



NEW YORK STATE BAR ASSOCIATION

**Proposed Rules of
Professional Conduct**

Albany, New York

February 1, 2008

This report was approved by the New York State Bar Association's House of Delegates on November 3, 2007. The rules contained herein are not effective unless and until approved by the Appellate Division of State Supreme Court.

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NEW YORK STATE BAR ASSOCIATION PROPOSED RULES OF PROFESSIONAL CONDUCT

INTRODUCTION

The New York State Bar Association (the “NYSBA”) submits to the Presiding Justices of the Appellate Division of the Supreme Court of the State of New York its proposed New York Rules of Professional Conduct. These Rules are the product of over five years of work, involving lawyers in a broad range of practice areas throughout the State, and have the unanimous support of the NYSBA House of Delegates, as well as that of many of the county and local bar associations in New York. If these Rules are adopted, New York will join rest of the nation in rejecting the confusing and outdated Model Code of Professional Responsibility (the “Model Code”), and join the 47 states and the District of Columbia that have already embraced the Model Rules of Professional Conduct (the “Model Rules”) since their introduction by the American Bar Association (the “ABA”) in August 1983. It is the hope of the NYSBA, which speaks for its 72,000 members, that the courts will review and favorably consider adoption of these proposals.

DEVELOPMENT OF THE PROPOSED RULES

In late 1983, many states began to consider replacing the Model Code with the then-new Model Rules. New York was poised to become one of the first states to make the change to the Model Rules, but in November 1985 a proposal to adopt the Rules was rejected by a narrow margin in the NYSBA House of Delegates, partly out of the uncertainty that might have arisen if New York had become a pioneer in testing a new set of ethics rules. However, the NYSBA House recognized even then that the Model Rules offered many improvements over the Model

Code. Accordingly, the NYSBA embarked upon two waves of “engrafting” of Model Rules language and concepts into the framework of the existing New York Lawyers’ Code of Professional Responsibility. This process resulted in substantial amendments to New York’s ethics rules in 1990 and 1999. New York’s current Code, consequently, is an awkward amalgam of Model Code and Model Rules provisions, interspersed with rules developed specifically by and for New York.

Between 1987 and 1997, the ABA amended, expanded and refined the Model Rules almost annually to improve the wording and to address evolving problems. By 1997, however, the ABA recognized that piecemeal amendments were insufficient to keep pace with the rapid and dramatic changes in the legal profession, technology and globalization. The ABA decided to undertake a full-scale review of the Model Rules, and created the Commission on Evaluation of the Rules of Professional Conduct, more commonly known as the “Ethics 2000” Commission. Based on that Commission’s work, the ABA House of Delegates adopted a broad range of amendments to the Model Rules in 2002.¹ Since that time, numerous states have reviewed and enacted many of the recent ABA amendments, resulting in the greatest degree of national uniformity since the Model Code was adopted virtually verbatim by the entire nation in the early 1970s. This uniformity reflects not only the substantial benefits of rules that are consistent from one state to another, but also the wisdom and experience gained in nearly 25 years of using and refining the Model Rules.

¹ Additional amendments to the Model Rules relating to multijurisdictional practice and confidentiality were adopted by the ABA during 2003.

In January 2003, the Committee on Standards of Attorney Conduct (“COSAC” or the “Committee”) began its own comprehensive evaluation of the revised Model Rules.² The two dozen members of the Committee were drawn from a broad range of practice areas and settings, and represented the entire state geographically. All members of the Committee have substantial experience in matters of legal ethics and professional responsibility.³

The work of COSAC was divided among three subcommittees, each considering approximately one-third of the provisions of the Model Rules and generating discussion drafts for review by the full Committee and, in many cases, for public comment. A distinguished ethics professor worked with each subcommittee as an Associate Reporter. Together, the subcommittees held approximately 50 conference calls, each typically two hours in length or longer. COSAC held 11 days of in-person plenary sessions, convening full-day (and sometimes two-day) meetings in New York City, Albany and Rochester. With associated preparation, the members of the Committee together devoted many thousands of hours to the development of its initial report to the NYSBA House of Delegates.

