# PREAMBLE AND SCOPE

**PREAMBLE:**

**A LAWYER'S RESPONSIBILITIES**

1. 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. 2 As a representative of clients, a lawyer performs various func­ tions. As advisor, a lawyer provides a client with an informed under­ standing 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 an evaluator, a lawyer acts by exam­ ining a client's legal affairs and reporting about them to the client or to others.
3. 3 In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the par­ ties to resolve a dispute or other matter. Some of these Rules apply di­ rectly 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 en­ gaging in conduct involving dishonesty, fraud, deceit or misrepresenta­ tion. See Rule 8.4.
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 disclo­ sure is required or permitted by the Rules of Professional Conduct or other law.
5. 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 law-

**ABA MODEL RULES**

yer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

1. 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 pub­ lic'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 law­ yer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, can­ not 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.

1. 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 ap­ probation of professional peers. A lawyer should strive to attain the high­ est level of skill, to improve the law and the legal profession and to exem­ plify the legal profession's ideals of public service.
2. 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 con­ fidences 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.
3. 9 In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict behveen 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,

**PREAMBLE AND SCOPE**

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 per­ sons involved in the legal system.

1. 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 be­ tween the profession and the processes of government and law enforce­ ment. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.
2. 11 To the extent that lawyers meet the obligations of their profes­ sional 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 impor­ tant force in preserving government under law, for abuse of legal author­ ity is more readily challenged by a profession whose members are not dependent on government for the right to practice.
3. 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 law­ yer 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.
4. 13 Lawyers play a vital role in the preservation of society. The ful­ fillment of this role requires an understanding by lawyers of their rela­ tionship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

**SCOPE**

1. 14 The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representa­ tion 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

**ABA MODEL RULES**

permissive and define areas under the Rules in which the lawyer has dis­ cretion 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 disciplin­ ary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Com­ ments do not add obligations to the Rules but provide guidance for prac­ ticing in compliance with the Rules.

1. 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] 16 Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, sec­ ondarily 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. The Rules simply provide a framework for the ethical practice of law.

(17] 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 du­ ties flowing from the client-lawyer relationship attach only after the cli­ ent 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) 18 Under various legal provisions, including constitutional, statu­ tory 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

**PREAMBLE AND SCOPE**

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 con­ tr wersies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

1. 19 Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presup­ pose 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 circum­ stances, such as the willfulness and seriousness of the violation, extenuat­ ing factors and whether there have been previous violations.
2. 20 Violation of a Rule should not itself give rise to a cause of ac­ tion 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 dis­ qualification 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 sub­ verted when they are invoked by opposing parties as procedural weap­ ons. 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 au­ thority, 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.
3. 21The 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

1. 1.0a "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.
2. 1.0b "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 (e) 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.
3. 1.0c "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.
4. 1.0d "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.
5. 1.0e "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.

1. 1.0f "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.
2. 1.0g "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.
3. 1.0h "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.
4. 1.0i "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.
5. 1.0j "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.

Rule 1.0 ABA MODEL RULES

1. **1.0k "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.**

**(1) 1.0L "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.**

1. **1.0m "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.**

1. **1.0n "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. 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***

1. Whether two or more lawyers constitute a firm within paragraph

(c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinar­ ily would not be regarded as constituting a firm. However, if they pres­ ent 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 as­ sociated lawyers are relevant in determining whether they are a firm, as



**TERMINOLOGY Rule 1.0**

is the fact that they have mutual access to information concerning the cli­ ents 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.

1. With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Profes­ sional 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 di­ rectly employed. A similar question can arise concerning an unincorpo­ rated association and its local affiliates.
2. 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*

1. When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or proce­ dural 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*

1. 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 cli­ ent or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules l.2(c), l.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circum­ stances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person

**Rule 1.0 ABA MODEL RULES**

possesses information reasonably adequate to make an informed deci­ sion. Ordinarily, this will require communication that includes a disclo­ sure of the facts and circumstances giving rise to the situation, any ex­ planation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of con­ duct and a discussion of the client's or other person's options and alterna­ tives. 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 per­ sonally 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 rea­ sonably 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 indepen­ dently 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 in­ formed consent.

1. Obtaining informed consent will usually require an affirmative

response by the client or other person. In general, a lawyer may not as­ sume 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 re­ quire that a person's consent be confirmed in writing. See Rules l.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be ob­ tained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

###### Screened

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

1. The purpose of screening is to assure the affected parties that con­ fidential information known by the personally disqualified lawyer re­ mains protected. The personally disqualified lawyer should acknowledge

**CLIENT-LAWYER RELATIONSHIP Rule 1.1**

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 disquali­ fied lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circum­ stances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to under­ take 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 information, including information in elec­ tronic form, 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 information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

1. In order to be effective, screening measures must be imple­ mented as soon as practical after a lawyer or law firm knows or reason­ ably should know that there is a need for screening.

# CLIENT-LAWYER RELATIONSHIP

**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 knowl­ edge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general ex­ perience, 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

**Rule 1.1 ABA MODEL RULES**

required proficiency is that of a general practitioner. Expertise in a par­ ticular field of law may be required in some circumstances.

1. A lawyer need not necessarily have special training or prior ex­

perience to handle legal problems of a type with which the lawyer is un­ familiar. 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 de­ termining 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 nec­ essary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question .

1. In an emergency a lawyer may give advice or assistance in a mat­ ter 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 ac­ tion under emergency conditions can jeopardize the client's interest.
2. 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 per­ son. See also Rule 6.2.

*Thoroughness and Preparation*

1. 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 practitio­ ners. 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 be­ tween the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule l.2(c).

###### Retaining or Contracting With Other Lawyers

1. Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal ser­ vices to ,1 client, the lawyer should ordinarily obtain informed consent

**CLIENT-LAWYER RELATIONSHIP Rule 1.2**

from the client and must reasonably believe that the other lawyers' ser­ vices will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.S(e) (fee sharing), 1.6 (confidentiality), and 5.S(a) (unau­ thorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and repu­ tation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

1. When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule

1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

***Maintaining Competence***

1. To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the ben­ efits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education re­ quirements to which the lawyer is subject.

**Definitional Cross-References**

"Reasonably" *See* Rule l.O(h)

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

* 1. **1.2a 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**

Rule 1.2 ABA MODEL RULES

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.

* 1. 1.2b 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.

* 1. 1.2c A lawyer may limit the scope of the representation if the

limitation is reasonable under the circumstances and the client gives informed consent.

* 1. 1.2d 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

[l] 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 de­ cisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule l.4(a)(l) 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 l.4(a)(2) and may take such ac­ tion as is impliedly authorized to carry out the representation.

1. On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients nor­ mally defer to the special knowledge and skill of their lawyer with re­ spect 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 cli­ ent might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how

**CLIENT-LAWYER RELATIONSHIP Rule 1.2**

such disagreements are to be resolved. Other law, however, may be ap­ plicable 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 funda­ mental disagreement with the client, the lawyer may withdraw from the representation. See Rule l.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule l.16(a)(3).

1. At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further con­ sultation. 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.
2. In a case in which the client appears to be suffering 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*

1. Legal representation should not be denied to people who are un­ able 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

1. The scope of services to be provided by a lawyer may be lim­ ited by agreement with the client or by the terms under which the law­ yer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the repre­ sentation 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 rep­ resentation is undertaken may exclude specific means that might other­ wise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer re­ gards as repugnant or imprudent.
2. Although this Rule affords the lawyer and client substantial lati­ tude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to secur­ ing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and

**Rule 1.2 ABA MODEL RULES**

client may agree that the lawyer's services will be limited to a brief tele­ phone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the cli­ ent 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.

1. 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***

1. 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 ac­ tual 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.
2. 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 deliv­ ering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue as­ sisting 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.
3. Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.
4. Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a trans­ action to effectuate criminal or fraudulent avoidance of tax liability. Para­ graph (d) does not preclude undertaking a criminal defense incident to a

**CLIENT-LAWYER RELATIONSHIP Rule 1.3**

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 disobe­ dience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

1. If a lawyer comes to know or reasonably should know that a cli­

ent 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 instruc­ tions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

**Definitional Cross-References** "Fraudulent" *See* Rule 1.0(d) "Informed consent" *See* Rule l.O(e) "Knows" *See* Rule 1.0(f) "Reasonable" *See* Rule l.O(h)

**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 op­ position, 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 dedi­ cation 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 advan­ tage 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

**Rule 1.3 ABA MODEL RULES**

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 posi­ tion 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 pre­ clude the lawyer from agreeing to a reasonable request for a postpone­ ment that will not prejudice the lawyer's client.

1. 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 rela­ tionship 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 con­ tinuing 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 sup­ pose 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 ad­ ministrative 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 pos­ sibility of appeal before relinquishing responsibility for the ma tter. 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.
2. To prevent neglect of client matters in the event of a sole practitio­ ner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that des­ ignates 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 Asso­ ciation 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).

**Definitional Cross-References**

"Reasonable" *Sec* Rule 1.0(h)

CLIENT-LAWYER RELATIONSHIP Rule 1.4

**RULE 1.4: COMMUNICATION**

* 1. **1.4a A lawyer shall:**
     1. **1.4a1 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. **1.4a2 reasonably consult with the client about the means by which the client's objectives are to be accomplished;**
     3. **1.4a3 keep the client reasonably informed about the status of the matter;**
     4. **1.4a4 promptly comply with reasonable requests for**

**information; and**

* + 1. **1.4a5 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.**
  1. **1.4b 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*

1. If these Rules require that a particular decision about the repre­ sentation be made by the client, paragraph (a)(l) requires that the lawyer promptly consult with and secure the client's consent prior to taking ac­ tion 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 pro­ posal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule l.2(a).
2. Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objec­ tives. In some situations-depending on both the importance of the ac­ tion under consideration and the feasibility of consulting with the client

-this duty will require consultation prior to taking action. In other cir-

**Rule 1.4 ABA MODEL RULES**

cumstances, 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 reason­ ably to inform the client of actions the lawyer has taken on the client's be­ half. Additionally, paragraph (a)(3) requires that the lawyer keep the cli­ ent reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

1. 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 infor­ mation, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a mem­ ber of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

*Explaining Matters*

1. The client should have sufficient information to participate intel­ ligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is will­ ing 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 are likely to result in significant expense or to injure or coerce oth­ ers. On the other hand, a lawyer ordinarily will not be expected to de­ scribe 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 cli­ ent's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a repre­ sentation affected by a conflict of interest, the client must give informed consent, as defined in Rule l.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 cxc1mple, where the client is a child or suffers from diminished capacity.

**CLIENT-LAWYER RELATIONSHIP Rule 1.5**

See Rule 1.14. When the client is an organization or group, it is often im­ possible 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***

1. In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react im­ prudently to an immediate communication. Thus, a lawyer might with­ hold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not with­ hold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders govern­ ing 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.

**Definitional Cross-References** "Informed consent" *See* Rule l.O(e) "Knows" *See* Rule l.O(f) "Reasonably" *See* Rule l.O(h)

**RULE 1.5: FEES**

* 1. **1.5a 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. **1.5a1 the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;**
    2. **1.5a2 the likelihood,** if **apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;**
    3. **1.5a3 the fee customarily charged in the locality for similar legal services;**
    4. **1.5a4 the amount involved and the results obtained;**

Rule 1.5 ABA MODEL RULES

* + 1. 1.5a5 the time limitations imposed by the client or by the circumstances;
    2. 1.5a6 the nature and length of the professional relationship

with the client;

* + 1. 1.5a7 the experience, reputation, and ability of the lawyer or lawyers performing the services; and
    2. 1.5a8 whether the fee is fixed or contingent.
  1. 1.5b 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.
  2. 1.5c 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.

* 1. 1.5d A lawyer shall not enter into an arrangement for, charge, or collect:
     1. 1.5d1 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

* + 1. 1.5d2 a contingent fee for representing a defendant in a criminal case.
  1. 1.5e A division of a fee between lawyers who are not in the same firm may be made only if:

CLIENT-LAWYER RELATIONSHIP Rule 1.5

* + 1. **1.5e1 the division is in proportion to the services performed** by **each lawyer or** each **lawyer** assumes joint **responsibility** for **the representation;**
    2. **1.5e2 the client** agrees **to the arrangement, including the** share

**each** lawyer will receive, and the agreement is confirmed in

**writing; and**

* + 1. **1.5e3 the total** fee is reasonable.

