigative services in connection with a lawsuit.

4483
4484 [8] Regardless of the sophistication of potential recipients of law-related services, a
4485 lawyer should take special care to keep separate the provision of law-related and legal
4486 services in order to minimize the risk that the recipient will assume that the law-related
4487 services are legal services. The risk of such confusion is especially acute when the
4488 lawyer renders both types of services with respect to the same matter. Under some
4489 circumstances the legal and law-related services may be so closely entwined that they
4490 cannot be distinguished from each other, and the requirement of disclosure and
4491 consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a
4492 lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent
4493 required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer
4494 controls complies in all respects with the Rules of Professional Conduct.

4495
4496 [9] A broad range of economic and other interests of clients may be served by
4497 lawyers' engaging in the delivery of law-related services. Examples of law-related
4498 services include providing title insurance, financial planning, accounting, trust services,
4499 real estate counseling, legislative lobbying, economic analysis, social work,
4500 psychological counseling, tax preparation, and patent, medical or environmental
4501 consulting.

4502
4503 [10] When a lawyer is obliged to accord the recipients of such services the protections
4504 of those Rules that apply to the client-lawyer relationship, the lawyer must take special
4505 care to heed the ~~proscriptions~~proscriptions of the Rules addressing conflict of interest
4506 (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to
4507 scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential
4508 information. The promotion of the law-related services must also in all respects comply
4509 with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard,
4510 lawyers should take special care to identify the obligations that may be imposed as a
4511 result of a jurisdiction's decisional law.

4512
4513 [11] When the full protections of all of the Rules of Professional Conduct do not apply
4514 to the provision of law-related services, principles of law external to the Rules, for
4515 example, the law of principal and agent, govern the legal duties owed to those receiving
4516 the services. Those other legal principles may establish a different degree of protection
4517 for the recipient with respect to confidentiality of information, conflicts of interest and
4518 permissible business relationships with clients. See also Rule 8.4 (Misconduct).

4519
4520

4521 **RULE 5.8: EMPLOYMENT OF DISBARRED, SUSPENDED, OR**
4522 **INVOLUNTARILY INACTIVE LAWYERS**

4523
4524 **(a) For purposes of this rule "employ" means to engage the services of another, including**
4525 **employees, agents, independent contractors and consultants, regardless of whether any**
4526 **compensation is paid.**

4527

4528 (b) A lawyer shall not employ, associate professionally with, or aid a person the lawyer
4529 knows or reasonably should know has been disbarred, suspended, or placed on disability
4530 inactive status by order of the court to do any of the following on behalf of the lawyer's
4531 client:

4532 (1) render legal consultation or advice to the client;

4533 (2) appear on behalf of a client in any hearing or proceeding or before any judicial
4534 officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or
4535 hearing officer unless the rules of the tribunal involved permit representation by
4536 nonlawyers and the client has been informed of the lawyer's suspension, disbarment, or
4537 disability inactive status;

4538 (3) appear as a representative of the client at a deposition or other discovery matter;

4539 (4) negotiate or transact any matter for or on behalf of the client with third parties;

4540 (5) receive, disburse or otherwise handle the client's funds; or

4541 (6) engage in activities that constitute the practice of law.

4542

4543 (c) A lawyer may employ, associate professionally with, or aid a disbarred, suspended, or
4544 disability inactive lawyer to perform research, drafting, clerical, or similar activities,
4545 including but not limited to:

4546 (1) legal work of a preparatory nature for the lawyer's review, such as legal research, the
4547 gathering of information, drafting of pleadings, briefs, and other similar documents;

4548 (2) direct communication with the client or third parties regarding matters such as
4549 scheduling, billing, updates, information gathering, confirmation of receipt or sending of
4550 correspondence and messages; or

4551 (3) accompanying an active lawyer in attending a deposition or other discovery procedure
4552 for the limited purpose of providing clerical assistance to the active lawyer who will
4553 appear as the representative of the client.

4554

4555 (d) Prior to or at the time of employing a person the lawyer knows or reasonably should
4556 know is a disbarred, suspended, or disability inactive lawyer, the lawyer shall serve upon
4557 the Office of Lawyers Professional Responsibility written notice of the employment,
4558 including a full description of such person's current license status. The notice shall state
4559 that the suspended, disbarred, or disability inactive lawyer shall not be employed to
4560 perform any of the activities prohibited by paragraph (b).

4561

4562 (e) Upon termination of the employment of the disbarred, suspended, or disability
4563 inactive lawyer, the employing lawyer shall promptly serve upon the Office of Lawyers
4564 Professional Responsibility written notice of the termination.

4565

4565 **RULE 6.1: VOLUNTARY PRO BONO PUBLICO SERVICE**

4566
4567 Every lawyer has a professional responsibility to provide legal services to those unable to
4568 pay. A lawyer should aspire to render at least ~~(50)~~ hours of pro bono publico legal
4569 services per year. In fulfilling this responsibility, the lawyer should:

4570
4571 (a) provide a substantial majority of the ~~(50)~~ hours of legal services without fee or
4572 expectation of fee to:

4573 (1) persons of limited means or

4574 (2) charitable, religious, civic, community, governmental and educational organizations
4575 in matters that are designed primarily to address the needs of persons of limited means;
4576 and

4577
4578 (b) provide any additional services through:

4579 (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups
4580 or organizations seeking to secure or protect civil rights, civil liberties or public rights, or
4581 charitable, religious, civic, community, governmental and educational organizations in
4582 matters in furtherance of their organizational purposes, where the payment of standard
4583 legal fees would significantly deplete the organization's economic resources or would be
4584 otherwise inappropriate;

4585 (2) delivery of legal services at a substantially reduced fee ~~to~~of persons of limited
4586 means; or

4587 (3) participation in activities for improving the law, the legal system or the legal
4588 profession.

4589 In addition, a lawyer should voluntarily contribute financial support to organizations that
4590 provide legal services to persons of limited means.

4591
4592 **Comment**

4593
4594 [1] Every lawyer, regardless of professional prominence or professional work load,
4595 has a responsibility to provide legal services to those unable to pay, and personal
4596 involvement in the problems of the disadvantaged can be one of the most rewarding
4597 experiences in the life of a lawyer. The ~~American~~Minnesota State Bar Association urges
4598 all lawyers to provide a minimum of 50 hours of pro bono services annually. ~~States,~~
4599 ~~however, may decide to choose a higher or lower number of hours of annual service~~
4600 ~~(which may be expressed as a percentage of a lawyer's professional time) depending~~
4601 ~~upon local needs and local conditions.~~ It is recognized that in some years a lawyer may
4602 render greater or fewer hours than the annual standard specified; but, during the course of
4603 his or her legal career, each lawyer should render on average per year, the number of
4604 hours set forth in this Rule. Services can be performed in civil matters or in criminal or
4605 quasi- criminal matters for which there is no government obligation to provide funds for
4606 legal representation, such as post- conviction death penalty appeal cases.