The methodology followed by the Committee was to review each ABA Model Rule, the corresponding provision of the New York Code, and versions of the Model Rule as adopted in other states, together with the relevant case law, ethics opinions and commentary. With respect to each Rule, COSAC’s goal was to develop the best possible formulation of the provision based on all of the available resources. For purposes of national uniformity, which would have significant benefits for New York lawyers, COSAC made an effort to adopt the ABA Model

² In February 2003, COSAC advised the Presiding Justices of the Appellate Division of the commencement of this project and the Committee was encouraged to proceed. The Appellate Division’s Interdepartmental Committee on the Code of Professional Responsibility, chaired by First Department Justice Joseph P. Sullivan, was periodically advised of the progress of the project throughout its development.

³ Biographical sketches of the members of the Committee follow this section of the Report.

Rule language absent some compelling reason to do otherwise. Compelling reasons were found, for example, where a New York Disciplinary Rule (“DR”) had been adopted or amended relatively recently after considerable study, or where COSAC believed that the New York DR was more clearly written or rested on a sounder policy footing. In those circumstances, the New York rule was imported into the Model Rules format, sometimes with fine-tuning changes to enhance clarity or to address additional issues. COSAC did not follow the Model Rules slavishly, but also did not depart from them lightly.⁴

Following COSAC’s own initial review at plenary sessions, discussion drafts of the core rules were published for comment on the NYSBA web site. COSAC received written comments on the core rules from the following organizations: the Bar Association of Erie County; the National Employment Lawyers Association/New York; the NYSBA Commercial and Federal Litigation Section; the NYSBA Committee on Professional Ethics; the NYSBA Labor and Employment Law Section; the NYSBA Young Lawyers Section; the New York City Bar; the New York County Lawyers’ Association; and the Richmond County Bar Association. All of those comments were studied and considered in June 2005 at the final two-day plenary session in Rochester.

On September 30, 2005, COSAC issued a two-volume report proposing a set of Rules of Professional Conduct for adoption in New York. A Scheduling Resolution (the “Resolution”)

⁴ To the maximum extent possible, the numbering of the Model Rules has been preserved. In some cases, this has resulted in paragraphs of Rules or Comments being intentionally “reserved,” in the case of Rules, or “omitted,” in the case of Comments. Also, particularly in the case of Comments, we have added new paragraphs by appending letters, e.g., “[3A],” rather than renumbering all of the Comment paragraphs that follow sequentially. We have adopted this approach to facilitate correlation between New York’s Rules of Professional Conduct, the ABA Model Rules, and the rules that are in effect in the rest of the country. Various other states, such as Massachusetts, have taken a similar approach to numbering.

was adopted by the House of Delegates on November 5, 2005.⁵ Under the Resolution, an initial vote was taken on April 1, 2006 on the overarching question whether to change from the Model Code to the Model Rules format. The House approved that change unanimously. The Resolution also divided the proposed Rules into six tranches, which were considered by the House over the course of six consecutive meetings from June 2006 through November 2007, a process that generated widespread publicity in New York and nationally. A broad range of entities and individuals reviewed the rules in each tranche. Detailed written comments were received from the following organizations and individuals:

- Bar Association of Erie County
- District Attorneys Association of New York State
- IOLA Fund of New York State
- Legal Aid Society
- New York Association of Collaborative Professionals
- New York City Bar
- New York County District Attorney
- New York County Lawyers' Association
- NYSBA Business Law Section
- NYSBA Commercial and Federal Litigation Section
- NYSBA Corporate Counsel Section
- NYSBA Committee on Attorney Professionalism
- NYSBA Committee on Legal Aid
- NYSBA Committee on Professional Discipline
- NYSBA Committee on Professional Ethics
- New York State Defenders Association
- United States Attorneys for the Districts of New York
- Hon. Fern Fisher
- Steve Krantz
- Eugene Nathanson
- Hon. Juanita Bing Newton
- William C. Silverman

The COSAC subcommittee responsible for the Rules under consideration studied and reviewed each wave of comments as received and proposed changes to the draft Rules, which

⁵ A copy of the Resolution is appended to this portion of the Report.

were then considered by the full Committee in day-long plenary sessions before COSAC submitted revised Rules to the House. The day before each House meeting, the NYSBA Executive Committee examined and ultimately supported adoption of each of the proposals, sometimes after requesting changes of its own. Each Rule, with its associated Comments, was voted upon by the full House of Delegates over the course of the six meetings. Finally, at the conclusion of its November 3, 2007 meeting in Albany, by unanimous voice vote, the NYSBA House of Delegates adopted a capstone resolution approving the Proposed New York Rules of Professional Conduct and directing that they be transmitted to the Courts for their consideration. Through this Report, therefore, the NYSBA urges the Presiding Justices of the Appellate Division, exercising their authority under Section 90 of the Judiciary Law, to adopt the Proposed New York Rules of Professional Conduct in place of the current New York Lawyers' Code of Professional Responsibility.