### Comment

###### Reasonableness of Fee and Expenses

1. Paragraph (a) requires that lawyers charge fees that are reason­ able 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

1. When the lawyer has regularly represented a client, they ordi­ narily 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 law­ yer'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.
2. Contingent fees, like any other fees, are subject to the reason­ ableness 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 limita­ tions on contingent fees, such as a ceiling on the percentage allowable, or

**Rule 1.5 ABA MODEL RULES**

may require a lawyer to offer clients an alternative basis for the fee. Ap­ plicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

*Terms of Payment*

1. A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule l.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 l.8(a) because such fees often have the essential qualities of a business transaction with the client.
2. 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 prob­ ably 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 de­ fine 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

1. Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the se­ curing 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

1. 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 fa­ cilitates association of more than one lawyer in a matter in which neither c1lone could serve the client as well, and most often is used when the fee

**CLIENT-LA WYER RELATIONSHIP Rule 1.6**

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 repre­ sentation 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.

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

###### Disputes over Fees

1. 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 submit­ ting 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.

**Definitional Cross-References** "Confirmed in writing" *See* Rule l.O(b) "Firm" *See* Rule l.O(c)

"Writing" and "Written" and "Signed" *See* Rule 1.0(n)

**RULE 1.6: CONFIDENTIALITY OF INFORMATION**

* 1. **1.6a A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure** is **impliedly authorized in order to carry out the representation or the disclosure** is **permitted by paragraph (b**).
  2. **1.6b A lawyer may reveal information relating to the**

Rule 1.6 ABA MODEL RULES

representation of a client to the extent the lawyer reasonably believes necessary:

* + 1. 1.6b1 to prevent reasonably certain death or substantial

bodily harm;

* + 1. 1.6b2 to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
    2. 1.6b3 to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
    3. 1.6b4 to secure legal advice about the lawyer's compliance with these Rules;
    4. 1.6b5 to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or

to respond to allegations in any proceeding concerning the lawyer's representation of the client;

* + 1. 1.6b6 to comply with other law or a court order; or
    2. 1.6b7 to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
  1. 1.6c A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment

1. This Rule governs the disclosure by a lawyer of information relat­ ing 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 informa­ tion 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 rep­ resentation of a former client and Rules l.8(b) and 1.9(c)(l) for the law­ yer's duties with respect to the use of such information to the disadvan­ tage of clients and former clients.

**CLIENT-LAWYER RELATIONSHIP Rule** 1.6

1. A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not re­ veal information relating to the representation. See Rule l.O(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encour­ aged 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.
2. 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 eth­ ics. The attorney-client privilege and work product doctrine apply in ju­ dicial and other proceedings in which a lawyer may be called as a wit­ ness 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 commu­ nicated 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.
3. Paragraph (a) prohibits a lawyer from revealing information relat­ ing to the representation of a client. This prohibition also applies to dis­ closures by a lawyer that do not in themselves reveal protected informa­ tion 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 likeli­ hood that the listener will be able to ascertain the identity of the client or the situation involved.

***Authorized Disclosure***

1. Except to the extent that the client's instructions or special cir­ cumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the represen-

**Rule** 1.6 **ABA MODEL RULES**

tation. In some situations, for example, a lawyer may be impliedly au­ thorized 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*

1. 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)(l) 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 dis­ charged toxic waste into a town's water supply may reveal this informa­ tion to the authorities if there is a present and substantial risk that a per­ son 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.
2. Paragraph (b)(2) is a limited exception to the rule of confidential­ ity that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the cli­ ent from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or prop­ erty interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule l.2(d). See illso Ruic 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule l.13(c), which permits the lawyer, where the client is an organization, to revcill information relating to the representation in limited circumstances.

**CLIENT-LAWYER RELATIONSHIP Rule 1.6**

1. Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consum­ mated. Although the client no longer has the option of preventing disclo­ sure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information re­ lating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for represen­ tation concerning that offense.
2. A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal re­ sponsibility 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)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.
3. Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involv­ ing 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)(5) does not require the lawyer to await the commencement of an action or proceed­ ing 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.
4. A lawyer entitled to a fee is permitted by paragraph (b)(S) 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.

**Rule 1.6 ABA MODEL RULES**

1. 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 relat­ ing to the representation appear·s 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)(6) permits the lawyer to make such disclosures as are nec­ essary to comply with the law.

###### Detection of Conflicts of Interest

1. Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a law­ yer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions re­ garding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any informa­ tion is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seek­ ing advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce be­ fore the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohib­ its disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.
2. Any information disclosed pursuant to paragraph (b)(7) may

be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursu-

**CLIENT-LAWYER RELATIONSHIP Rule** 1.6

ant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclo­ sure of information within a law firm when the disclosure is otherwise authorized, see Comment [S], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve con­ flicts of interest that could arise in connection with undertaking a new representation.

1. A lawyer may be ordered to reveal information relating to the

representation of a client by a court or by another tribunal or governmen­ tal entity claiming authority pursuant to other law to compel the disclo­ sure. 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 ofappeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to com­ ply with the court's order.

1. 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 disclo­ sure. 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.
2. Paragraph (b) permits but does not require the disclosure of in­ formation relating to a client's representation to accomplish the purposes specified in paragraphs (b)(l) through (b)(6). 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 deci­ sion 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 para­ graph (b). See Rules l.2(d), 4.l(b), 8.1 and 8.3. Rule 3.3, on the other hand,

Rule 1.6 **ABA MODEL RULES**

requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

*Acting Competently to Preserve Confidentiality*

1. Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthor­ ized access by third parties and against inadvertent or unauthorized dis­ closure by the lawyer or other persons who are participating in the rep­ resentation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the like­ lihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safe­ guards, and the extent to which the safeguards adversely affect the law­ yer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would oth­ erwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to com­ ply with other law, such as state and federal laws that govern data pri­ vacy or that impose notification requirements upon the loss of, or unau­ thorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers

outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

1. 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 un­ intended 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

32

**CLIENT-LAWYER RELATIONSHIP Rule** 1.7

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. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

***Former Client***

(20] The duty of confidentiality continues after the client-lawyer rela­ tionship has terminated. See Rule l.9(c)(2). See Rule l.9(c)(l) for the pro­ hibition against using such information to the disadvantage of the former client.

**Definitional Cross-References**

"Firm" *See* Rule l.0(c) "Fraud" *See* Rule 1.0(d)

"Informed consent" *See* Rule l.0(e) "Reasonable" and "Reasonably" *See* Rule l.0(h) "Reasonably believes" *See* Rule 1.0(i) "Substantial" *See* Rule 1.0(1)

**RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS**

1. **1.7a 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. **1.7a1 the representation of one client will be directly adverse to another client; or**
   2. **1.7a2 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.**

1. **1.7b Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client** if:
   1. **1.7b1 the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;**
   2. **1.7b2 the representation is not prohibited by law;**
   3. **1.7b3 the representation does not involve the assertion of a claim by one client against another client represented by**

**Rule 1.7 ABA MODEL RULES**

**the lawyer in the same litigation or other proceeding before a tribunal; and**

* 1. **1.7b4 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 re­ garding 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(e) and (b).
2. Resolution of a conflict of interest problem under this Rule re­ quires 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 re­ ferred to in paragraph (a)(l) and the one or more clients whose represen­ tation might be materially limited under paragraph (a)(2).
3. A conflict of interest may exist before representation is under­ taken, 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 law­ yer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litiga­ tion matters the persons and issues involved. See also Comment to Rule

5.1. Ignorance caused by a failure to institute such procedures will not ex­ cuse a lawyer's violation of this Rule. As to whether a client-lawyer rela­ tionship exists or, having once been established, is continuing, see Com­ ment to Rule 1.3 and Scope.

[4I 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 condi­ tions of paragraph (b). See Rule 1.16. Where more than one client is in-

**CLIENT-LA WYER RELATIONSHIP Rule** 1.7

volved, 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].

1. Unforeseeable developments, such as changes in corporate and

other organizational affiliations or the addition or realignment of par­ ties 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. Depend­ ing 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*

1. 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 mat­ ter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the rep­ resentation 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 re­ quire consent of the respective clients.

**Rule 1.7 ABA MODEL RULES**

1. 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 under­ take the representation without the informed consent of each client.

*Identifying Conflicts of Interest:*

*Material Limitation*

1. 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, rec­ ommend 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 re­ quire disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will ma­ terially 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

*Fonner Clients and Other Third Persons*

1. In addition to conflicts with other current clients, a lawyer's du­ ties of loyalty and independence may be materially limited by responsi­ bilities 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

1. 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 employ­ ment with an opponent of the lawyer's client, or with a law firm repre-

**CLIENT-LAWYER RELATIONSHIP Rule 1.7**

senting the opponent, such discussions could materially limit the law­ yer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by refer­ ring clients to an enterprise in which the lawyer has an undisclosed fi­ nancial 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).

1. When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or mar­ riage, there may be a significant risk that client confidences will be re­ vealed 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 represen­ tation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sib­ ling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives in­ formed consent. The disqualification arising from a close family relation­ ship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.
2. 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 l.8(j).

#### Interest of Person Paying for a Lawyer's Service

1. A lawyer may be paid from a source other than the client, in­ cluding 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(£). If acceptance of the payment from any other source presents a significant risk that the law­ yer's representation of the client will be materially limited by the law­ yer'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.

**Rule 1.7 ABA MODEL RULES**

*Prohibited Representations*

1. Ordinarily, clients may consent to representation notwithstand­ ing 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 ques­ tion of consentability must be resolved as to each client.
2. 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)(l), representation is pro­ hibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent represen­ tation. See Rule 1.1 (competence) and Rule 1.3 (diligence).
3. Paragraph (b)(2) describes conflicts that are nonconsentable be­ cause the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not rep­ resent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed con­ sent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.
4. Paragraph (b)(3) describes conflicts that are nonconsentable be­ cause of the institutional interest in vigorous development of each cli­ ent'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 para­ graph 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 l.0(m)), such representation may be pre­ cluded by paragraph (b)(l).

###### Informed Consent

1. Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foresee­ able ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required

**CLIENT-LAWYER RELATIONSHIP Rule** 1.7

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 representa­ tion, including possible effects on loyalty, confidentiality and the attor­ ney-client privilege and the advantages and risks involved. See Com­ ments [30] and [31] (effect of common representation on confidentiality).

1. Under some circumstances it may be impossible to make the dis­ closure necessary to obtain consent. For example, when the lawyer repre­ sents 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 secur­ ing 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***

1. Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a docu­ ment executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule l.0(b). See also Rule l.0(n) (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 l.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 al­ ternatives and to raise questions and conce rns. Rather, the writing is re­ quired 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

1. A client who has given consent to a conflict may revoke the con­ sent and, like any other client, may terminate the lawyer's representation

**Rule 1.7 ABA MODEL RULES**

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 cli­ ent revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detri­ ment to the other clients or the lawyer would result.

*Consent to Future Conflict*

1. Whether a lawyer may properly request a client to waive con­ flicts 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, par­ ticularly 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 set­ tlement of the clciims or liabilities in question. Such conflicts can arise in

**CLIENT-LAWYER RELATIONSHIP Rule** 1.7

criminal cases as well as civil. The potential for conflict of interest in rep­ resenting 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 interests in civil litigation is proper if the requirements of paragraph (b) are met.

1. Ordinarily a lawyer may take inconsistent legal positions in dif­ ferent 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 ac­ tion on behalf of one client will materially limit the lawyer's effective­ ness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or proce­ dural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.
2. When a lawyer represents or seeks to represent a class of plain­ tiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for pur­ poses of applying paragraph (a)(l) 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 seek­ ing 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*

[26J Conflicts of interest under paragraphs (a)(l) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse con­ flicts in transactional matters, see Comment [7]. Relevant factors in de­ termining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the

**Rule 1.7 ABA MODEL RULES**

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 de­ gree. See Comment [8].

1. 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 under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

1. 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 com­ mon 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 cli­ ents on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepre­ neurs, 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*

1. 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 re­ sult 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 exam­ ple, a lawyer cannot undertake common representation of clients where

**CLIENT-LAWYER RELATIONSHIP Rule 1.7**

contentious litigation or negotiations between them are imminent or con­ templated. Moreover, because the lawyer is required to be impartial be­ tween commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Gener­ ally, if the relationship between the parties has already assumed antago­ nism, 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 con­ tinuing basis and whether the situation involves creating or terminating a relationship between the parties.

1. A particularly important factor in determining the appropriate­ ness of common representation is the effect on client-lawyer confidenti­ ality 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.
2. As to the duty of confidentiality, continued common representa­ tion will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common repre­ sentation. 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 bear­ ing 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 rep­ resentation 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 ma­ terial to the representation should be kept from the other. In limited cir­ cumstances, it may be appropriate for the lawyer to proceed with the rep­ resentation 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 in­ volving a joint venture between the clients and agree to keep that infor­ mation confidential with the informed consent of both clients.
3. When seeking to establish or adjust a relationship between cli­ ents, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that

**Rule 1.7 ABA MODEL RULES**

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).