4607
4608 [2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists
4609 among persons of limited means by providing that a substantial majority of the legal
4610 services rendered annually to the disadvantaged be furnished without fee or expectation
4611 of fee. Legal services under these paragraphs consist of a full range of activities,
4612 including individual and class representation, the provision of legal advice, legislative
4613 lobbying, administrative rule making and the provision of free training or mentoring to
4614 those who represent persons of limited means. The variety of these activities should

4615 facilitate participation by government lawyers, even when restrictions exist on their
4616 engaging in the outside practice of law.

4617
4618 [3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who
4619 qualify for participation in programs funded by the Legal Services Corporation and those
4620 whose incomes and financial resources are slightly above the guidelines utilized by such
4621 programs but nevertheless, cannot afford counsel. Legal services can be rendered to
4622 individuals or to organizations such as homeless shelters, battered women's centers and
4623 food pantries that serve those of limited means. The term "governmental organizations"
4624 includes, but is not limited to, public protection programs and sections of governmental
4625 or public sector agencies.

4626
4627 [4] Because service must be provided without fee or expectation of fee, the intent of
4628 the lawyer to render free legal services is essential for the work performed to fall within
4629 the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be
4630 considered pro bono if an anticipated fee is uncollected, but the award of statutory
4631 attorneys' fees in a case originally accepted as pro bono would not disqualify such
4632 services from inclusion under this section. Lawyers who do receive fees in such cases are
4633 encouraged to contribute an appropriate portion of such fees to organizations or projects
4634 that benefit persons of limited means.

4635
4636 [5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro
4637 bono services exclusively through activities described in paragraphs (a)(1) and (2), to the
4638 extent that any hours of service remained unfulfilled, the remaining commitment can be
4639 met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or
4640 regulatory restrictions may prohibit or impede government and public sector lawyers and
4641 judges from performing the pro bono services outlined in paragraphs (a)(1) and (2).
4642 Accordingly, where those restrictions apply, government and public sector lawyers and
4643 judges may fulfill their pro bono responsibility by performing services outlined in
4644 paragraph (b).

4645
4646 [6] Paragraph (b)(1) includes the provision of certain types of legal services to those
4647 whose incomes and financial resources place them above limited means. It also permits
4648 the pro bono lawyer to accept a substantially reduced fee for services. Examples of the
4649 types of issues that may be addressed under this paragraph include First Amendment
4650 claims, Title VII claims and environmental protection claims. Additionally, a wide range
4651 of organizations may be represented, including social service, medical research, cultural
4652 and religious groups.

4653
4654 [7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest
4655 fee for furnishing legal services to persons of limited means. Participation in judicare
4656 programs and acceptance of court appointments in which the fee is substantially below a
4657 lawyer's usual rate are encouraged under this section.

4658
4659 [8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that
4660 improve the law, the legal system or the legal profession. Serving on bar association
4661 committees, serving on boards of pro bono or legal services programs, taking part in Law
4662 Day activities, acting as a continuing legal education instructor, a mediator or an
4663 arbitrator and engaging in legislative lobbying to improve the law, the legal system or the
4664 profession are a few examples of the many activities that fall within this paragraph.

4665
4666 [9] Because the provision of pro bono services is a professional responsibility, it is
4667 the individual ethical commitment of each lawyer. Nevertheless, there may be times
4668 when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer
4669 may discharge the pro bono responsibility by providing financial support to organizations
4670 providing free legal services to persons of limited means. Such financial support should

4671 be reasonably equivalent to the value of the hours of service that would have otherwise
4672 been provided. In addition, at times it may be more feasible to satisfy the pro bono
4673 responsibility collectively, as by a firm's aggregate pro bono activities.

4674
4675 [10] Because the efforts of individual lawyers are not enough to meet the need for free
4676 legal services that exists among persons of limited means, the government and the
4677 profession have instituted additional programs to provide those services. Every lawyer
4678 should financially support such programs, in addition to either providing direct pro bono
4679 services or making financial contributions when pro bono service is not feasible.

4680
4681 [11] Law firms should act reasonably to enable and encourage all lawyers in the firm
4682 to provide the pro bono legal services called for by this Rule.

4683
4684 [12] The responsibility set forth in this Rule is not intended to be enforced through
4685 disciplinary process.

4686

4687 **RULE 6.2: ACCEPTING APPOINTMENTS**

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4689 A lawyer shall not seek to avoid appointment by a tribunal to represent a person except
4690 for good cause, such as:

4691

4692 (a) representing the client is likely to result in violation of the Rules of Professional
4693 Conduct or other law;

4694

4695 (b) representing the client is likely to result in an unreasonable financial burden on
4696 the lawyer; or

4697

4698 (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the
4699 client-lawyer relationship or the lawyer's ability to represent the client.

4700

4701

4702 **Comment**

4703

4704 [1] A lawyer ordinarily is not obliged to accept a client whose character or cause the
4705 lawyer regards as repugnant. The lawyer's freedom to select clients is, however,
4706 qualified. All lawyers have a responsibility to assist in providing pro bono publico
4707 service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair
4708 share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject
4709 to appointment by a court to serve unpopular clients or persons unable to afford legal
4710 services.

4711

4712 **Appointed Counsel**

4713

4714 [2] For good cause a lawyer may seek to decline an appointment to represent a
4715 person who cannot afford to retain counsel or whose cause is unpopular. Good cause
4716 exists if the lawyer could not handle the matter competently, see Rule 1.1, or if
4717 undertaking the representation would result in an improper conflict of interest, for
4718 example, when the client or the cause is so repugnant to the lawyer as to be likely to
4719 impair the client-lawyer relationship or the lawyer's ability to represent the client. A
4720 lawyer may also seek to decline an appointment if acceptance would be unreasonably
4721 burdensome, for example, when it would impose a financial sacrifice so great as to be
4722 unjust.

4723 [3] An appointed lawyer has the same obligations to the client as retained counsel,
4724 including the obligations of loyalty and confidentiality, and is subject to the same
4725 limitations on the client-lawyer relationship, such as the obligation to refrain from
4726 assisting the client in violation of the Rules.