ADOPTION OF THE MODEL RULES IN NEW YORK

When New York first considered the Model Rules in 1985, only one other state had adopted them. Today, in contrast, New York is the only state that retains the Model Code in any form.⁶

Wholly apart from the substance of the proposed Rules, there are several compelling reasons for adopting the Model Rules format. First, the structure of the Model Rules provides a more readily accessible source of ethical guidance for New York lawyers than does the current New York Code. Disciplinary enforcement cannot be the primary basis for ensuring ethical

⁶ Although California and Maine follow neither the Model Code nor the Model Rules, both states are actively evaluating the ABA Model Rules and are considering their adoption. See www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10129&id=1100 (California); www.mebaroverseers.org/ethicsweb/ethicsmain.html (Maine).

conduct by lawyers. Voluntary compliance with ethics rules is critical to maintaining the integrity of the bar. To that end, it is essential that when lawyers have ethics questions – which are often urgent – they are able to locate quickly and understand readily the applicable rules. The structure of the Model Code,⁷ however, does not lend itself to quick or ready reference and problem-solving. The DRs, which are mandatory and set the minimum standards of conduct by which lawyers must abide, are grouped by abstract and amorphous professional ideals, set forth as chapter headings, called “Canons” under the Code. Each chapter begins with several Ethical Considerations (“ECs”), which were intended initially as setting non-binding “aspirational” goals for lawyers, but have evolved over the years, particularly as amendments have been made to the New York Code, so that they serve the dual functions of recommending “best practice” guidelines and providing explanatory commentary on specific DRs. Unfortunately, the Model Code format does not correlate the ECs and the DRs, making it difficult for all but the experts to find whatever explanation the ECs may provide. In addition, the ECs are frequently formulated in prescriptive terms, a construction that leads to further confusion among both lawyers and courts as to whether the ECs are aspirational or mandatory.

The Model Rules were developed by the ABA because lawyers and judges were dissatisfied with both the format and the substance of the Model Code. The Model Rules employ the familiar Restatement-type format, with black-letter rules followed by commentary. Comments follow each Rule and are part of a unitary whole. The format focuses the reader’s attention on the black-letter rule, not on the commentary or even less substantive “aspirational” standards. The structure makes it clear that there is only one set of Rules and that the Comments are subordinate to the text of the Rules that they follow.

⁷ The Model Code of Professional Responsibility was adopted by the ABA in 1969 and became effective in New York State as of January 1, 1970.

Another benefit of the Model Rules format is that it groups the Rules by reference to the various roles that lawyers can play and the tasks that they can perform, such as when a lawyer serves as a negotiator, as an advocate or as a counselor. This structure makes it easier for lawyers to find the provisions addressing a particular ethical issue. For example, the Model Code places rules governing legal fees under DR 2-106 but rules governing safeguarding of client property under DR 9-102, virtually at opposite ends of the document. The legal fee rule appears under Canon 2, which states aphoristically that “A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available.” The rule governing client property, one of the most important provisions of the New York Code, is virtually hidden under Canon 9, which states that “A Lawyer Should Avoid Even the Appearance of Professional Impropriety.” The Model Rules format, in contrast, places these related rules together in its first section (as Rule 1.5 and Rule 1.15, respectively) under the clear and simplified heading, “Client-Lawyer Relationship.”

The Model Rules also cover many topics that the Code does not. For example, the existing New York DRs have no counterpart to Model Rules provisions regarding such important topics as: (i) duties to prospective clients (Rule 1.18), (ii) the ability of lawyers to reveal client confidential information necessary to secure legal advice concerning compliance with the Rules (Rule 1.6(b)(4)), and (iii) the right of the client to decide whether to settle a matter (Rule 1.2(a)). In the New York Code, these topics are discussed – if at all – only in non-binding “aspirational” ECs.