1. Subject to the above limitations, each client in the common rep­ resentation has the right to loyal and diligent representation and the pro­ tection 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

1. A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any con­ stituent or affiliated organization, such as a parent or subsidiary. See Rule l.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 cli­ ent 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 organiza­ tional client or the new client are likely to limit materially the lawyer's representation of the other client.
2. A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the respon­ sibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Con­ sideration 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 obtain­ ing legal advice from another lawyer in such situations. If there is mate­ rial 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 law­ yer 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.

CLIENT-LAWYER RELATIONSHIP Rule 1.8

Definitional Cross-References "Confirmed in writing" *See* Rule 1.0(b) 11 Informed consent" *See* Rule l.O(e) "Reasonably believes" *See* Rule 1.0(i) "Tribunal" *See* Rule l.O(m)

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

1. 1.8a 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. 1.8a1 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. 1.8a2 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

* 1. 1.8a3 the client gives informed consent, in a writing signed by the client, 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.

1. 1.8b 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.
2. 1.8c A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
3. 1.8d 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.

Rule 1.8 ABA MODEL RULES

1. 1.8e A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
   1. 1.8e1 a lawyer may advance court costs and expenses of

litigation, the repayment of which may be contingent on the outcome of the matter; and

* 1. 1.8e2 a lawyer representing an indigent client may pay court

costs and expenses of litigation on behalf of the client.

1. 1.8f A lawyer shall not accept compensation for representing a client from one other than the client unless:
   1. 1.8f1 the client gives informed consent;
   2. 1.8f2 there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
   3. 1.8f3 information relating to representation of a client is

protected as required by Rule 1.6.

1. 1.8g A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, 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 or pleas involved and of the participation of each person in the settlement.
2. 1.8h A lawyer shall not:
   1. 1.8h1 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. 1.8h2 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.
3. 1.8i 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. 1.8i1 acquire a lien authorized by law to secure the lawyer's fee or expenses; and
   2. 1.8i2 contract with a client for a reasonable contingent fee in a civil case.

CLIENT-LAWYER RELATIONSHIP Rule 1.8

1. 1.8j A lawyer shall not **have sexual** relations **with a client** unless a consensual sexual relationship **existed** between **them when the client-lawyer relationship commenced.**
2. **1.8k 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 para­ graph (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 ar­ rangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an in­ terest 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, bank­ ing 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)(l) requires that the transaction itself be fair to the

client and that its essential terms be communicated to the client, in writ­ ing, 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

**Rule 1.8 ABA MODEL RULES**

writing signed by the client, both to the essential terms of the transac­ tion 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).

1. 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 fi­ nancial interest otherwise poses a significant risk that the lawyer's repre­ sentation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the law­ yer 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 ad­ viser 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 cli­ ent's consent to the transaction.
2. If the client is independently represented in the transaction, para­

graph (a)(2) of this Rule is inapplicable, and the paragraph (a)(l) require­ ment 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 reason­ able to the client as paragraph (a)(l) further requires.

*Use of Information Related to Representation*

1. Use of information relating to the representation to the disadvan­ tage of the client violates the lawyer's duty of loyalty. Paragraph (b) ap­ plies 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 ex­ ample, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to pur­ chase 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 repre-

**CLIENT-LAWYER RELATIONSHIP Rule 1.8**

sentation 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 l.2(d), 1.6, 1.9(c), 3.3, 4.l(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 pres­ ent given at a holiday or as a token of appreciation is permitted. If a cli­ ent offers the lawyer a more substantial gift, paragraph (c) does not pro­ hibit 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).

1. 'If effectuation of a substantial gift requires preparing a legal in­ strument such as a will or conveyance, the client should have the de­ tached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.
2. 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 con­ cerning the choice of an executor or other fiduciary. In obtaining the cli­ ent's informed consent to the conflict, the lawyer should advise the clierit 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

1. 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. Mea­ sures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does

**Rule 1.8 ABA MODEL RULES**

not prohibit a lawyer representing a client in a transaction concerning lit­ erary 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*

1. Lawyers may not subsidize lawsuits or administrative proceed­ ings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encour­ age 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 lend­ ing 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 allow­ ing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

1. Lawyers are frequently asked to represent a client under circum­ stances 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 corpora­ tion sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, in­ cluding interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are pro­ hibited from accepting or continuing such representations unless the law­ yer determines that there will be no interference with the lawyer's inde­ pendent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's pro­ fessional judgment by one who recommends, employs or pays the lawyer to render legal services for another).
2. Sometimes, it will be sufficient for the lawyer to obtain the cli­ ent's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a con­ flict 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 concern-

**CLIENT-LAWYER RELATIONSHIP Rule 1.8**

ing 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 ma­ terially 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 ac­ cept or continue the representation with the informed consent of each af­ fected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

***Aggregate Settlements***

1. Differences in willingness to make or accept an offer of settle­ ment 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 pro­ cess 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 offer is accepted. See also Rule l.O(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defen ­ dants, 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 mem­ bers and other procedural requirements designed to ensure adequate protection of the entire class.

##### Limiting Liability and Settling Malpractice Claims

1. Agreements prospectively limiting a lawyer's liability for mal­ practice 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 agree­ ment. This paragraph does not, however, prohibit a lawyer from enter­ ing into an agreement with the client to arbitrate legal malpractice claims,

**Rule 1.8 ABA MODEL RULES**

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 notifi­ cation 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.

1. 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 ap­ propriateness 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*

1. 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 in­ clude 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 law­ yer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of para­ graph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

**CLIENT-LAWYER RELATIONSHIP Rule 1.8**

*Client-Lawyer Sexual Relationships*

1. 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 be­ tween 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 judg­ ment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client con­ fidences 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 ad­ equate informed consent, this Rule prohibits the lawyer from having sex­ ual relations with a client regardless of whether the relationship is con­ sensual and regardless of the absence of prejudice to the client.
2. Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary rela­ tionship and client dependency are diminished when the sexual relation­ ship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circum­ stances, the lawyer should consider whether the lawyer's ability to rep­ resent the client will be materially limited by the relationship. See Rule l.7(a)(2).
3. When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or out­ side counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that law­ yer concerning the organization's legal matters.

#### Imputation of Prohibitions

1. Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associ­ ated 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

Rule 1.8 ABA MODEL RULES

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 ap­ plied to associated lawyers.

Definitional Cross-References

"Firm" *See* Rule l.O(c)

"Informed consent" *See* Rule l.O(e) "Knowingly" *See* Rule 1.0(f) "Substantial" *See* Rule 1.0(1)

"Writing" and "Signed" *See* Rule l.O(n)

RULE 1.9: DUTIES TO FORMER CLIENTS

* 1. 1.9a 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.
  2. 1.9b 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

* + 1. 1.9b1 whose interests are materially adverse to that person; and
    2. 1.9b2 about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

* 1. 1.9c 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. 1.9c1 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

* + 1. 1.9c2 reveal information relating to the representation except as these Rules would permit or require with respect to a client.

**CLIENT-LAWYER RELATIONSHIP Rule 1.9**

**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 per­ son 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 gov­ ernment 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 represent­ ing 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 mil­ itary 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 finan­ cial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously rep­ resented a client in securing environmental permits to build a shopping

**Rule 1.9 ABA MODEL RULES**

center would be precluded from representing neighbors seeking to op­ pose rezoning of the property on the basis of environmental consider­ ations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shop­ ping 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 repre­ sentations 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 for­ mer 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*

1. When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake rep­ resentation is more complicated. There are several competing consider­ ations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not com­ promised. 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 asso­ ciations and taking on new clients after having left a previous associa­ tion. 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 op­ portunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

**CLIENT-LAWYER RELATIONSHIP Rule 1.9**

1. Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules

1.6 and l.9(c). Thus, if a lawyer while with one firm acquired no knowl­ edge 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 l.lO(b) for the restrictions on a firm once a lawyer has termi­ nated association with the firm.

1. Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that rea­ sonably 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 in­ ferred 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 af­ fairs 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 in­ quiry, the burden of proof should rest upon the firm whose disqualifica­ tion is sought.
2. Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve con­ fidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).
3. Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or re­ vealed 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 repre­ senting another client.
4. 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(e). With regard to the effectiveness of an advance waiver, see Com­ ment [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 1.9 ABA MODEL RULES

Definitional Cross-References "Confirmed in writing" *See* Rule 1.0(b) "Firm" *See* Rule 1.0(c)

"Informed consent" *See* Rule l.0(e)

"Knowingly" and "Known" *See* Rule 1.0(f) "Writing" *See* Rule l.0(n)

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

* 1. 1.10a 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
     1. 1.10a1 the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
     2. 1.10a2 the prohibition is based upon Rule 1.9(a) or (b), and arises out of the disqualified lawyer's association with a prior firm, and
        1. 1.10a21 the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
        2. 1.10a22 written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement

that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

* + - 1. 1.10a23 certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.
  1. 1.10b When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person

CLIENT-LA WYER RELATIONSHIP Rule 1.10

**with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:**

* + 1. **1.10b1 the matter** is **the same or substantially related to that in**

**which the formerly associated lawyer represented the client; and**

* + 1. **1.10b2 any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.**
  1. **1.10c A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.**
  2. **1.10d 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 depart­ ment of a corporation or other organization. See Rule l.O(c). 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

1. 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)(l) 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 l.9(b) and l.10(a)(2) and l.lO(b).
2. The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential informa­ tion are presented. Where one lawyer in a firm could not effectively rep­ resent 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,

**Rule 1.10 ABA MODEL RULES**

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 loy­ alty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

1. 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 act­ ing because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, or­ dinarily 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 l.0(k) and 5.3.

1. Rule l.lO(b) operates to permit a law firm, under certain circum­ stances, 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 repre­ sented 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 vio­ late 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).
2. Rule l.lO(c) 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 rep­ resentation is not prohibited by Rule l.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 cli­ ent waivers of conflicts that might arise in the future, see Rule 1.7, Com­ ment [22]. For a definition of informed consent, see Rule 1.0(e).
3. Rule 1.10(a)(2) similarly removes the imputation otherwise re­ quired by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A de­ scription of effective screening mechanisms appears in Rule l.0(k). Law-

**CLIENT-LAWYER RELATIONSHIP Rule 1.10**

yers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

1. Paragraph (a)(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 re­ lated to the matter in which the lawyer is disqualified.
2. The notice required by paragraph (a)(2)(ii) generally should in­ clude a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes appar­ ent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been dis­ closed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.
3. The certifications required by paragraph (a)(2)(iii) give the for­ mer client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely im­ plementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.
4. Where a lawyer has joined a private firm after having repre­ sented the government, imputation is governed by Rule 1.ll(b) and (c), not this Rule. Under Rule l.11(d), where a lawyer represents the govern­ ment 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 dis­ qualified lawyer.
5. Where a lawyer is prohibited from engaging in certain transac­ tions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, deter­ mines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

**Definitional Cross-References**

"Firm" *See* Rule l.O(c) "Knowingly" *See* Rule l.O(f) "Partner" *See* Rule l.O(g) "Screened" *See* Rule l.O(k) "Tribunal" *See* Rule l.O(m) "Written" *See* Rule l.O(n)

Rule 1.11 ABA MODEL RULES

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

1. 1.11a Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
   1. 1.11a1 is subject to Rule 1.9(c); and
   2. 1.11a2 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.
2. 1.11b 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. 1.11b1 the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
   2. 1.11b2 written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.
3. 1.11c 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.

62

**CLIENT-LAWYER RELATIONSHIP Rule 1.11**

1. **1.11d Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:**
   1. **1.11d1 is subject to Rules 1.7 and 1.9; and**
   2. **1.11d2 shall not:**
      1. **1.11d21 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**
      2. **1.11d22 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).**
2. **1.11e As used in this Rule, the term "matter" includes:**
   1. **1.11e1 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. **1.11e2 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 l.O(e) for the definition of in­ formed consent.
2. Paragraphs (a)(l), (a)(2) and (d)(l) restate the obligations of an in­ dividual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private cli­ ent. 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. Be­ cause of the special problems raised by imputation within a government

63

**Rule 1.11 ABA MODEL RULES**

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.