4727

4728

4729 **RULE 6.3: MEMBERSHIP IN LEGAL SERVICES ORGANIZATION**

4730

4731 A lawyer may serve as a director, officer or member of a legal services organization,
4732 apart from the law firm in which the lawyer practices, notwithstanding that the
4733 organization serves persons having interests adverse to a client of the lawyer. The lawyer
4734 shall not knowingly participate in a decision or action of the organization:

4735

4736 (a) if participating in the decision or action would be incompatible with the lawyer's
4737 obligations to a client under Rule 1.7; or

4738

4739 (b) where the decision or action could have a material adverse effect on the
4740 representation of a client of the organization whose interests are adverse to a client of the
4741 lawyer.

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Comment

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RULE 6.4: LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

4761 A lawyer may serve as a director, officer or member of an organization involved in
4762 reform of the law or its administration notwithstanding that the reform may affect the
4763 interests of a client of the lawyer. When the lawyer knows that the interests of a client
4764 may be materially benefitted by a decision in which the lawyer participates, the lawyer
4765 shall disclose that fact but need not identify the client.

4766

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Comment

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[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules

4774 governing that subject. In determining the nature and scope of participation in such
4775 activities, a lawyer should be mindful of obligations to clients under other Rules,
4776 particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the
4777 program by making an appropriate disclosure within the organization when the lawyer
4778 knows a private client might be materially benefitted.

4779

4780

4781 **RULE 6.5: ~~NONPROFIT AND COURT-ANNEXED~~ PRO BONO LIMITED**
4782 **LEGAL SERVICES PROGRAMS**

4783

4784 (a) A lawyer who, under the auspices of a program ~~sponsored by a nonprofit~~
4785 ~~organization or court offering pro bono legal services~~, provides short-term limited legal
4786 services to a client without expectation by either the lawyer or the client that the lawyer
4787 will provide continuing representation in the matter:

4788 (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of
4789 the client involves a conflict of interest; and

4790 (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with
4791 the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

4792

4793 (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation
4794 governed by this Rule.

4795

4796 **Comment**

4797

4798 [1] Legal services organizations, courts and various ~~nonprofit~~ organizations have
4799 established programs through which lawyers provide short-term limited legal services —
4800 such as advice or the completion of legal forms - that will assist persons to address their
4801 legal problems without further representation by a lawyer. In these programs, such as
4802 legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer
4803 relationship is established, but there is no expectation that the lawyer's representation of
4804 the client will continue beyond the limited consultation. Such programs are normally
4805 operated under circumstances in which it is not feasible for a lawyer to systematically
4806 screen for conflicts of interest as is generally required before undertaking a
4807 representation. See, e.g., Rules 1.7, 1.9 and 1.10.

4808

4809 [2] A lawyer who provides short-term limited legal services pursuant to this Rule
4810 must secure the client's informed consent to the limited scope of the representation. See
4811 Rule 1.2(c). If a short-term limited representation would not be reasonable under the
4812 circumstances, the lawyer may offer advice to the client but must also advise the client of
4813 the need for further assistance of counsel. Except as provided in this Rule, the Rules of
4814 Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited
4815 representation.

4816

4817 [3] Because a lawyer who is representing a client in the circumstances addressed by
4818 this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph
4819 (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the
4820 representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the
4821 lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or
4822 1.9(a) in the matter.

4823

4824 [4] Because the limited nature of the services significantly reduces the risk of
4825 conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b)

4826 provides that Rule 1.10 is inapplicable to a representation governed by this Rule except
4827 as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to
4828 comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by
4829 Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a
4830 short-term limited legal services program will not preclude the lawyer's firm from
4831 undertaking or continuing the representation of a client with interests adverse to a client
4832 being represented under the program's auspices. Nor will the personal disqualification of
4833 a lawyer participating in the program be imputed to other lawyers participating in the
4834 program.

4835
4836 [5] If, after commencing a short-term limited representation in accordance with this
4837 Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules
4838 1.7, 1.9(a) and 1.10 become applicable.

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4840 **RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES**

4841
4842 A lawyer shall not make a false or misleading communication about the lawyer or the
4843 lawyer's services. A communication is false or misleading if it contains a material
4844 misrepresentation of fact or law, or omits a fact necessary to make the statement
4845 considered as a whole not materially misleading.

4846
4847 **Comment**

4848
4849 [1] This Rule governs all communications about a lawyer's services, including
4850 advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's
4851 services, statements about them must be truthful.

4852
4853 [2] Truthful statements that are misleading are also prohibited by this Rule. A truthful
4854 statement is misleading if it omits a fact necessary to make the lawyer's communication
4855 considered as a whole not materially misleading. A truthful statement is also misleading
4856 if there is a substantial likelihood that it will lead a reasonable person to formulate a
4857 specific conclusion about the lawyer or the lawyer's services for which there is no
4858 reasonable factual foundation.

4859
4860 [3] An advertisement that truthfully reports a lawyer's achievements on behalf of
4861 clients or former clients may be misleading if presented so as to lead a reasonable person
4862 to form an unjustified expectation that the same results could be obtained for other clients
4863 in similar matters without reference to the specific factual and legal circumstances of
4864 each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or
4865 fees with the services or fees of other lawyers may be misleading if presented with such
4866 specificity as would lead a reasonable person to conclude that the comparison can be
4867 substantiated. The inclusion of an appropriate disclaimer or qualifying language may
4868 preclude a finding that a statement is likely to create unjustified expectations or otherwise
4869 mislead a prospective client.

4870
4871 [4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to
4872 influence improperly a government agency or official or to achieve results by means that
4873 violate the Rules of Professional Conduct or other law.

4874
4875
4876 **RULE 7.2: ADVERTISING**

4877
4878 (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services
4879 through written, recorded or electronic communication, including public media.

4880
4881 (b) A lawyer shall not give anything of value to a person for recommending the lawyer's
4882 services except that a lawyer may

4883 (1) pay the reasonable costs of advertisements or communications permitted by this Rule;

4884 (2) pay the usual charges of a legal service plan or a not-for-profit ~~or qualified~~ lawyer
4885 referral service. ~~A qualified lawyer referral service is a lawyer referral service that has~~
4886 ~~been approved by an appropriate regulatory authority;~~

- 4887 (3) pay for a law practice in accordance with Rule 1.17; and
4888 (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement
4889 not otherwise prohibited under these Rules that provides for the other person to refer
4890 clients or customers to the lawyer, if
4891 (i) the reciprocal referral agreement is not exclusive, and
4892 (ii) the client is informed of the existence and nature of the agreement.
4893
4894 (c) Any communication made pursuant to this rule shall include the name and office
4895 address of at least one lawyer or law firm responsible for its content.