It is therefore not surprising that almost every other disciplinary jurisdiction in the United States has embraced the Model Rules. Over the past 25 years, a nationwide body of law has developed that New York lawyers cannot readily access because our state – now alone –

continues to adhere to the Model Code. In addition to case law and bar association ethics opinions from other states, most of the secondary literature about the professional responsibility of lawyers now focuses exclusively on the Model Rules. Adoption of the Model Rules format would facilitate ethical research by lawyers in New York, particularly for busy solo practitioners and small-firm lawyers for whom time is at a premium, eliminating the need first to determine which Model Rule correlates to the DR or EC being researched (or vice versa) and facilitating access to a large base of analysis and authority.

Correspondingly, lawyers outside New York would be better able to review and follow New York precedents if the Model Rules were adopted here. At present, New York rulings, opinions and other authorities – once preeminent among the states – have little influence outside this state. They are often discounted elsewhere because of New York’s continued reliance on the Model Code format. Conversion to the Model Rules format would allow New York statements on ethics issues to be national headlines, not obscure footnotes. Relatedly, for the growing number of lawyers who occasionally or frequently travel outside their state of admission to engage in the practice of law, adoption of the Model Rules format would mean less confusion and fewer inconsistencies and contradictions in multijurisdictional practice.⁸

New York’s transition to the Model Rules format should not be difficult. One of the objections to adoption of the Model Rules format in 1985 was that New York had, only 15 years before, embraced the Model Code after many years of existence under the Canons of Professional Ethics, and that it was therefore too soon to change to an untested structure. That argument is no longer valid. Lawyers and judges in New York have had nearly four decades of experience under the Model Code to recognize its many deficiencies, and continued patchwork

⁸ For example, all six states bordering New York have adopted the Model Rules.

amendments cannot adequately remedy these shortcomings. Meanwhile, the rest of the country has had nearly 25 years of growing and satisfied use of the Model Rules.

Importantly, the majority of New York lawyers are already fully familiar with the Model Rules. Since 1982, persons seeking admission to the New York bar have had to pass the Multistate Professional Responsibility Examination (“MPRE”), which has always been based largely, and now is based solely, on the ABA Model Rules. Over two-thirds of all NYSBA members have been admitted to practice since 1982, and accordingly have been required to learn the Model Rules prior to admission. Today, law schools throughout the state and country emphasize the Model Rules in teaching ethics to their students (partially because textbooks used in law school courses on professional responsibility have deleted most cases and ethics opinions based on the old Model Code). Retaining the Model Code only complicates the teaching of ethics in New York’s law schools because, in allocating the limited classroom time they have available, law professors must choose between teaching two sets of sometimes inconsistent regulations or ignoring the New York Code altogether and focusing solely on the more accessible, understandable and nationally embraced Model Rules.

For admitted lawyers, Continuing Legal Education (“CLE”) programs have been referring to and relying upon the Model Rules since their adoption by the ABA 25 years ago. Indeed, CLE programs in New York have been specifically tracking and discussing COSAC’s work on the very provisions presented here for the past several years, and if the Rules are adopted will provide lawyers with any additional transitional guidance they may need through the ethics courses that New York’s CLE regulations already require.

The transition will be relatively easy for the additional reason that New York lawyers are already familiar with a number of Model Rules concepts that have found their way into the New

York Code through the 1990 and 1999 amendments, as well as the proposed amendments regarding multijurisdictional practice approved by the NYSBA House of Delegates in 2003. While the “cut and paste” approach of engrafting parts of the Model Rules into the Code has given us some of the benefits of consistency with national standards, it has not afforded New York lawyers the benefit of the Model Rules’ far more accessible and understandable structure and numbering system, or the ability to tap easily into the nationwide body of law that has developed under the Model Rules for 25 years.

The legal profession has changed enormously since 1985, when the Model Rules were rejected by the NYSBA, and the pace of change has accelerated since 1996, when the NYSBA began consideration of the last significant wave of proposed amendments to the New York Code. Over the past 23 years, membership in the bar has nearly doubled. New practice areas have emerged and others have faded. New technologies (such as email and the Internet) have radically altered the way in which lawyers communicate with their clients, other lawyers and the public, and has transformed the way in which lawyers and courts conduct research. Multijurisdictional and even global law practice has become more commonplace. The time for a fresh look at our ethics rules has come. The NYSBA believes that adopting the Rules of Professional Conduct as proposed in this Report is critical to improving ethics compliance in New York, and hopes that the Justices of the Appellate Division will take appropriate action to implement the recommendations contained herein.