1. 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 pur­ sued 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 ser­ vice, 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)(l) and (d)(l), Rule 1.10 is not applicable to the conflicts of interest ad­ dressed by these paragraphs.
2. 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 gov­ ernment. Also, unfair advantage could accrue to the other client by rea­ son 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 em­ ployed 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
3. are necessary to prevent the disqualification rule from imposing too

severe a deterrent against entering public service. The limitation of dis­ qualification in paragraphs (a)(2) and (d)(2) to matters involving a spe­ cific party or parties, rather than extending disqualification to all substan­ tive issues on which the lawyer worked, serves a similar function.

IS] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate

64

**CLIENT-LAWYER RELATIONSHIP Rule 1.11**

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 [9].

1. Paragraphs (b) and (c) contemplate a screening arrangement. See Rule l.O(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share es­ tablished by prior independent agreement, but that lawyer may not re­ ceive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.
2. Notice, including a description of the screened lawyer's prior rep­ resentation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes ap­ parent.
3. 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.
4. Paragraphs (a) and (d) do not prohibit a lawyer from jointly rep­ resenting a private party and a government agency when doing so is per­ mitted by Rule 1.7 and is not otherwise prohibited by law.
5. For purposes of paragraph (e) of this Rule, a "matter" may con­ tinue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the mat­ ters involve the same basic facts, the same or related parties, and the time elapsed.

**Definitional Cross-References** "Confirmed in writing" *See* Rule l.O(b) "Firm" *See* Rule l.O(c)

"Informed consent" *See* Rule l.O(e) "Knowingly" and "Knows" *See* Rule l.O(f) "Screened" *See* Rule l.O(k)

"Written" *See* Rule l.O(n)

65

Rule 1.12 ABA MODEL RULES

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

* 1. 1.12a 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.
  2. 1.12b 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.
  3. 1.12c 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. 1.12c1 the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
     2. 1.12c2 written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.
  4. 1.12d 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 multimem­ ber court, and thereafter left judicial office to practice law, is not prohib­ ited 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

66

**CLIENT-LAWYER RELATIONSHIP Rule 1.12**

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. Paragraphs C(2), 0(2) and E(2) of the Application Section of the Model Code of Judicial Con­ duct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, shall not "act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those Rules corre­ spond in meaning.

1. 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 pro­ ceedings give their informed consent, confirmed in writing. See Rule l.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualifi­ cation. See Rule 2.4.
2. 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) pro­ vides 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.
3. Requirements for screening procedures are stated in Rule l.0(k). Paragraph (c)(l) 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 mat­ ter in which the lawyer is disqualified.
4. Notice, including a description of the screened lawyer's prior rep­ resentation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

67

Rule 1.12 ABA MODEL RULES

Definitional Cross-References "Confirmed in writing" *See* Rule 1.0(b) "Firm" *See* Rule 1.0(c)

"Informed consent" *See* Rule 1.0(e)

"Knowingly" *See* Rule 1.0(f) "Screened" *See* Rule 1.0(k) "Tribunal" *See* Rule 1.0(m)

"Writing" and "Written" *See* Rule 1.0(n)

RULE **1.13:** ORGANIZATION AS CLIENT

* 1. 1.13a A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
  2. 1.13b 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 that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the

best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

* 1. 1.13c Except as provided in paragraph (d), if
     1. 1.13c1 despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law; and
     2. 1.13c2 the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure,

68

CLIENT-LAWYER RELATIONSHIP Rule 1.13

**but only** if **and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.**

* 1. **1.13d Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising**

**out of an alleged violation of law.**

* 1. **1.13e A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of**

**those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.**

(£)1.13f **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.**

**(g) 1.13g 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 con­ stituents. Officers, directors, employees and shareholders are the con­ stituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constitu­ ents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organi­ zational clients that are not corporations.
2. When one of the constituents of an organizational client com­ municates with the organization's lawyer in that person's organizational

69

**Rule 1.13 ABA MODEL RULES**

capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate al­ legations of wrongdoing, interviews made in the course of that investiga­ tion 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 representa­ tion except for disclosures explicitly or impliedly authorized by the orga­ nizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

1. 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, in­ cluding ones entailing serious risk, are not as such in the lawyer's prov­ ince . Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organiza­ tion or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule l.O(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

1. In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization con­ cerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a con­ stituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the law­ yer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing

70

**CLIENT-LAWYER RELATIONSHIP Rule 1.13**

information relating to the representation to persons outside the organi­ zation. Even in circumstances where a lawyer is not obligated by Rule

1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best in­ terest of the organization.

1. Paragraph (b) also makes clear that when it is reasonably nec­

essary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organi­ zation's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, ap­ plicable law may prescribe that under certain conditions the highest au­ thority reposes elsewhere, for example, in the independent directors of a corporation.

#### Relation to Other Rules

1. The authority and responsibility provided in this Rule are con­ current with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(l) - (6). Under paragraph
2. the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain sub­ stantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule l.2(d) may also be applicable, in which event, withdrawal from the repre­ sentation under Rule l.16(a)(l) may be required.
3. Paragraph (d) makes clear that the authority of a lawyer to dis­ close information relating to a representation in circumstances described

71

**Rule 1.13 ABA MODEL RULES**

in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged viola­ tion of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organiza­ tional clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

1. A lawyer who reasonably believes that he or she has been dis­ charged because of the lawyer's actions taken pursuant to paragraph

(b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

*Government Agency*

1. The duty defined in this Rule applies to governmental organiza­ tions. Defining precisely the identity of the client and prescribing the re­ sulting obligations of such lawyers may be more difficult in the govern­ ment 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 pur­ poses of this Rule. Moreover, in a matter involving the conduct of gov­ ernment officials, a government lawyer may have authority under appli­ cable 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 tlze Lawyer's Role

(10) There are times when the organization's interest may be or be­ come adverse to those of one or more of its constituents. In such circum­ stances the lav-.ryer should advise any constituent, whose interest the law-

72

**CLIENT-LA WYER RELATIONSHIP Rule 1.13**

yer 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 pro­ vide legal representation for that constituent individual, and that discus­ sions between the lawyer for the organization and the individual may not be privileged.

1. 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*

1. Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

### Derivative Actions

1. 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 un­ incorporated 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.
2. 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.

**Definitional Cross-References** "Knows" *See* Rule 1.0(f) "Reasonably" *See* Rule l.O(h) "Reasonably believes" *See* Rule l.O(i)

"Reasonably should know" *See* Rule l.O{j) "Substantial" *See* Rule 1.0(1)

73

Rule 1.14 ABA MODEL RULES

**RULE 1.14: CLIENT WITH DIMINISHED CAPACITY**

* 1. **1.14a 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.**
  2. **1.14b 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.**

* 1. **1.14c 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(a) 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 mak­ ing decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the or­ dinary 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 conclu­ sions 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 hvelve, 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 a disability does not diminish the

74

**CLIENT-LA WYER RELATIONSHIP Rule 1.14**

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 main­ taining communication.

1. 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. Neverthe­ less, 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.

1. If a legal representative has already been appointed for the cli­ ent, 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 mis­ conduct. See Rule 1.2(d).

*Taking Protective Action*

1. If a lawyer reasonably believes that a client is at risk of substan­ tial 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 communi­ cate 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 clarifica­ tion or improvement of circumstances, using voluntary surrogate deci­ sionmaking 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 inter­ ests 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.

75



**Rule 1.14 ABA MODEL RULES**

1. 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.
2. If a legal representative has not been appointed, the lawyer

should consider whether appointment of a guardian ad litem, conser­ vator 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 pro­ cedure in litigation sometimes provide that minors or persons with di­ minished 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 trau­ matic 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 af­ fect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involun­ tary 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 neces­ sary 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 discuss­ ing matters related to the client. The lawyer's position in such cases is an unarnidably difficult one.

76

**CLIENT-LAWYER RELATIONSHIP Rule** 1.15

##### Emergency Legal Assistance

1. 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 mat­ ter, when the person or another acting in good faith on that person's be­ half 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 im­ minent 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. ·
2. A lawyer who acts on behalf of a person with seriously dimin­ ished capacity in an emergency should keep the confidences of the per­ son as if dealing with a client, disclosing them only to the extent neces­ sary 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 solu­ tions as soon as possible. Normally, a lawyer would not seek compensa­ tion for such emergency actions taken.

**Definitional Cross-References** "Reasonably" *See* Rule l.O(h) "Reasonably believes" *See* Rule l.O(i) "Substantial" *See* Rule 1.0(1)

**RULE 1.15: SAFEKEEPING PROPERTY**

* 1. **1.15a A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds 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. Complete records of such account**

77

Rule 1.15 ABA MODEL RULES

**funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.**

* 1. **1.15b A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.**
  2. **1.15c A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.**
  3. **1.5d Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.**
  4. **1.5e When in the course of representation a lawyer is in** possession **of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property** as **to which the interests are not in dispute.**

# 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 cir­ cumstances. 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 ac­ counts. 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 gen­ erally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., ABA Model Rules for Client Trust Account Records.

[2] While normally it is impermissible to commingle the lawyer's own funds \Vith client funds, paragraph (b) provides that it is permissible

78

**CLIENT-LAWYER RELATIONSHIP Rule 1.16**

when necessary to pay bank service charges on that account. Accurate re­ cords must be kept regarding which part of the funds are the lawyer's.

1. 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 dis­ puted 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 arbi­ tration. The undisputed portion of the funds shall be promptly distributed.
2. Paragraph (e) also recognizes that third parties may have law­ ful 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 arbi­ trate 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.
3. The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For exam­ ple, a lawyer who serves only as an escrow agent is governed by the ap­ plicable law relating to fiduciaries even though the lawyer does not ren­ der legal services in the transaction and is not governed by this Rule.
4. 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 manda­ tory, and, even when it is voluntary, the lawyer should participate.

**RULE 1.16: DECLINING OR TERMINATING REPRESENTATION**

* 1. **1.16a 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. **1.16a1 the representation will result in violation of the Rules** of **Professional Conduct or other law;**

79

Rule 1.16 ABA MODEL RULES

* + 1. 1.16a2 the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
    2. 1.16a3 the lawyer is discharged.
  1. 1.16b Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
     1. 1.16b1 withdrawal can be accomplished without material adverse effect on the interests of the client;
     2. 1.16b2 the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
     3. 1.16b3 the client has used the lawyer's services to perpetrate a crime or fraud;
     4. 1.16b4 the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
     5. 1.16b5 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. 1.16b6 the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
     7. 1.16b7other good cause for withdrawal exists.
  2. 1.16c 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.
  3. 1.16d 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.

Comment

[11 A lawyer should not accept representation in a matter unless i can be performed competently, promptly, without improper conflict of in

80

**Rule 1.16 ABA MODEL RULES**

#### Optional Withdrawal

1. A lawyer may withdraw from representation in some circum­ stances. 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 rea­ sonably 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 wh re the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a· fundamental dis agreement.
2. A lawyer may withdraw if the client refuses to abide by the term of an agreement relating to the representation, such as an agreement con cerning fees or court costs or an agreement limitin.g the objectives of th representation. ·

*Assisting the Client upon Withdrawal*

1. Even if the lawyer has been unfairly ischarged by the client, lawyer must take all reasonable steps to mitigate the consequences to th client. The lawyer may retain papers as security for a fee only to the e tent permitted by law. See Rule 1.15.

**Definitional Cross-References** "Fraud" and "Fraudulent" *See* Rule 1.0(d) "Reasonable" *See* Rule 1.0(h)

"Reasonably believes" *See* Rule 1.0(i) "Tribunal" *See* Rule 1.0(m)

**RULE 1.17: SALE OF**

**LAW PRACTICE**

**A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:**

* 1. **1.17a The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;**

82

CLIENT-LAWYER RELATIONSHIP Rule 1.17

* 1. **1.17b The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;**
  2. **1.17c The seller gives written notice to each of the seller's**

**clients regarding:**

* + 1. **1.17c1 the proposed sale;**
    2. **1.17c2 the client's right to retain other counsel or to take possession of the file; and**
    3. **1.17c3 the fact that the client's consent to the transfer of the**

**client's files will be presumed** if **the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.**

If **a client cannot be given notice, the representation of that**

**client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.**

* 1. **1.17d The fees charged clients shall not be increased by reason**

**of the sale.**

# Comment

1. The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the repre­ sentation, the selling lawyer or firm may obtain compensation for the rea­ sonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

### Termination of Practice by the Seller

1. The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For ex­ ample, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant

83

**Rule 1.17 ABA MODEL RULES**

to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or re­ signs from a judiciary position.