4896

4897

Comment

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[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

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[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

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[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. ~~Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.~~

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[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

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Paying Others to Recommend a Lawyer

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[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory

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4939 listings, newspaper ads, television and radio airtime, domain-name registrations,
4940 sponsorship fees, banner ads, and group advertising. A lawyer may compensate
4941 employees, agents and vendors who are engaged to provide marketing or client-
4942 development services, such as publicists, public-relations personnel, business-
4943 development staff and website designers. See Rule 5.3 for the duties of lawyers and law
4944 firms with respect to the conduct of nonlawyers who prepare marketing materials for
4945 them.

4946
4947 [6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit ~~or~~
4948 ~~qualified~~ lawyer referral service. A legal service plan is a prepaid or group legal service
4949 plan or a similar delivery system that assists prospective clients to secure legal
4950 representation. A lawyer referral service, on the other hand, is any organization that holds
4951 itself out to the public as a lawyer referral service. Such referral services are understood
4952 by laypersons to be consumer-oriented organizations that provide unbiased referrals to
4953 lawyers with appropriate experience in the subject matter of the representation and afford
4954 other client protections, such as complaint procedures or malpractice insurance
4955 requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a
4956 not-for-profit ~~or qualified~~ lawyer referral service. ~~A qualified lawyer referral service is~~
4957 ~~one that is approved by an appropriate regulatory authority as affording adequate~~
4958 ~~protections for prospective clients. See, e.g., the American Bar Association's Model~~
4959 ~~Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral~~
4960 ~~and Information Service Quality Assurance Act (requiring that organizations that are~~
4961 ~~identified as lawyer referral services (i) permit the participation of all lawyers who are~~
4962 ~~licensed and eligible to practice in the jurisdiction and who meet reasonable objective~~
4963 ~~eligibility requirements as may be established by the referral service for the protection of~~
4964 ~~prospective clients; (ii) require each participating lawyer to carry reasonably adequate~~
4965 ~~malpractice insurance; (iii) act reasonably to assess client satisfaction and address client~~
4966 ~~complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are~~
4967 ~~employed by the referral service.)~~

4968
4969 [7] A lawyer who accepts assignments or referrals from a legal service plan or referrals
4970 from a not-for-profit lawyer referral service must act reasonably to assure that the
4971 activities of the plan or service are compatible with the lawyer's professional obligations.
4972 See Rule 5.3. Legal service plans and lawyer referral services may communicate with
4973 prospective clients, but such communication must be in conformity with these Rules.
4974 Thus, advertising must not be false or misleading, as would be the case if the
4975 communications of a group advertising program or a group legal services plan would
4976 mislead prospective clients to think that it was a lawyer referral service sponsored by a
4977 state agency or bar association. Nor could the lawyer allow in-person, or telephonic, ~~or~~
4978 ~~real-time~~ contacts that would violate Rule 7.3.

4979
4980 [8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer
4981 professional, in return for the undertaking of that person to refer clients or customers to
4982 the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's
4983 professional judgment as to making referrals or as to providing substantive legal services.
4984 See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives
4985 referrals from a lawyer or nonlawyer professional must not pay anything solely for the
4986 referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer
4987 clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral
4988 agreement is not exclusive and the client is informed of the referral agreement. Conflicts
4989 of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral
4990 agreements should not be of indefinite duration and should be reviewed periodically to
4991 determine whether they comply with these Rules. This Rule does not restrict referrals or
4992 divisions of revenues or net income among lawyers within ~~firms comprised of multiple~~
4993 ~~entities~~ a firm.

4994

4995

4996 **RULE 7.3: DIRECT CONTACT WITH PROSPECTIVE CLIENTS**

4997

4998 (a) A lawyer shall not by in-person, or live telephone ~~or real-time electronic~~ contact
4999 solicit professional employment from a prospective client when a significant motive for
5000 the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

5001 (1) is a lawyer; or

5002 (2) has a family, close personal, or prior professional relationship with the lawyer.

5003

5004 (b) A lawyer shall not solicit professional employment from a prospective client by
5005 written, recorded or electronic communication or by in-person, or telephone ~~or real-time~~
5006 ~~electronic~~ contact even when not otherwise prohibited by paragraph (a), if:

5007 (1) the prospective client has made known to the lawyer a desire not to be solicited by the
5008 lawyer; or

5009 (2) the solicitation involves coercion, duress or harassment.

5010

5011 (c) Every written, recorded or electronic communication from a lawyer soliciting
5012 professional employment from a prospective client known to be in need of legal services
5013 in a particular matter shall clearly and conspicuously include the words "Advertising
5014 Material" on the outside envelope, if any, and ~~at the beginning and ending of~~ within any
5015 written, recorded or electronic communication, unless the recipient of the communication
5016 is a person specified in paragraphs (a)(1) or (a)(2).

5017

5018 (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a
5019 prepaid or group legal service plan operated by an organization not owned or directed by
5020 the lawyer that uses in-person or telephone contact to solicit memberships or
5021 subscriptions for the plan from persons who are not known to need legal services in a
5022 particular matter covered by the plan.

5023

5024

Comment

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5026 [1] There is a potential for abuse inherent in direct in-person, or live telephone ~~or real-~~
5027 ~~time electronic~~ contact by a lawyer with a prospective client known to need legal
5028 services. These forms of contact between a lawyer and a prospective client subject the
5029 layperson to the private importuning of the trained advocate in a direct interpersonal
5030 encounter. The prospective client, who may already feel overwhelmed by the
5031 circumstances giving rise to the need for legal services, may find it difficult fully to
5032 evaluate all available alternatives with reasoned judgment and appropriate self-interest in
5033 the face of the lawyer's presence and insistence upon being retained immediately. The
5034 situation is fraught with the possibility of undue influence, intimidation, and over-
5035 reaching.

5036

5037 [2] This potential for abuse inherent in direct in-person, or live telephone ~~or real-time~~
5038 ~~electronic~~ solicitation of prospective clients justifies its prohibition, particularly since
5039 lawyer advertising and written and recorded communication permitted under Rule 7.2
5040 offer alternative means of conveying necessary information to those who may be in need
5041 of legal services. Advertising and written and recorded communications which may be

5042 mailed or autodialed make it possible for a prospective client to be informed about the
5043 need for legal services, and about the qualifications of available lawyers and law firms,
5044 without subjecting the prospective client to direct in-person, or telephone ~~or real-time~~
5045 ~~electronic~~ persuasion that may overwhelm the client's judgment.