CONTENTS OF THIS REPORT

The body of this Report contains the text of the Proposed New York Rules of Professional Conduct as approved by the NYSBA House of Delegates. Each Rule is followed by the associated Comments, also approved by the House, and the COSAC Reporters’ Notes, which

discuss the proposed provisions, any material differences from the existing rules, and the reasons for the proposed changes.

The NYSBA asks that the Courts adopt both the Rules and the Comments.⁹ We recognize, however, that the Appellate Division has historically promulgated only the black-letter DRs used for the imposition of professional discipline. If the Appellate Division adopts only the Rules, and not the Comments,¹⁰ we anticipate that COSAC, and then the NYSBA House of Delegates, would review the Comments after the Rules have been approved and make necessary conforming changes, as has been the case in the past with the existing ECs.

CONCLUSION

The NYSBA therefore respectfully urges the Courts of the State of New York to adopt the proposed New York Rules of Professional Conduct as being in the best interest of lawyers, judges and the people of this state.

January 2008

⁹ We have surveyed other states to determine whether the courts have chosen to adopt the Comments as well as the Rules, and determined that the courts have done so in about one-third of the states. Of course, the Comments would provide far more authoritative guidance for lawyers, courts and disciplinary authorities if they were adopted by the Appellate Division.

¹⁰ We urge in this regard that the Courts, if and when they adopt the Proposed New York Rules of Professional Conduct, adopt a numbering system that is consistent with the systems employed in rest of the country, and that incorporates each rule number into the official citation. A great deal of confusion has been caused by the current numbering system, in which Disciplinary Rules carry with them a separate citation under Part 1200 of the court rules. For example, the basic confidentiality rule, generally known to the bar as DR 4-101, is officially cited as 22 N.Y.C.R.R. § 1200.19. Some courts refer to the rule only as section 1200.19, some refer only to the DR 4-101 cite, and some refer to both. Most lawyers are not aware that when researching these rules, particularly when using computer-assisted research techniques, they must search for the rule under both numbering systems. Critical references may be missed as a result. Other states have employed systems that meld their own internal regulatory numbering systems with the Model Rules numbering. In New York, this might be accomplished by a system as simple as codifying Rule 1.6(b), for example, as 22 N.Y.C.R.R. § 1200-1.6(b), so that a lawyer searching a computer database for references to “1.6(b)” would find authorities using either formulation.

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¹¹ Served through January 2005.

¹² The Committee gratefully acknowledges the assistance of volunteers James M. Bergin, Robert M. Fettman, James Fuchs, David G. Keyko, James B. Kobak, Martin Minkowitz, Joseph E. Neuhaus and Thomas W. Walsh in the final production of this report.

BIOGRAPHICAL SKETCHES OF COMMITTEE MEMBERS¹³

Dierdre A. Burgman has spent most of her career as a commercial litigator in New York City. She was an associate at Cahill Gordon & Reindel and later became Counsel at Salans Hertzfeld Helibronn Christy & Viener. She also served as Senior Vice President and General Counsel of the New York State Urban Development Corporation, where she had chief legal responsibility for the 42nd Street Development Project, and as a New York State Deputy Inspector General. Ms. Burgman is a former member of the NYSBA House of Delegates and a former member of the NYCLA Board of Directors, having chaired NYCLA's Committee on the Supreme Court. She has authored and co-authored several law review articles and lectured at CLE programs. In addition to her work on other committees of the ABA, NYCB and NYCLA, she has served on four legal ethics-related committees, including NYCB's Committee on Professional and Judicial Ethics and Committee on Professional Responsibility. She left her position as Counsel at Sullivan & Worcester in 2006 after becoming disabled.

Marilyn T. Carreras is a practicing lawyer and maintains a general and trial practice in the upstate resort town of Windham. She is a graduate of the Fordham Law School and has been in practice for over 23 years. She is licensed to practice law in the states of New York, Florida and Colorado. In addition to serving on COSAC, she serves on the NYSBA By-Laws Committee. She has served on the NYSBA Attorney Professionalism Committee for eight years and on the NYSBA Committee to Review the Standards of Judicial Conduct. Ms. Carreras has lectured for the NYSBA and for local organizations, and has been an alternate member of the NYSBA Nominating Committee.