1. The requirement that the seller cease to engage in the private

practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

1. The Rule permits a sale of an entire practice attendant upon re­ tirement from the private practice of law within the jurisdiction. Its pro­ visions, therefore, accommodate the lawyer who sells the practice on the occasion of moving to another state. Some states are so large that a move from one locale therein to another is tantamount to leaving the jurisdic­ tion in which the lawyer has engaged in the practice of law. To also ac­ commodate 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 l.17(a).
2. This Rule also permits a lawyer or law firm to sell an area of prac­ tice. 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 as­ suming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule l.S{e). For example, a lawyer with a substantial number of estate plan­ ning 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 mat­ ters. 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

1. The Rule requires that the seller's entire practice, or an entire area of prc1ctice, 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 lim-

84

**CLIENT-LAWYER RELATIONSHIP Rule 1.17**

ited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to cli­ ent 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

1. Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an iden­ tifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible associa­ tion of another lawyer or mergers between firms, with respect to which client consent is not required. See Rule 1.6(b)(7). Providing the purchaser access to detailed information relating to the representation, such as the client's file, however, requires client consent. The Rule provides that be­ fore such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, in­ cluding 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.
2. A lawyer or law firm ceasing to practice cannot be required to re­ main 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. Preserva­ tion of client confidences requires that the petition for a court order be considered in camera. (A procedure by which such an order can be ob­ tained needs to be established in jurisdictions in which it presently does not exist).
3. 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.

85

Rule 1.17 **ABA MODEL RULES**

*Fee Arrangements Between Client and Purchaser*

1. The sale may not be financed by increases in fees charged the cli­ ents of the practice. Existing arrangements between the seller and the cli­ ent as to fees and the scope of the work must be honored by the purchaser.

***Other Applicable Ethical Standards***

1. 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 qual­ ified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid dis­ qualifying 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 pro­ tect information relating to the representation (see Rules 1.6 and 1.9).
2. 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 in­ cluded in the sale (see Rule 1.16).

## Applicability of the Rule

1. This Rule applies to the sale of a law practice of a deceased, dis­ abled or disappeared lawyer. Thus, 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 seller as well as the purchasing lawyer can be expected to see to it that they are met.
2. Admission to or retirement from a law partnership or profes­ sional 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.
3. This Rule does not apply to the transfers of legal representation behvecn lawyers when such transfers are unrelated to the sale of a prac­ tice or an area of practice.

**Definitional Cross-References** "Law firm" *See* Rule l.O(c) "Written" *See* Rule 1.0(n)

86

CLIENT-LAWYER RELATIONSHIP Rule 1.18

RULE **1.18:** DUTIES TO PROSPECTIVE CLIENT

* 1. 1.18a A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
  2. 1.18b Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
  3. 1.18c 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).
  4. 1.18d When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
     1. 1.18d1 both the affected client and the prospective client have given informed consent, confirmed in writing; or:
     2. 1.18d2 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
        1. 1.18d21 the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
        2. 1.18d22 written notice is promptly given to the prospective client.

Comment

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

87

**Rule 1.18 ABA MODEL RULES**

1. A person becomes a prospective client by consulting with a law­ yer about the possibility of forming a client-lawyer relationship with re­ spect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the cir­ cumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any me­ dium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or pro­ vides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of f rming a client­ lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualify­ ing the lawyer is not a "prospective client."
   * 1. 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 undert ake. Paragraph (b) prohibits the lawyer from using or reveal­ ing 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 pro­ spective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation 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 a consultation with a prospective client on the person's informed consent that no information disclosed during

88

**CLIENT-LAWYER RELATIONSHIP Rule 1.18**

the consultation will prohibit the lawyer from representing a different cli­ ent 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.

1. 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 infor­ mation that could be significantly harmful if used in the matter.
2. Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(l), im­ putation 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 writ­ ten notice is promptly given to the prospective client. See Rule l.O(k) (re­ quirements for screening procedures). Paragraph (d)(2)(i) does not pro­ hibit 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.
3. Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures em­ ployed, generally should be given as soon as practicable after the need for screening becomes apparent.
4. 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 law­ yer's care, see Rule 1.15.

**Definitional Cross-References** "Confirmed in writing" *See* Rule l.O(b) "Firm" *See* Rule l.O(c)

"Informed consent" *See* Rule l.O(e) "Knowingly" *See* Rule 1.0(£)

"Reasonable" and "Reasonably" *See* Rule l.O(h) "Screened" *See* Rule l.O(k)

"Written" *See* Rule 1.0(n)

89

Rule 3.1 ABA MODEL RULES

ADVOCATE

**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 ad­ vocacy, 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 cli­ ent is not frivolous merely because the facts have not first been fully sub­ stantiated 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 law­ yer believes that the client's position ultimately will not prevail. The ac­ tion 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 fed­ eral or state constitutional law that entitles a defendant in a criminal mat­ ter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

ADVOCATE Rule 3.3

**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 disre­ pute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to rou­ tinely fail to expedite litigation solely for the convenience of the advo­ cates. 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 substan­ tial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

## Definitional Cross-References

"Reasonable" *See* Rule l.O(h)

**RULE 3.3: CANDOR TOWARD THE TRIBUNAL**

* 1. **3.3a A lawyer shall not knowingly:**
     1. **3.3a1 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. **3.3a2 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. **3.3a3 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.**

Rule 3.3 ABA MODEL RULES

* 1. **3.3b 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.**
  2. **3.3c 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.**
  3. **3.3d 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(m) for the defini­ tion of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudi­ cative 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. Per­ form nce of that duty while maintaining confidences of the client, how­ ever, is qualified by the advocate's duty of candor to the tribunal. Consequently, 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 sat t ements 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 owledge of matters asserted therein, for litigation documents ot<linar- 1y present assertions by the client, or by someone on the client's behalf,

**ADVOCATE Rule 3.3**

and not assertions by the lawyer. Compare Rule 3.1. However, an asser­ tion 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 misrepre­ sentation. The obligation prescribed in Rule l.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule l.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

### Legal Argument

1. 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 exis­ tence 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

1. 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 pur­ pose of establishing its falsity.
2. If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to per­ suade 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.

1. The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, how­ ever, courts have required counsel to present the accused as a witness

Rule 3.3 ABA MODEL RULES

1. 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.
2. 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.

1. 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 l.O(m) for the defini­ tion of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudi­ cative 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.

1. 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. Per­ formance of that duty while maintaining confidences of the client, how­ ever, is qualified by the advocate's duty of candor to the tribunal. Conse­ quently, 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*

1. 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 ordinar­ ily present assertions by the client, or by someone on the client's behalf,

**ADVOCATE Rule** 3.3

and not assertions by the lawyer. Compare Rule 3.1. However, an asser­ tion 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 misrepre­ sentation. The obligation prescribed in Rule l.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule l.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

###### Legal Argument

1. 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 exis­ tence 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

1. 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 pur­ pose of establishing its falsity.
2. If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to per­ suade 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.
3. The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, how­ ever, courts have required counsel to present the accused as a witness

Rule 3.3 **ABA MODEL RULES**

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].

1. 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(£). Thus, although a lawyer should re­ solve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.
2. 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 ef­ fectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a law­ yer to refuse to offer the testimony of such a client where the lawyer rea­ sonably believes but does not know that the testimony will be false. Un­ less the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

###### Remedial Measures

1. 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-examina­ tion 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 fur­ ther remedial action. If withdrawal from the representation is not permit­ ted 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

**ADVOCATE Rule** 3.3

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.

1. 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 alterna­ tive is that the lawyer cooperate in deceiving the court, thereby subvert­ ing 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 ev­ idence, 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*

1. Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the ad­ judicative 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 law­ yer 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

1. 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

1. Ordinarily, an advocate has the limited responsibility of present­ ing one side of the matters that a tribunal should consider in reaching a

**Rule 3.3 ABA MODEL RULES**

decision; the conflicting position is expected to be presented by the op­ posing party. However, in any ex parte proceeding, such as an applica­ tion for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is neverthe­ less to yield a substantially just result. The judge has an affirmative re­ sponsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of ma­ terial facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

*Withdrawal*

1. Normally, a lawyer's compliance with the duty of candor im­ posed 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 re­ quired 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 l.16(b) for the circumstances in which a lawyer will be permitted to seek a tribu­ nal's permission to withdraw. In connection with a request for permis­ sion to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent rea­ sonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

**Definitional Cross-References**

"Fraudulent" *See* Rule 1.0(d)

"Knowingly" and "Known" and "Knows" *See* Rule l.O(f) "Reasonable" *See* Rule 1.0(h)

"Reasonably believes" *See* Rule l.O(i) "Tribunal" *See* Rule 1.0(m)

**RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL**

**A lawyer shall not:**

* 1. **3.4a 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;**

* 1. **3.4b falsify evidence, counsel or assist a witness to testify**

**falsely, or offer an inducement to a witness that is prohibited by law;**

* 1. **3.4c knowingly disobey an obligation under the rules of a**

**tribunal, except for an open refusal based on an assertion that no valid obligation exists;**

* 1. **3.4d 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;**
  2. **3.4e 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**
  3. **3.4f request a person other than a client to refrain from voluntarily giving relevant information to another party unless:**
     1. **3.4f1 the person is a relative or an employee or other agent of a client; and**
     2. **3.4f2 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 evi­ dence in a case is to be marshalled competitively by the contending par­ ties. 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 es­ tablish 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. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evi-

**Rule** 3.5 **ABA MODEL RULES**

dence is also generally a criminal offense. Paragraph (a) applies to evi­ dentiary material generally, including computerized information. Appli­ cable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited exam­ ination that will not alter or destroy material characteristics of the evi­ dence. In such a case, applicable law may require the lawyer to tum the evidence over to the police or other prosecuting authority, depending on the circumstances.

1. 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. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.
2. 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.

**Definitional Cross-References** "Knowingly" *See* Rule l.O(f) "Reasonably" *See* Rule l.O(h) "Reasonably believes" *See* Rule l.O(i) "Tribunal" *See* Rule l.O(m)

**RULE 3.5: IMPARTIALITY AND**

**DECORUM OF THE TRIBUNAL**

**A lawyer shall not:**

* 1. **3.5a seek to influence a judge, juror, prospective juror or other official by means prohibited by law;**
  2. **3.5b communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;**
  3. **3.5c communicate with a juror or prospective juror after discharge of the jury if:**
     1. **3.5c1 the communication is prohibited by law or court order;**
     2. **3.5c2 the juror has made known to the lawyer a desire not to communicate; or**
     3. **3.5c3 the communication involves misrepresentation, coercion, duress or harassment; or**
  4. **3.5d engage in conduct intended to disrupt a tribunal.**

**ADVOCATE Rule 3.6**

## 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 re­ quired to avoid contributing to a violation of such provisions.
2. During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.
3. A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The law­ yer may not engage in improper conduct during the communication.
4. 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 simi­ lar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.
5. The duty to refrain from disruptive conduct applies to any pro­ ceeding of a tribunal, including a deposition. See Rule l.0(m).

## Definitional Cross-References

"Known" *See* Rule l.0{f) "Tribunal" *See* Rule l.0(m)

**RULE 3.6: TRIAL PUBLICITY**

* 1. **3.6a A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement 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 an adjudicative proceeding in the matter.**
  2. **3.6b Notwithstanding paragraph (a), a lawyer may state:**
     1. **3.6b1 the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;**

Rule 3.6 ABA MODEL RULES

* + 1. 3.6b2 information contained in a public record;
    2. 3.6b3 that an investigation of a matter is in progress;
    3. 3.6b4 the scheduling or result of any step in litigation;
    4. 3.6b5 a request for assistance in obtaining evidence and information necessary thereto;
    5. 3.6b6 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

* + 1. 3.6b7 in a criminal case, in addition to subparagraphs (1)

through (6):

* + - 1. 3.6b71 the identity, residence, occupation and family status of the accused;
      2. 3.6b72 if the accused has not been apprehended,

information necessary to aid in apprehension of that person;

* + - 1. 3.6b73 the fact, time and place of arrest; and
      2. 3.6b74 the identity of investigating and arresting officers or agencies and the length of the investigation.
  1. 3.6c 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.
  2. 3.6d 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

**. AD VOCATE. Rule** 3.6

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.

1. Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and per­ haps other types of litigation. Rule 3.4(c) requires compliance with such rules.
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 an adjudicative proceed­ ing. 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. 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 consid­ ered prohibited by the general prohibition of paragraph (a). Paragraph
4. 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).
   1. 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:
      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;
      2. in a criminal case or proceeding that could result in incarcera­ tion, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a de­ fendant or suspect or that person's refusal or failure to make a state­ ment;
      3. the performance or results of any examination or test or the re-

**Rule 3.6 ABA MODEL RULES**

fusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

* + 1. any opinion as to the guilt or innocence of a defendant or sus­ pect in a criminal case or proceeding that could result in incarcera­ tion;
    2. 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

* + 1. the fact that a defendant has been charged with a crime, un­ less there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

1. Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hear­ ings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.
2. Finally, extrajudicial statements that might otherwise raise a ques­ tion 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 re­ sponse is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, respon­ sive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive state­ ments should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.
3. See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

**Definitional Cross-References**

"Firm" *See* Rule l.O(c) "Knows" *See* Rule 1.0(f) "Reasonable" *See* Rule l.O(h)

"Reasonably should know" *See* Rule l.O(j) "Substantial" *See* Rule 1.0(1)

ADVOCATE Rule 3.7

**RULE 3.7: LAWYER AS WITNESS**

* 1. **3.7a A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:**
     1. **3.7a1 the testimony relates to an uncontested issue;**
     2. **3.7a2 the testimony relates to the nature and value of legal services rendered in the case; or**
     3. **3.7a3 disqualification of the lawyer would work substantial**

**hardship on the client.**

* 1. **3.7b 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

1. 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.
2. To protect the tribunal, paragraph (a) prohibits a lawyer from si­ multaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(l) through (a)(3). Paragraph (a)(l) recognizes that if the testimony will be uncontested, the ambigui­ ties 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.
3. Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of

**Rule 3.7 ABA MODEL RULES**

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 tes­ timony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in deter­ mining 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.

1. 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

1. 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 con­ sider that the dual role may give rise to a conflict of interest that will re­ quire 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 com­ pliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advo­ cate and witness because the lawyer's disqualification would work a sub­ stantial hardship on the client. Similarly, a lawyer who might be permit­ ted 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 l.O(b) for the definition

of "confirmed in writing" and Rule l.O(e) for the definition of "informed consent."

1. Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associ­ ated in a firm is precluded from doing so by paragraph (a). If, however,

ADVOCATE Rule 3.8

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.

Definitional Cross-References

"Firm" *See* Rule l.0(c) "Substantial" *See* Rule 1.0(1)

RULE **3.8:** SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

* 1. 3.8a refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
  2. 3.8b 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;
  3. 3.8c not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
  4. 3.8d 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;
  5. 3.8e 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. 3.8e1 the information sought is not protected from disclosure by any applicable privilege;
     2. 3.8e2 the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
     3. 3.8e3 there is no other feasible alternative to obtain the information;
  6. 3.8f except for statements that are necessary to inform

the public of the nature and extent of the prosecutor's action

Rule 3.8 ABA MODEL RULES

and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extra judicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

* 1. 3.8g When a prosecutor knows of new, credible and material

evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

* + 1. 3.8g1 promptly disclose that evidence to an appropriate court or authority, and
    2. 3.8g2 if the conviction was obtained in the prosecutor's jurisdiction,
       1. 3.8g21 promptly disclose that evidence to the defendant unless a court authorizes delay, and
       2. 3.8g22 undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
  1. 3.8h When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

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, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards for Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent repre­ sentation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation . Applicable

**ADVOCATE Rule** 3.8

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

1. In some jurisdictions, a defendant may waive a preliminary hear­ ing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of prelimi­ nary hearings or other important pretrial rights from unrepresented ac­ cused persons. Paragraph (c) does not apply, however, to an accused ap­ pearing *prose* 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.
2. The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of in­ formation to the defense could result in substantial harm to an individual or to the public interest.
3. Paragraph (e) is intended to limit the issuance of lawyer subpoe­ nas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relation­ ship.
4. Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudica­ tory 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 Com­ ment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).
5. 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. In addition, paragraph (f) requires a prosecutor to exercise reason­ able care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such per­ sons are not under the direct supervision of the prosecutor. Ordinarily,

**Rule** 3.8 **ABA MODEL RULES**

the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

1. When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropri­ ate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evi­ dence and undertake further investigation to determine whether the de­ fendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the de­ fendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.
2. Under paragraph (h), once the prosecutor knows of clear and con­ vincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the con­ viction. Necessary steps may include disclosure of the evidence to the de­ fendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.
3. A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sec­ tions (g) and (h), though subsequently determined to have been errone­ ous, does not constitute a violation of this Rule.

**Definitional Cross-References** "Known" and "Knows" *See* Rule 1.0(f) "Reasonable" *See* Rule 1.0(h) "Reasonably believes" *See* Rule l.0(i) "Substantial" *See* Rule 1.0(1) "Tribunal" *See* Rule 1.0(m)

ADVOCATE Rule 3.9

RULE 3.9: ADVOCATE IN NON ADJUDICATIVE 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-mak­ ing 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 proce­ dure. 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 con­ nection 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 repre­ sentation 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 ABA MODEL RULES

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

**RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS**

**In the course of representing a client a lawyer shall not knowingly:**

1. **4.1a make a false statement of material fact or law to a third person; or**
2. **4.1b fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure** is **prohibited by Rule 1.6.**

# 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 op­ posing party of relevant facts. A misrepresentation can occur if the law­ yer 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

1. This Rule refers to statements of fact. Whether a particular state­ ment 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. Esti­ mates 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.

116

**TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS Rule 4.2**

***Crime or Fraud by Client***

1. Under Rule 1.2(d), a lawyer is prohibited from counseling or as­ sisting a client in conduct that the lawyer knows is criminal or fraudu­ lent. Paragraph (b) states a specific application of the principle set forth in Rule l.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the repre­ sentation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirma­ tion or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid as­ sisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

**Definitional Cross-References** "Fraudulent" *See* Rule l.0(d) "Knowingly" *See* Rule l.0(f)

**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 sys­ tem by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are par­ ticipating in the matter, interference by those lawyers with the client-law­ yer relationship and the uncounselled disclosure of information relating to the representation.
2. This Rule applies to communications with any person who is rep­ resented by counsel concerning the matter to which the communication relates.

117

Rule 4.2 **ABA MODEL RULES**

1. 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.
2. 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 orga­ nizations, 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 prohib­ ited 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.

1. Communications authorized by law may include communica­ tions by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communica­ tions authorized by law may also include investigative activities of law­ yers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement pro­ ceedings. 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 es­ tablish that the communication is permissible under this Rule.
2. A lawyer who is uncertain whether a communication with a rep­ resented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a commu­ nication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain in jury.
3. In the case of a represented organization, this Rule prohibits com­ munications with a constituent of the organization who supervises, di-

118

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS Rule 4.3

rects 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. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is repre­ sented in the matter by his or her own counsel, the consent by that coun­ sel to a communication will be sufficient for purposes of this Rule. Com­ pare Rule 3.4(£). 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.

1. 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 law­ yer has actual knowledge of the fact of the representation; but such ac­ tual knowledge may be inferred from the circumstances. See Rule l.O(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.
2. In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's com­ munications are subject to Rule 4.3.

**Definitional Cross-References**

"Knows" *See* Rule l.O(f)

**RULE 4.3: DEALING WITH UNREPRESENTED PERSON**

**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. 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. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel,** 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.**

119

**Rule 4.3 ABA MODEL RULES**

# 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 necessary, ex­ plain 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(£).
2. The Rule distinguishes between situations involving unrepre­ sented 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 coun­ sel. 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 ex­ plained that the lawyer represents an adverse party and is not represent­ ing 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.

**Definitional Cross-References** "Knows" *See* Rule 1.0(£) "Reasonable" *See* Rule l.O(h)

"Reasonably should know" *See* Rule l.O(j)

**RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS**

* 1. **4.4a 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.**

120

**TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS Rule 4.4**

* 1. **4.4b A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information 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 im­ practical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted in­ trusions into privileged relationships, such as the client-lawyer relation­ ship.
2. Paragraph (b) recognizes that lawyers sometimes receive a doc­ ument or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or elec­ tronically stored information is inadvertently sent when it is acciden­ tally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protec­ tive measures. Whether the lawyer is required to take additional steps, such as returning the document or deleting electronically stored informa­ tion, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Meta­ data in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

121

**Rule 4.4 ABA MODEL RULES**

1. Some lawyers may choose to return a document or delete elec­ tronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not re­ quired by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of profes-' sional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

## Definitional Cross-References

"Knows" *See* Rule l.O(f)

"Reasonably should know" *See* Rule l.O(j) "Substantial" *See* Rule 1.0(1)

LAW FIRMS AND ASSOCIATIONS

RULE 5.1: RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

1. 5.1a 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.

1. 5.1b 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.
2. 5.1c A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
   1. 5.1c1 the lawyer orders or, with knowledge of the specific

*/* conduct, ratifies the conduct involved; or

* 1. 5.1c2the 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 l.O(c). This includes mem-

**LAW FIRMS AND ASSOCIATIONS Rule** 5.1

hers of a partnership, the shareholders in a law firm organized as a pro­ fessional 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 govern­ ment agency; and lawyers who have intermediate managerial responsi­ bilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

1. Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and proce­ dures 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 inter­ est, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced law­ yers are properly supervised.
2. Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the na­ ture of its practice. In a small firm of experienced lawyers, informal su­ pervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which dif­ ficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior law­ yers can make confidential referral of ethical problems directly to a des­ ignated 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 law­ yers associated with the firm will inevitably conform to the Rules.
3. Paragraph (c) expresses a general principle of personal responsi­ bility for acts of another. See also Rule 8.4(a).
4. Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a law­ yer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory author­ ity 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

**Rule** 5.1 **ABA MODEL RULES**

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 mat­ ter to an opposing party in negotiation, the supervisor as well as the sub­ ordinate has a duty to correct the resulting misapprehension.

1. Professional misconduct by a lawyer under supervision could re­ veal 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.
2. Apart from this Rule and Rule 8.4(a), a lawyer does not have dis­ ciplinary 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.
3. 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).

**Definitional Cross-References** "Firm" and "Law firm" *See* Rule l.O(c) "Knows" *See* Rule 1.0(f)

"Partner" *See* Rule l.O(g) "Reasonable" *See* Rule 1.0(h)

**RULE 5.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER**

* 1. **5.2a A lawyer** is **bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.**
  2. **5.2b 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

**LAW FIRMS AND ASSOCIATIONS Rule** 5.3

may be relevant in determining whether a lawyer had the knowledge re­ quired to render conduct a violation of the Rules. For example, if a sub­ ordinate 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.

1. When lawyers in a supervisor-subordinate relationship encoun­ ter a matter involving professional judgment as to ethical duty, the su­ pervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the ques­ tion 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 sub­ ordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervi­ sor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

**Definitional Cross-References**

"Reasonable" *See* Rule l .0(h)

**RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE**

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

* 1. **5.3a 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;**
  2. **5.3b 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**
  3. **5.3c 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:

125

Rule 5.3 ABA MODEL RULES

* + 1. **5.3c1 the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or**
    2. **5.3c2 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. Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way com­ patible with the professional obligations of the lawyer. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule

5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

### Nonlawyers Within the Firm

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 con­ cerning 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.

### Nonlawyers Outside the Finn

1. A lawyer may use nonlawyers outside the firm to assist the law­ yer in rendering legal services to the client. Examples include the reten­ tion of an investigative or paraprofessional service, hiring a document

**LAW FIRMS AND ASSOCIATIONS Rule** 5.4

management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scan­ ning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reason­ able efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services in­ volved; the terms of any arrangements concerning the protection of cli­ ent information; and the legal and ethical environments of the jurisdic­ tions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of author­ ity), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (profes­ sional independence of the lawyer), and 5.S(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

1. Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

**Definitional Cross-References** "Firm" and "Law firm" *See* Rule l.O(c) "Knows" *See* Rule l.O(f)

"Partner" *See* Rule l.O(g) "Reasonable" *See* Rule 1.0(h)

**RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER**

* 1. **5.4a A lawyer or law firm shall not share legal fees with a nonlawyer, except that:**
     1. **5.4a1 an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money,**

Rule 5.4 ABA MODEL RULES

over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

* + 1. 5.4a2 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;

* + 1. 5.4a3 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; and
    2. 5.4a4 a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.
  1. 5.4b A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
  2. 5.4c 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.
  3. 5.4d 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. 5.4d1 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. 5.4d2 a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
     3. 5.4d3 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 shar­ ing fees. These limitations are to protect the lawyer's professional inde­ pendence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrnngcment docs 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.

LAW FIRMS AND ASSOCIATIONS Rule 5.5

1. 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(£) (lawyer may accept compensation from a third party as long as there is no interfer­ ence with the lawyer's independent professional judgment and the client gives informed consent).