5046
5047 [3] The use of general advertising and written, recorded or electronic communications
5048 to transmit information from lawyer to prospective client, rather than direct in-person, or
5049 live telephone ~~or real-time electronic~~ contact, will help to assure that the information
5050 flows cleanly as well as freely. The contents of advertisements and communications
5051 permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed
5052 and may be shared with others who know the lawyer. This potential for informal review
5053 is itself likely to help guard against statements and claims that might constitute false and
5054 misleading communications, in violation of Rule 7.1. The contents of direct in-person, or
5055 live telephone ~~or real-time electronic~~ conversations between a lawyer and a prospective
5056 client can be disputed and may not be subject to third-party scrutiny. Consequently, they
5057 are much more likely to approach (and occasionally cross) the dividing line between
5058 accurate representations and those that are false and misleading.

5059
5060 [4] There is far less likelihood that a lawyer would engage in abusive practices against
5061 an individual who is a former client, or with whom the lawyer has a close personal or
5062 family relationship, or in situations in which the lawyer is motivated by considerations
5063 other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the
5064 person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the
5065 requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is
5066 not intended to prohibit a lawyer from participating in constitutionally protected activities
5067 of public or charitable legal- service organizations or bona fide political, social, civic,
5068 fraternal, employee or trade organizations whose purposes include providing or
5069 recommending legal services to its members or beneficiaries.

5070
5071 [5] But even permitted forms of solicitation can be abused. Thus, any solicitation
5072 which contains information which is false or misleading within the meaning of Rule 7.1,
5073 which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or
5074 which involves contact with a prospective client who has made known to the lawyer a
5075 desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is
5076 prohibited. Moreover, if after sending a letter or other communication to a client as
5077 permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate
5078 with the prospective client may violate the provisions of Rule 7.3(b).

5079
5080 [6] This Rule is not intended to prohibit a lawyer from contacting representatives of
5081 organizations or groups that may be interested in establishing a group or prepaid legal
5082 plan for their members, insureds, beneficiaries or other third parties for the purpose of
5083 informing such entities of the availability of and details concerning the plan or
5084 arrangement which the lawyer or lawyer's firm is willing to offer. This form of
5085 communication is not directed to a prospective client. Rather, it is usually addressed to an
5086 individual acting in a fiduciary capacity seeking a supplier of legal services for others
5087 who may, if they choose, become prospective clients of the lawyer. Under these
5088 circumstances, the activity which the lawyer undertakes in communicating with such
5089 representatives and the type of information transmitted to the individual are functionally
5090 similar to and serve the same purpose as advertising permitted under Rule 7.2.

5091
5092 [7] The requirement in Rule 7.3(c) that certain communications be marked
5093 "Advertising Material" does not apply to communications sent in response to requests of
5094 potential clients or their spokespersons or sponsors. General announcements by lawyers,
5095 including changes in personnel or office location, do not constitute communications

5096 soliciting professional employment from a client known to be in need of legal services
5097 within the meaning of this Rule.

5098

5099 [8] Paragraph (d) of this Rule permits a lawyer to participate with an organization
5100 which uses personal contact to solicit members for its group or prepaid legal service plan,
5101 provided that the personal contact is not undertaken by any lawyer who would be a
5102 provider of legal services through the plan. The organization must not be owned by or
5103 directed (whether as manager or otherwise) by any lawyer or law firm that participates in
5104 the plan. For example, paragraph (d) would not permit a lawyer to create an organization
5105 controlled directly or indirectly by the lawyer and use the organization for the in-person
5106 or telephone solicitation of legal employment of the lawyer through memberships in the
5107 plan or otherwise. The communication permitted by these organizations also must not be
5108 directed to a person known to need legal services in a particular matter, but is to be
5109 designed to inform potential plan members generally of another means of affordable legal
5110 services. Lawyers who participate in a legal service plan must reasonably assure that the
5111 plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

5112

5113

5114 **RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND**
5115 **SPECIALIZATION**

5116

5117 (a) A lawyer may communicate the fact that the lawyer does or does not practice in
5118 particular fields of law.

5119

5120 (b) A lawyer admitted to engage in patent practice before the United States Patent and
5121 Trademark Office may use the designation "Patent Attorney" or a substantially similar
5122 designation.

5123

5124 (c) A lawyer engaged in Admiralty practice may use the designation "Admiralty,"
5125 "Proctor in Admiralty" or a substantially similar designation.

5126

5127 (d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a
5128 particular field of law, unless:

5129 (1) the lawyer ~~has been~~is certified as a specialist by an organization that ~~has been~~is
5130 approved by an appropriate state authority or that ~~has been~~is accredited by the American
5131 Bar Association; and

5132 (2) the name of the certifying organization is clearly identified in the communication.

5133

5134

Comment

5135

5136 [1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in
5137 communications about the lawyer's services. If a lawyer practices only in certain fields,
5138 or will not accept matters except in a specified field or fields, the lawyer is permitted to
5139 so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist,"
5140 practices a "specialty," or "specializes in" particular fields, but such communications are
5141 subject to the "false and misleading" standard applied in Rule 7.1 to communications
5142 concerning a lawyer's services.

5143

5144 [2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark
5145 Office for the designation of lawyers practicing before the Office. Paragraph (c)
5146 recognizes that designation of Admiralty practice has a long historical tradition
5147 associated with maritime commerce and the federal courts.
5148

5149 [3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in
5150 a field of law if such certification is granted by an organization approved by an
5151 appropriate state authority or accredited by the American Bar Association or another
5152 organization, such as a state bar association, that ~~has been~~ approved by the state
5153 authority to accredit organizations that certify lawyers as specialists. Certification
5154 signifies that an objective entity has recognized an advanced degree of knowledge and
5155 experience in the specialty area greater than is suggested by general licensure to practice
5156 law. Certifying organizations may be expected to apply standards of experience,
5157 knowledge and proficiency to insure that a lawyer's recognition as a specialist is
5158 meaningful and reliable. In order to insure that consumers can obtain access to useful
5159 information about an organization granting certification, the name of the certifying
5160 organization must be included in any communication regarding the certification.
5161

5162
5163 **RULE 7.5: FIRM NAMES AND LETTERHEADS**
5164

5165 (a) A lawyer shall not use a firm name, letterhead or other professional designation that
5166 violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not
5167 imply a connection with a government agency or with a public or charitable legal services
5168 organization and is not otherwise in violation of Rule 7.1.
5169

5170 (b) A law firm with offices in more than one jurisdiction may use the same name or
5171 other professional designation in each jurisdiction, but identification of the lawyers in an
5172 office of the firm shall indicate the jurisdictional limitations on those not licensed to
5173 practice in the jurisdiction where the office is located.
5174

5175 (c) The name of a lawyer holding a public office shall not be used in the name of a law
5176 firm, or in communications on its behalf, during any substantial period in which the
5177 lawyer is not actively and regularly practicing with the firm.
5178

5179 (d) Lawyers may state or imply that they practice in a partnership or other organization
5180 only when that is the fact.
5181

5182 **Comment**
5183

5184 [1] A firm may be designated by the names of all or some of its members, by the
5185 names of deceased members where there has been a continuing succession in the firm's
5186 identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may
5187 also be designated by a distinctive website address or comparable professional
5188 designation. Although the United States Supreme Court has held that legislation may
5189 prohibit the use of trade names in professional practice, use of such names in law practice
5190 is acceptable so long as it is not misleading. If a private firm uses a trade name that
5191 includes a geographical name such as "Springfield Legal Clinic," an express disclaimer
5192 that it is a public legal aid agency may be required to avoid a misleading implication. It
5193 may be observed that any firm name including the name of a deceased partner is, strictly
5194 speaking, a trade name. The use of such names to designate law firms has proven a useful

5195 means of identification. However, it is misleading to use the name of a lawyer not
5196 associated with the firm or a predecessor of the firm, ~~or the name of a nonlawyer.~~

5197
5198 [2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in
5199 fact associated with each other in a law firm, may not denominate themselves as, for
5200 example, "Smith and Jones," for that title suggests that they are practicing law together in
5201 a firm.

5202
5203

5204 **~~RULE 7.6: POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT~~**
5205 **~~LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES~~**

5206

5207 ~~A lawyer or law firm shall not accept a government legal engagement or an~~
5208 ~~appointment by a judge if the lawyer or law firm makes a political contribution or solicits~~
5209 ~~political contributions for the purpose of obtaining or being considered for that type of~~
5210 ~~legal engagement or appointment.~~

5211

5212 **Comment**

5213

5214 ~~[1]—Lawyers have a right to participate fully in the political process, which~~
5215 ~~includes making and soliciting political contributions to candidates for judicial and other~~
5216 ~~public office. Nevertheless, when lawyers make or solicit political contributions in order~~
5217 ~~to obtain an engagement for legal work awarded by a government agency, or to obtain~~
5218 ~~appointment by a judge, the public may legitimately question whether the lawyers~~
5219 ~~engaged to perform the work are selected on the basis of competence and merit. In such a~~
5220 ~~circumstance, the integrity of the profession is undermined.~~

5221

5222 ~~[2]—The term "political contribution" denotes any gift, subscription, loan,~~
5223 ~~advance or deposit of anything of value made directly or indirectly to a candidate,~~
5224 ~~incumbent, political party or campaign committee to influence or provide financial~~
5225 ~~support for election to or retention in judicial or other government office. Political~~
5226 ~~contributions in initiative and referendum elections are not included. For purposes of this~~
5227 ~~Rule, the term "political contribution" does not include uncompensated services.~~

5228

5229 ~~[3]—Subject to the exceptions below, (i) the term "government legal~~
5230 ~~engagement" denotes any engagement to provide legal services that a public official has~~
5231 ~~the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes~~
5232 ~~an appointment to a position such as referee, commissioner, special master, receiver,~~
5233 ~~guardian or other similar position that is made by a judge. Those terms do not, however,~~
5234 ~~include (a) substantially uncompensated services; (b) engagements or appointments made~~
5235 ~~on the basis of experience, expertise, professional qualifications and cost following a~~
5236 ~~request for proposal or other process that is free from influence based upon political~~
5237 ~~contributions; and (c) engagements or appointments made on a rotational basis from a list~~
5238 ~~compiled without regard to political contributions.~~

5239

5240 ~~[4]—The term "lawyer or law firm" includes a political action committee or other~~
5241 ~~entity owned or controlled by a lawyer or law firm.~~

5242

5243 ~~[5]— Political contributions are for the purpose of obtaining or being considered~~
5244 ~~for a government legal engagement or appointment by a judge if, but for the desire to be~~
5245 ~~considered for the legal engagement or appointment, the lawyer or law firm would not~~
5246 ~~have made or solicited the contributions. The purpose may be determined by an~~
5247 ~~examination of the circumstances in which the contributions occur. For example, one or~~
5248 ~~more contributions that in the aggregate are substantial in relation to other contributions~~
5249 ~~by lawyers or law firms, made for the benefit of an official in a position to influence~~
5250 ~~award of a government legal engagement, and followed by an award of the legal~~
5251 ~~engagement to the contributing or soliciting lawyer or the lawyer’s firm would support an~~
5252 ~~inference that the purpose of the contributions was to obtain the engagement, absent other~~
5253 ~~factors that weigh against existence of the proscribed purpose. Those factors may include~~
5254 ~~among others that the contribution or solicitation was made to further a political, social,~~
5255 ~~or economic interest or because of an existing personal, family, or professional~~
5256 ~~relationship with a candidate.~~

5257

5258 ~~[6]— If a lawyer makes or solicits a political contribution under circumstances~~
5259 ~~that constitute bribery or another crime, Rule 8.4(b) is implicated.~~

5260

5261

5261 **RULE 8.1: BAR ADMISSION AND DISCIPLINARY MATTERS**

5262
5263 An applicant for admission to the bar, or a lawyer in connection with a bar admission
5264 application or in connection with a disciplinary matter, shall not:

5265
5266 (a) knowingly make a false statement of material fact; or

5267
5268 (b) fail to disclose a fact necessary to correct a misapprehension known by the
5269 person to have arisen in the matter, or knowingly fail to respond to a lawful demand for
5270 information from an admissions or disciplinary authority, except that this rule does not
5271 require disclosure of information otherwise protected by Rule 1.6.

5272
5273 **Comment**

5274
5275 [1] The duty imposed by this Rule extends to persons seeking admission to the bar as
5276 well as to lawyers. Hence, if a person makes a material false statement in connection
5277 with an application for admission, it may be the basis for subsequent disciplinary action if
5278 the person is admitted, and in any event may be relevant in a subsequent admission
5279 application. The duty imposed by this Rule applies to a lawyer's own admission or
5280 discipline as well as that of others. Thus, it is a separate professional offense for a lawyer
5281 to knowingly make a misrepresentation or omission in connection with a disciplinary
5282 investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires
5283 correction of any prior misstatement in the matter that the applicant or lawyer may have
5284 made and affirmative clarification of any misunderstanding on the part of the admissions
5285 or disciplinary authority of which the person involved becomes aware.