Definitional Cross-References "Firm" and "Law firm" *See* Rule 1.0(c) "Partner" *See* Rule 1.0(g)

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

* 1. 5.5a 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.
  2. 5.5b A lawyer who is not admitted to practice in this jurisdiction shall not:
     1. 5.5b1 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. 5.5b2 hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
  3. 5.5c 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. 5.5c1 are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
     2. 5.5c2 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;

* + 1. 5.5c3 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

Rule 5.5 ABA MODEL RULES

jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

* + 1. 5.5c4 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.
  1. 5.5d A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:
     1. 5.5d1 are provided to the lawyer's employer or its

organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when performed by

a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

* + 1. 5.5d2 are services that the lawyer is authorized by federal law or other law or rule to provide in this jurisdiction.
  1. 5.5e For purposes of paragraph (d):
     1. 5.5e1 the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction,

the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or

* + 1. 5.5e2 the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise of its discretion, [the highest court 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 an-

**LAW FIRMS AND ASSOCIATIONS Rule** 5.5

other person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that per­ son's jurisdiction.

1. The definition of the practice of law is established by law and var­

ies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendi­ tion of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegat­ ing functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

1. A lawyer may provide professional advice and instruction to non­ lawyers 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 paraprofes­ sionals, who are authorized by the law of a jurisdiction to provide partic­ ular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed prose.
2. Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)

(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be sys­ tematic 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 Rule 7.1.

1. There are occasions in which a lawyer admitted to practice in an­ other 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 un­ reasonable 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 paragraphs (d)(l) and (d)(2), this Rule does not au­ thorize a U.S. or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.
2. There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may there­ fore be permissible under paragraph (c). Services may be "temporary"

**Rule 5.5 ABA MODEL RULES**

even though the lawyer provides services in this jurisdiction on a recur­ ring basis, or for an extended period of time, as when the lawyer is repre­ senting a client in a single lengthy negotiation or litigation.

1. Paragraphs (c) and (d) apply to lawyers who are admitted to prac­

tice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. Paragraph (d) also applies to lawyers admitted in a foreign jurisdiction. The word "admitted" in paragraphs (c), (d) and (e) 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 au­ thorized to practice, because, for example, the lawyer is on inactive status.

1. Paragraph (c)(l) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction as­ sociates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this ju­ risdiction must actively participate in and share responsibility for the representation of the client.
2. 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 tribu­ nal 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 ap­ pearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.
3. 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 hear­ ing 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. Ex­ amples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer ad­ mitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdic­ tion in which the lawyer is or reasonably expects to be authorized to ap­ pear, including taking depositions in this jurisdiction.

**LAW FIRMS AND ASSOCIATIONS Rule** 5.5

1. When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also per­ mits conduct by lawyers who are associated with that lawyer in the mat­ ter, 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.
2. Paragraph (c)(3) permits a lawyer admitted to practice law in

another jurisdiction to perform services on a temporary basis in this ju­ risdiction if those services are in or reasonably related to a pending or po­ tential arbitration, mediation, or other alternative dispute resolution pro­ ceeding 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 admis­ sion pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

1. Paragraph (c)(4) permits a lawyer admitted in another jurisdic­ tion to provide certain legal services on a temporary basis in this jurisdic­ tion 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 para­ graphs (c)(2) or (c)(3). These services include both legal services and ser­ vices that nonlawyers may perform but that are considered the practice of law when performed by lawyers.
2. 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 juris­ dictions, 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 ex­ pertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform,

**Rule** 5.5 **ABA MODEL RULES**

foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not other­ wise authorized to practice law, should consult the *[Model Court Rule on Provision of Legal Services Following Determination of Major Disaster].*

1. Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States or a foreign jurisdic­ tion, and is not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursu­ ant to paragraph (c) of this Rule, a lawyer admitted in any U.S. jurisdic­ tion may also provide legal services in this jurisdiction on a temporary basis. See also *Model Rule on Temporary Practice by Foreign Lawyers.* Ex­ cept as provided in paragraphs (d)(l) and (d)(2), a lawyer who is admit­ ted to practice law in another United States or foreign 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.
2. Paragraph (d)(l) applies to a U.S. or foreign lawyer who is em­ ployed by a client to provide legal services to the client or its organiza­ tional affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or em­ ployees. The paragraph applies to in-house corporate lawyers, govern­ ment lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign law­ yer authorized to practice under paragraph (d)(l) of this Rule needs to base that advice on the advice of a lawyer licensed and authorized by the jurisdiction to provide it.
3. If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to

**LAW FIRMS AND ASSOCIATIONS Rule** 5.6

the employer, the lawyer may be subject to registration or other require­ ments, including assessments for client protection funds and mandatory continuing legal education. See *Model Rule for Registration of In-House Counsel.*

1. Paragraph (d)(2) recognizes that a U.S. or foreign 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. See, e.g., *Model Rule on Practice Pending Admission.*
2. A lawyer who practices law in this jurisdiction pursuant to para­ graphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.S(a).
3. In some circumstances, a lawyer who practices law in this juris­ diction 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 ex­ ample, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule l.4(b).
4. Paragraphs (c) and (d) do not authorize communications adver­ tising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may commu­ nicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.3.

**Definitional Cross-References** "Reasonably" *See* Rule l.O(h) "Tribunal" *See* Rule l .O(m)

**RULE 5.6: RESTRICTIONS ON RIGHT TO PRACTICE**

**A lawyer shall not participate in offering or making:**

* 1. **5.6a 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**

* 1. **5.6b an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.**

**Rule** 5.6 **ABA MODEL RULES**

# 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 re­ tirement benefits for service with the firm.
2. Paragraph (b) prohibits a lawyer from agreeing not to represent

other persons in connection with settling a claim on behalf of a client.

1. This Rule does not apply to prohibit restrictions that may be in­ cluded in the terms of the sale of a law practice pursuant to Rule 1.17.

**RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES**

* 1. **5.7a 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. **5.7a1 by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or**
     2. **5.7a2 in other circumstances 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.**

* 1. **5.7b 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

[11 When a lawyer performs law-related services or controls an or­ ganization 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

**LAW FIRMS AND ASSOCIATIONS Rule** 5.7

expect,for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obliga­ tions of a lawyer to maintain professional independence apply to the pro­ vision 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 law­ yer even when the lawyer does not provide any legal services to the per­ son for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate en­ tity. The Rule identifies the circumstances in which all of the Rules of Pro­ fessional 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 con­ duct involves the provision of legal services. See, e.g., Rule 8.4.

1. When law-related services are provided by a lawyer under circum­ stances 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 para­ graph (a)(l). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through sepa­ rate entities or different support staff within the law firm, the Rules of Pro­ fessional Conduct apply to the lawyer as provided in paragraph (a)(2) un­ less 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.
2. 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 cir­ cumstances of the particular case.
3. 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 l.8(a).

**Rule** 5.7 **ABA MODEL RULES**

1. In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practi­ cal 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 under­ stands 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 pro­ viding law-related services, and preferably should be in writing.
2. The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the de­ sired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser ex­ planation 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.
3. 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.
4. A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Ex­ amples 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 ser­ vices the protections of those Rules that apply to the client-lawyer re-

**PUBLIC SERVICE Rule 6.1**

lationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, espe­ cially Rules l.7(a)(2) and l.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential informa­ tion. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicita­ tion. In that regard, lawyers should take special care to identify the obliga­ tions 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 Con­ duct 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 re­ cipient with respect to confidentiality of information, conflicts of inter­ est and permissible business relationships with clients. See also Rule 8.4 (Misconduct) .

**Definitional Cross-References** "Knows" *See* Rule l.O(f) "Reasonable" *See* Rule l.O(h)

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:

1. 6.1a provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
   1. 6.1a1 persons of limited means; or
   2. 6.1a2 charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
2. 6.1b provide any additional services through:
   1. 6.1b1 delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking

Rule 6.1 ABA MODEL RULES

**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;**

* 1. **6.1b2 delivery of legal services at a substantially reduced fee to persons of limited means; or**
  2. **6.1b3 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 profes­ sional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvan­ taged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a law­ yer 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

*I* be performed in civil matters or in criminal or quasi-criminal matters for

which there is no government obligation to provide funds for legal repre­ sentation, such as post-conviction death penalty appeal cases.

1. Paragraphs (a)(l) and (2) recognize the critical need for legal ser­ vices that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disad­ vantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including in­ dividual and class representation, the provision of legal advice, legisla­ tive lobbying, administrative rule making and the provision of free train­ ing or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government

**PUBLIC SERVICE Rule 6.1**

lawyers, even when restrictions exist on their engaging in the outside practice of law.

1. Persons eligible for legal services under paragraphs (a)(l) 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 neverthe­ less, 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 "govern­ mental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

1. 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)(l) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attor­ neys' 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.
2. While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(l) 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 restric­ tions 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).

1. Paragraph (b)(l) 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. Addition­ ally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

**Rule 6.1 ABA MODEL RULES**

1. 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 ap­ pointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.
2. 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 en­ gaging 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.

1. Because the provision of pro bono services is a professional re­

sponsibility, it is the individual ethical commitment of each lawyer. Nev­ ertheless, there may be times when it is not feasible for a lawyer to en­ gage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations pro­ viding free legal services to persons of limited means. Such financial sup­ port 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.

1. Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of lim­ ited 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.
2. 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 Rul e.
3. The responsibility set forth in this Rule is not intended to be en­ forced through disciplinary process.

Definitional Cross-References

"Substantial" *Sec* Rule l.O(l)

PUBLIC SERVICE Rule 6.2

**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:**

* 1. **6.2a representing the client is likely to result in violation of the Rules of Professional Conduct or other law;**
  2. **6.2b representing the client is likely to result in an unreasonable financial burden on the lawyer; or**
  3. **6.2c 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 char­ acter 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*

1. 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 mat­ ter 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 cli­ ent-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 finan­ cial sacrifice so great as to be unjust.
2. An appointed lawyer has the same obligations to the client as re­ tained 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.

# Definitional Cross-References

"Tribunal" *See* Rule l.O(m)

Rule 6.3 ABA MODEL 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:**

* 1. **6.3a if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or**
  2. **6.3b 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 serv­ ing on the board of a legal services organization, the profession's involve­ ment 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.

**Definitional Cross-References** "Law firm" *See* Rule l.O(c) "Knowingly" *See* Rule l.O(f)

**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**

**PUBLIC SERVICE Rule 6.5**

**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 gener­ ally do not have a client-lawyer relationship with the organization. Oth­ erwise, it might follow that a lawyer could not be involved in a bar as­ sociation law reform program that might indirectly affect a client. See also Rule l.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 profession­ ally obligated to protect the integrity of the program by making an ap­ propriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.

## Definitional Cross-References

"Knows" *See* Rule l.O(f)

**RULE 6.5: NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS**

* 1. **6.5a A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, 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. **6.5a1 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. **6.5a2 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.**
  1. **6.5b Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.**

**Rule 6.5 ABA MODEL RULES**

# Comment

1. Legal services organizations, courts and various nonprofit or­ ganizations 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 prose 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 con­ flicts of interest as is generally required before undertaking a representa­ tion . 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 l.2(c). If a short-term limited representa­ tion 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 l.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 l.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 l.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 pre­ clude the lawyer's firm from undertaking or continuing the representa­ tion of a client with interests adverse to a client being represented under

**INFORMATION ABOUT LEGAL SERVICES Rule 7.1**

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.

1. If, after commencing a short-term limited representation in accor­ dance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, l.9(a) and 1.10 become applicable.

**Definitional Cross-References**

"Law firm" *See* Rule l.O(c) "Knows" *See* Rule l.O(f)

INFORMATION ABOUT LEGAL SERVICES

**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. Whatever means are used to make known a law­ yer's services, statements about them must be truthful.
2. Misleading truthful statements are 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 mislead­ ing. A truthful statement is misleading if a substantial likelihood exists 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. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.
3. A communication 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

**Rule** 7.1 **ABA MODEL RULES**

same results could be obtained for other clients in similar matters with­ out reference to the specific factual and legal circumstances of each cli­ ent's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a rea­ sonable person to conclude that the comparison or claim can be substan­ tiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified ex­ pectations or otherwise mislead the public.