5286
5287 [2] This Rule is subject to the provisions of the fifth amendment of the United States
5288 Constitution and corresponding provisions of state constitutions. A person relying on
5289 such a provision in response to a question, however, should do so openly and not use the
5290 right of nondisclosure as a justification for failure to comply with this Rule.

5291
5292 [3] A lawyer representing an applicant for admission to the bar, or representing a
5293 lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules
5294 applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule
5295 3.3.

5296
5297
5298 **RULE 8.2: JUDICIAL AND LEGAL OFFICIALS**

5299
5300 (a) A lawyer shall not make a statement that the lawyer knows to be false or with
5301 reckless disregard as to its truth or falsity concerning the qualifications or integrity of a
5302 judge, adjudicatory officer or public legal officer, or of a candidate for election or
5303 appointment to judicial or legal office.

5304
5305 (b) A lawyer who is a candidate for judicial office shall comply with the applicable
5306 provisions of the Code of Judicial Conduct.

5307
5308 **Comment**

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5310 [1] Assessments by lawyers are relied on in evaluating the professional or personal
5311 fitness of persons being considered for election or appointment to judicial office and to

5312 public legal offices, such as attorney general, prosecuting attorney and public defender.
5313 Expressing honest and candid opinions on such matters contributes to improving the
5314 administration of justice. Conversely, false statements by a lawyer can unfairly
5315 undermine public confidence in the administration of justice.

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5317 [2] When a lawyer seeks judicial office, the lawyer should be bound by applicable
5318 limitations on political activity.

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5320 [3] To maintain the fair and independent administration of justice, lawyers are
5321 encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

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5324 **RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT**

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5326 (a) A lawyer who knows that another lawyer has committed a violation of the
5327 ~~Rules~~rules of Professional Conduct that raises a substantial question as to that lawyer's
5328 honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the
5329 appropriate professional authority.

5330

5331 (b) A lawyer who knows that a judge has committed a violation of applicable rules of
5332 judicial conduct that raises a substantial question as to the judge's fitness for office shall
5333 inform the appropriate authority.

5334

5335 (c) This Rule does not require disclosure of information ~~otherwise protected by that~~
5336 Rule 1.6 requires or allows a lawyer to keep confidential or information gained by a
5337 lawyer or judge while participating in ~~an approved~~a lawyers assistance program or other
5338 program providing assistance, support or counseling to lawyers who are chemically
5339 dependent or have mental disorders.

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Comment

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[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

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[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in ~~an approved~~ a bona fide lawyers or judges assistance program or other program that provides assistance, support or counseling to lawyers, including lawyers and judges who may be impaired due to chemical abuse or dependency, behavioral addictions, depression or other mental disorders. In that circumstance, providing for ~~an exception to the reporting requirements~~ confidentiality of paragraphs (a) and (b) of this Rule information obtained by a lawyer-participant encourages lawyers and judges to participate and seek treatment through such a ~~program~~ programs. Conversely, without such ~~an exception~~ confidentiality, lawyers and judges may hesitate to seek assistance ~~from these programs~~, which may then result in additional harm to themselves, their professional careers and additional injury to the welfare of clients, and the public. ~~These Rules do not otherwise address the confidentiality of information received by a lawyer or judge.~~ The Rule therefore exempts lawyers participating in an approved lawyers assistance program; such an programs from the reporting obligation, however, of paragraphs (a) and (b) with respect to information they acquire while participating. A lawyer exempted from mandatory reporting under part (c) of the Rule may be imposed by nevertheless report misconduct in the rules of lawyer's discretion, particularly if the program impaired lawyer or other law judge indicates an intent to engage in future illegal activity, for example, the conversion of client funds. See the comments to Rule 1.6.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
- (g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation or marital status in connection with a lawyer's professional activities;

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5410 (h) commit a discriminatory act, prohibited by federal, state or local statute or ordinance,
5411 that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act
5412 reflects adversely on a lawyer's fitness as a lawyer shall be determined after
5413 consideration of all the circumstance, including:
5414 (1) the seriousness of the act,
5415 (2) whether the lawyer knew that it was prohibited by statute or ordinance,
5416 (3) whether it was part of a pattern of prohibited conduct, and
5417 (4) whether it was committed in connection with the lawyer's professional activities; or
5418
5419 (i) refuse to honor a final and binding fee arbitration award after agreeing to arbitrate a
5420 fee dispute.

5421
5422 **Comment**
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5424 [1] Lawyers are subject to discipline when they violate or attempt to violate the Rules
5425 of Professional Conduct, knowingly assist or induce another to do so or do so through the
5426 acts of another, as when they request or instruct an agent to do so on the lawyer's behalf.
5427 Paragraph (a), however, does not prohibit a lawyer from advising a client concerning
5428 action the client is legally entitled to take.

5429 [2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as
5430 offenses involving fraud and the offense of willful failure to file an income tax return.
5431 ~~However, some kinds of offenses carry no such implication. Traditionally, the distinction~~
5432 ~~was drawn in terms of offenses involving "moral turpitude." That concept can be~~
5433 ~~construed to include offenses concerning some matters of personal morality, such as~~
5434 ~~adultery and comparable offenses, that have no specific connection to fitness for the~~
5435 ~~practice of law. Although a lawyer is personally answerable to the entire criminal law, a~~
5436 ~~lawyer should be professionally answerable only for offenses that indicate lack of those~~
5437 ~~characteristics relevant to lawthe practice of law. Offenses involving violence,~~
5438 ~~dishonesty, or breach of trust, or serious interference with the administration of justice~~
5439 ~~are in that category. A pattern of repeated offenses, even ones of minor significance when~~
5440 ~~considered separately, can indicate indifference to legal obligation.~~

5441 [3] ~~— A lawyer who, in the course of representing a client, knowingly manifests by~~
5442 ~~words or conduct, bias or prejudice based upon race, sex, religion, national origin,~~
5443 ~~disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when~~
5444 ~~such actions are prejudicial to the administration of justice. Legitimate advocacy~~
5445 ~~respecting the foregoing factors does not violate paragraph (d). A trial judge's finding~~
5446 ~~that peremptory challenges were exercised on a discriminatory basis does not alone~~
5447 ~~establish a violation of this rule.~~

5448 [4] ~~— A lawyer may refuse to comply with an obligation imposed by law upon a good~~
5449 ~~faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a~~
5450 ~~good faith challenge to the validity, scope, meaning or application of the law apply to~~
5451 ~~challenges of legal regulation of the practice of law.~~

5452 [5] Lawyers holding public office assume legal responsibilities going beyond those
5453 of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the
5454 professional role of lawyersattorney. The same is true of abuse of positions of private
5455 trust such as trustee, executor, administrator, guardian, agent and officer, director or
5456 manager of a corporation or other organization.