1. It is professional misconduct for a lawyer to engage in conduct in­ volving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to im­ properly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.
2. Firm names, letterhead and professional designations are com­ munications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of de­ ceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media usemame or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a for­ mer member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geo­ graphical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication .
3. A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.
4. Lawyers may not imply or hold themselves out as practicing to­ gether in one firm when they are not a firm, as defined in Rule l.O(c), because to do so would be false and misleading.
5. It is misleading to use the name of a lawyer holding a public of­ fice in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

INFORMATION ABOUT LEGAL SERVICES Rule 7.2

RULE 7.2: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES: SPECIFIC RULES

* 1. 7.2a A lawyer may communicate information regarding the lawyer's services through any media.
  2. 7.2b A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services except that a lawyer may:
     1. 7.2b1 pay the reasonable costs of advertisements or communications permitted by this Rule;
     2. 7.2b2 pay the usual charges of a legal service plan or a not-for­ profit or qualified lawyer referral service;
     3. 7.2b3 pay for a law practice in accordance with Rule 1.17;
     4. 7.2b4 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:
        1. 7.2b41the reciprocal referral agreement is not exclusive; and
        2. 7.2b42 the client is informed of the existence and nature of the agreement; and
     5. 7.2b5 give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.
  3. 7.2c A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:
     1. 7.2c1 the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and
     2. 7.2c2 the name of the certifying organization is clearly identified in the communication.
  4. 7.2d Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

Comment

1. This Rule permits public dissemination of information concern­ ing a lawyer's or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the

**Rule** 7.2 **ABA MODEL RULES**

basis on which the lawyer's fees are determined, including prices for spe­ cific 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.

# Paying Others to Recommend a Lawyer

1. Except as permitted under paragraphs (b)(l)-(b)(S), lawyers are not permitted to pay others for recommending the lawyer's services. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other pro­ fessional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."
2. Paragraph (b)(l) allows a lawyer to pay for advertising and com­

munications 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, Internet-based advertisements, and group advertising. A lawyer may compensate em­ ployees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations person­ nel, business-development staff, television and radio station employees or spokespersons and website designers.

1. Paragraph (b)(S) permits lawyers to give nominal gifts as an ex­ pression of appreciation to a person for recommending the lawyer's ser­ vices or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospi­ tality. A gift is prohibited if offered or given in consideration of any prom­ ise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

(5] A lawyer may pay others for generating client leads, such as In­ ternet-based client leads, as long as the lead generator does not recom­ mend the lawyer, any payment to the lead generator is consistent with Rules 1.S(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a

**INFORMATION ABOUT LEGAL SERVICES Rule 7.2**

person's legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

1. A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek 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. Qualified referral services are con­ sumer-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 mal­ practice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer re­ ferral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Re­ ferral and Information Service Quality Assurance Act.
2. A lawyer who accepts assignments or referrals from a legal ser­ vice plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer refer­ ral services may communicate with the public, but such communica­ tion 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 the public to think that it was a lawyer referral service sponsored by a state agency or bar association.
3. 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 arrange­ ments 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.S(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

**Rule 7.2 ABA MODEL RULES**

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 re­ ferral agreements should not be of indefinite duration and should be re­ viewed 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 firms comprised of multiple entities.

# Communications about Fields of Practice

1. Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer "concentrates in" or is a "spe­ cialist," practices a "specialty," or "specializes in" particular fields based on the lawyer's experience, specialized training or education, but such communications are subject to the "false and misleading" standard ap­ plied in Rule 7.1 to communications concerning a lawyer's services.
2. The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.
3. This Rule 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 or­ ganization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar As­ sociation or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that cer­ tify 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 ex­ perience, knowledge and proficiency to ensure that a lawyer's recogni­ tion as a specialist is meaningful and reliable. To ensure 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.

INFORMATION ABOUT LEGAL SERVICES Rule 7.3

*Required Contact Information*

1. This Rule requires that any communication about a lawyer or law firm's services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

RULE 7.3: SOLICITATION OF CLIENTS

* 1. 7.3a "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.
  2. 7.3b A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:
     1. 7.3b1 lawyer;
     2. 7.3b2 person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or
     3. 7.3b3 person who routinely uses for business purposes the type of legal services offered by the lawyer.
  3. 7.3c A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:
     1. 7.3c1 the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
     2. 7.3c2 the solicitation involves coercion, duress or harassment.
  4. 7.3d This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.
  5. 7.3e Notwithstanding the prohibitions in this Rule, 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 live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

153

**Rule** 7.3 **ABA MODEL RULES**

**Comment**

1. Paragraph (b) prohibits a lawyer from soliciting professional em­ ployment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for in­ formation or is automatically generated in response to electronic searches.
2. "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encoun­ ter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private im­ portuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate selfinter­ est in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.
3. The potential for overreaching inherent in live person-to-person

contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not vio­ late other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a per­ son's judgment.

1. The contents of live person-to-person contact can be disputed and may not be subject to thirdparty scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line be­ tween accurate representations and those that are false and misleading.
2. There is far less likelihood that a lawyer would engage in over­ reaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situ-

**INFORMATION ABOUT LEGAL SERVICES Rule 7.3**

ations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreach­ ing when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples in­ clude persons who routinely hire outside counsel to represent the en­ tity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other p ople who routinely retain lawyers for business transactions or formations. Paragraph (b) 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 organiza­ tions whose purposes include providing or recommending legal services to their members or beneficiaries.

1. A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3(c)(2), or that involves contact with some­ one who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(l) is prohibited. Live, person­ to-person contact of individuals who may be especially vulnerable to co­ ercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.
2. This Rule does not prohibit a lawyer from contacting representa­ tives 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 avail­ ability of and details concerning the plan or arrangement which the law­ yer or lawyer's firm is willing to offer. This form of communkation is not directed to people who are seeking legal services for themselves. 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 repre­ sentatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permit­ ted under Rule 7.2.
3. Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

**Rule** 7.6 **ABA MODEL RULES**

1. Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll 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 ser­ vices through the plan. The organization must not be owned by or di­ rected (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or oth­ erwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular mat­ ter, but must 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(c).

**RULE 7.4 (DELETED 2018)**

**RULE 7.5 (DELETED 2018)**

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

**A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge** if **the lawyer or law firm makes a political contribution or solicits political**

**contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.**

*/* **Comment**

1. Lawyers have a right to participate fully in the political process,

which includes making and soliciting political contributions to candi­ dates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appoint-

**INFORMATION ABOUT LEGAL SERVICES Rule 7.6**

ment by a judge, the public may legitimately question whether the law­ yers engaged to perform the work are selected on the basis of compe­ tence and merit. In such a circumstance, the integrity of the profession is undermined.

1. The term "political contribution" denotes any gift, subscription,

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

1. Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include

(a) substantially uncompensated services; (b) engagements or appoint­ ments made on the basis of experience, expertise, professional qualifica­ tions and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engage­ ments or appointments made on a rotational basis from a list compiled without regard to political contributions.

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

**Rule 8.1 ABA MODEL RULES**

made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

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

**Definitional Cross-References**

"Law firm" *See* Rule l.O(c)

MAINTAINING THE INTEGRITY OF THE PROFESSION

**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:**

1. **8.1a knowingly make a false statement of material fact; or**
2. **8.1b 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 admis­ sion 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 of­ fense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own con­ duct. Paragraph (b) of this Rule also requires correction of any prior mis­ statement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the ad­ missions or disciplinary authority of which the person involved becomes aware.

158

**MAINTAINING THE INTEGRITY OF THE PROFESSION Rule 8.2**

1. This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state con­ stitutions. 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.
2. A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or pro­ ceeding, is governed by the Rules applicable to the client-lawyer relation­ ship, including Rule 1.6 and, in some cases, Rule 3.3.

**Definitional Cross-References**

"Knowingly" and "Known" *See* Rule l.O(f)

**RULE 8.2: JUDICIAL AND LEGAL OFFICIALS**

* 1. **8.2a 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.**
  2. **8.2b 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 profes­ sional or personal fitness of persons being considered for election or ap­ pointment 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 ad­ ministration of justice. Conversely, false statements by a lawyer can un­ fairly 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.

**Definitional Cross-References**

"Knows" *See* Rule l.O(f)

159

Rule 8.3 ABA MODEL RULES

**RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT**

* 1. **8.3a A lawyer who knows that another lawyer has commi tted 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.**
  2. **8.3b 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.**

* 1. **8.3c This Rule does not require disclosure of information otherwise protected by Rule** 1.6 **or information gained by a lawyer or judge while participating in an approved lawyers assistance program.**

# 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 con­ sent 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 offe nse. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regu­ lating profession must vigorously endeavor to prevent. A measure of judg­ ment 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.

160

**MAINTAINING THE INTEGRITY OF THE PROFESSION Rule 8.4**

1. 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 cli­ ent-lawyer relationship.
2. 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 lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs
3. and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and ad­ ditional 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 participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

**Definitional Cross-References** "Knows" *See* Rule l.O(f) "Substantial" *See* Rule 1.0(1)

**RULE 8.4: MISCONDUCT**

It **is professional misconduct for a lawyer to:**

* 1. **8.4a 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;**
  2. **8.4b commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;**
  3. **8.4c engage in conduct involving dishonesty, fraud, deceit or misrepresentation;**
  4. **8.4d engage in conduct that is prejudicial to the administration of justice;**
  5. **8.4e 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;**
  6. **8.4f knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules** of **judicial conduct or other law; or**

161

Rule 8.4 ABA MODEL RULES

* 1. **8.4g engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of**

**race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.**

**This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.**

# Comment

1. Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce an­ other 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), how­ ever, 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 prac­

tice law, such as offenses involving fraud and the offense of willful fail­ ure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fit­ ness for the practice of law. 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 law practice. Offenses involving violence, dishonesty, breach of trust, or seri­ ous interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when con­ sidered separately, can indicate indifference to legal obligation.

1. Discrimination and harassment by lawyers in violation of para­ graph (g) undermine confidence in the legal profession and the legal sys­ tem. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical con­ duct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and antiharass­ ment statutes and case law may guide application of paragraph (g).

162

**MAINTAINING THE INTEGRITY OF THE PROFESSION Rule 8.4**

1. Conduct related to the practice of law includes representing cli­ ents; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or so­ cial activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violat­ ing this Rule by, for example, implementing initiatives aimed at recruit­ ing, hiring, retaining and advancing diverse employees or sponsoring di­ verse law student organizations.
2. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of para­ graph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's prac­ tice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule l.S(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule

6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not con­ stitute an endorsement by the lawyer of the client's views or activities. See Rule l.2(b).

1. A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provi­ sions of Rule l.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal reg­ ulation of the practice of law.
2. Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can sug­ gest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, ad­ ministrator, guardian, agent and officer, director or manager of a corpora­ tion or other organization.

**Definitional Cross-References**

"Fraud" *See* Rule l.O(d)

"Knowingly and knows" *See* Rule 1.0(f) "Reasonably should know" *See* Rule l.O(j)

163

Rule 8.5 ABA MODEL RULES

RULE 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW

* 1. 8.5a 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.
  2. 8.5b 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. 8.5b1 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. 8.5b2 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 Autlzority*

[1] It is longstanding l,nv th.1t 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 ju­ risdiction is for the protection of the citizens of this jurisdiction. Recip­ rocal enforcement of il jurisdiction's clisciplin.1ry findings and sanctions will further adv,uice the purposl's of this Rule. See, Rules 6 and 22, ABA *1\tfodcl Rulc:-for f.11il'\_11cr [)i ciplinary h f<1 rcc111n 1t.* A l,nvycr who is subject to the disciplinilry i1t1thority of this jurisdiction under Rule 8.S(a) appoints iln officiill to be design,1ted hy this court to receive service of process in this ju ris d ict io n. The fact that the lcw:yer is subject to the disciplinary au­ thority nf this jurisdiction may be a factor in determining whether per­ sonal jurisdiction m,1y be asserted n\·er the lawyer for civil matters.

MAINTAINING THE INTEGRITY OF THE PROFESSION **Rule** 8.5

*Choice of Law*

1. 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 differ­ ing 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.
2. 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 profes­ sion). Accordingly, it takes the approach of (i) providing that any particu­ lar conduct of a lawyer shall be subject to only one set of rules of profes­ sional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with rec­ ognition of appropriate regulatory interests of relevant jurisdictions, and

(iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

1. Paragraph (b)(l) 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 professional conduct of that tribunal. As to all other con­ duct, 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 tribu­ nal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.
2. 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. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the law er and client that reasonably specifies a particular jurisdiction as wit in

165

**Rule 8.5 ABA MODEL RULES**

the scope of that paragraph may be considered if the agreement was ob­ tained with the client's informed consent confirmed in the agreement.

1. 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.
2. The choice of law provision applies to lawyers engaged in trans­ national practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

**Definitional Cross-References** "Reasonably believes" *See* Rule l.O(i) "Tribunal" *See* Rule l.O(m)

166