5457 [4] Paragraph (g) specifies a particularly egregious type of discriminatory act -
5458 harassment on the basis of sex, race, age, creed, religion, color, national origin, disability,
5459 sexual orientation, or marital status. What constitutes harassment in this context may be
5460 determined with reference to antidiscrimination legislation and case law thereunder. This
5461 harassment ordinarily involves the active burdening of another, rather than mere passive
5462 failure to act properly.

5463 [5] Harassment on the basis of sex, race, age, creed, religion, color, national origin,
5464 disability, sexual orientation, or marital status may violate either paragraph (g) or
5465 paragraph (h). The harassment violates paragraph (g) if the lawyer committed it in
5466 connection with the lawyer's professional activities. Harassment, even if not committed
5467 in connection with the lawyer's professional activities, violates paragraph (h) if the
5468 harassment (1) is prohibited by antidiscrimination legislation and (2) reflects adversely
5469 on the lawyer's fitness as a lawyer, determined as specified in paragraph (h).

5470 [6] Paragraph (h) reflects the premise that the concept of human equality lies at the very
5471 heart of our legal system. A lawyer whose behavior demonstrates hostility toward or
5472 indifference to the policy of equal justice under the law may thereby manifest a lack of
5473 character required of members of the legal profession. Therefore, a lawyer's
5474 discriminatory act prohibited by statute or ordinance may reflect adversely on his or her
5475 fitness as a lawyer even if the unlawful discriminatory act was not committed in
5476 connection with the lawyer's professional activities.

5477 [7] Whether an unlawful discriminatory act reflects adversely on fitness as a lawyer is
5478 determined after consideration of all relevant circumstances, including the four factors
5479 listed in paragraph (h). It is not required that the listed factors be considered equally, nor
5480 is the list intended to be exclusive. For example, it would also be relevant that the lawyer
5481 reasonably believed that his or her conduct was protected under the state or federal
5482 constitution or that the lawyer was acting in a capacity for which the law provides an
5483 exemption from civil liability. See, e.g., Minn. Stat. Section 317A.257 (unpaid director or
5484 officer of nonprofit organization acting in good faith and not willfully or recklessly).

5485 [8] A lawyer may refuse to comply with an obligation imposed by law upon a good faith
5486 belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good
5487 faith challenge to the validity, scope, meaning or application of the law apply to
5488 challenges of legal regulation of the practice of law.

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RULE 8.5 : DISCIPLINARY AUTHORITY; CHOICE OF LAW

5491 (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject
5492 to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct
5493 occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary
5494 authority of this jurisdiction if the lawyer provides or offers to provide any legal services
5495 in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this
5496 jurisdiction and another jurisdiction for the same conduct.

5497 (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the
5498 rules of professional conduct to be applied shall be as follows:
5499 (1) for conduct in connection with a matter pending before a tribunal, the rules
5500 of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide
5501 otherwise; and

5502 (2) for any other conduct, the rules of the jurisdiction in which the lawyer's
5503 conduct occurred, or, if the predominant effect of the conduct is in a different
5504 jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall
5505 not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction
5506 in which the lawyer reasonably believes the predominant effect of the lawyer's conduct
5507 will occur.

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Comment

5510 **Disciplinary Authority**

5511 [1] It is longstanding law that the conduct of a lawyer admitted to practice in this
5512 jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the
5513 disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide
5514 legal services in this jurisdiction is for the protection of the citizens of this jurisdiction.
5515 Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further
5516 advance the purposes of this Rule. See, Rules 6 and 22, *ABA Model Rules for Lawyer*
5517 *Disciplinary Enforcement*. A lawyer who is subject to the disciplinary authority of this
5518 jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to
5519 receive service of process in this jurisdiction. The fact that the lawyer is subject to the
5520 disciplinary authority of this jurisdiction may be a factor in determining whether personal
5521 jurisdiction may be asserted over the lawyer for civil matters.

5522 **Choice of Law**

5523 [2] A lawyer may be potentially subject to more than one set of rules of professional
5524 conduct which impose different obligations. The lawyer may be licensed to practice in
5525 more than one jurisdiction with differing rules, or may be admitted to practice before a
5526 particular court with rules that differ from those of the jurisdiction or jurisdictions in
5527 which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve
5528 significant contacts with more than one jurisdiction.

5529 [3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that
5530 minimizing conflicts between rules, as well as uncertainty about which rules are
5531 applicable, is in the best interest of both clients and the profession (as well as the bodies
5532 having authority to regulate the profession). Accordingly, it takes the approach of (i)
5533 providing that any particular conduct of a lawyer shall be subject to only one set of rules
5534 of professional conduct, (ii) making the determination of which set of rules applies to
5535 particular conduct as straightforward as possible, consistent with recognition of
5536 appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection
5537 from discipline for lawyers who act reasonably in the face of uncertainty.

5538 [4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding
5539 pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction
5540 in which the tribunal ~~sites~~sits unless the rules of the tribunal, including its choice of law
5541 rule, provide otherwise. As to all other conduct, including conduct in anticipation of a
5542 proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer
5543 shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or,
5544 if the predominant effect of the conduct is in another jurisdiction, the rules of that
5545 jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a
5546 proceeding that is likely to be before a tribunal, the predominant effect of such conduct
5547 could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

5548 [5] When a lawyer's conduct involves significant contacts with more than one
5549 jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct
5550 will occur in a jurisdiction other than the one in which the conduct occurred. So long as
5551 the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer
5552 reasonably believes the predominant effect will occur, the lawyer shall not be subject to
5553 discipline under this Rule.

5554 [6] If two admitting jurisdictions were to proceed against a lawyer for the same
5555 conduct, they should, applying this rule, identify the same governing ethics rules. They
5556 should take all appropriate steps to see that they do apply the same rule to the same
5557 conduct, and in all events should avoid proceeding against a lawyer on the basis of two
5558 inconsistent rules.

5559 [7] The choice of law provision applies to lawyers engaged in transnational practice,
5560 unless international law, treaties or other agreements between competent regulatory
5561 authorities in the affected jurisdictions provide otherwise.

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Adopted by the MSBA General Assembly June 20, 200