Peter V. Coffey practices in Schenectady with the firm of Englert, Coffey & McHugh. He graduated from Albany Law School, where he was a member of the Law Review. He previously has served as a member and Chair of the Committee on Professional Standards of the Third Judicial Department, as President of the Schenectady County Bar Association, as President of the Legal Aid Society of Northeastern New York, and as a Vice President of the NYSBA. Mr. Coffey has been awarded the Distinguished Service Award for his service to legal aid organizations in Schenectady County and the NYSBA President's Pro Bono Service Attorney Award. Currently, he is Secretary of the NYSBA Real Property Law Section and a Life Fellow of both the American Bar Foundation and the New York State Bar Foundation.

Roger C. Cramton (Associate Reporter, Subcommittee II) is Professor of Law at Cornell Law School in Ithaca, a position he has held since 1973. He previously served as Dean of the Cornell Law School, and also as a Professor of Law at the University of Chicago and the University of Michigan. He has served as a law professor since 1958, prior to which he spent five years in government as a law clerk, the head of an independent federal agency, and an Assistant Attorney General in the U.S. Department of Justice. Since 1980, his principal field of scholarship has been the law and ethics of lawyering. Prof. Cramton served as the initial chairman of the Legal Services Corporation and, subsequently, as a member of two national commissions concerned

¹³ In the biographical sketches, the American Bar Association is abbreviated as "ABA," the New York State Bar Association as "NYSBA," the New York City Bar as "NYCB," and the New York County Lawyers' Association as "NYCLA." The NYSBA Committee on Standards of Attorney Conduct continues to be referred to as "COSAC."

with the federal courts and their judges. In his capacity as a member of the Council of the American Law Institute, he worked on the Restatement of the Law Governing Lawyers.

Evan A. Davis is a litigation partner at Cleary Gottlieb Steen & Hamilton LLP in New York City. He is a graduate of the Columbia Law School, where he was Editor-in-Chief of the Columbia Law Review. He is a past President of the NYCB and served as Counsel to Governor Mario M. Cuomo from 1985 to 1990. Mr. Davis chaired the NYCB Committee on the Model Rules when the Rules were first proposed, has been a member of several NYSBA committees considering revisions to professional ethics rules in New York and participated actively in most of the key debates in the ABA House of Delegates relating to the Model Rules.

Kenneth L. Gartner is a commercial and appellate litigator with the Mineola law firm of Lynn & Gartner, LLP, where his practice includes representing lawyers and law firms in criminal, civil and disciplinary matters, and serving as an expert witness or special counsel on legal ethics issues. For seven years, until 2006, he was a civil and criminal trial judge in the Nassau County District Court. Judge Gartner is a Special Professor of Legal Ethics at the Hofstra University School of Law, and an Adjunct Professor at the Jacob D. Fuchsberg Law Center, Touro College. He is a member of the NYSBA's Committee on Professional Ethics. He received his J.D., *cum laude*, from the State University of New York at Buffalo, where he was Managing Editor of the Law Review. Prior to his election as a judge, he served as an antitrust/litigation associate at a Manhattan law firm and, subsequently, as a partner in the Garden City firm of Meyer, Suozzi, English & Klein, P.C. Judge Gartner spent 17 years as a trial and appellate litigator, when, among other things, he defended attorneys in grievance proceedings. He is also a past Chair of both the Nassau County Bar Association Professional Ethics Committee and COSAC, and is or has been a member of the NYCB Committee on Professional Responsibility, the Federalist Society Professional Responsibility Practice Group, and the American Association of Professional Responsibility Lawyers.

A. Paul Goldblum has served as a trial lawyer, appellate counsel and regional counsel for Liberty Mutual for 35 years and a solo practitioner for 20 years in Queens County, where he was President of the Queens County Bar Association. He served as Chair of the NYSBA's Committee on Professional Discipline and Chair of its Committee on Judicial Administration. For 16 years, he was a member and Chair of the Grievance Committee for the Second and Eleventh Judicial Districts. He was also NYSBA Vice President from the Eleventh Judicial District. Currently, Mr. Goldblum is a member of the NYSBA's House of Delegates, Committee on Professional Discipline and Committee on Courts of Appellate Jurisdiction.

Bruce A. Green is the Louis Stein Professor at the Fordham Law School in New York City, where he teaches legal ethics and directs the Louis Stein Center for Law and Ethics. He currently serves as a member and past Chair of the NYSBA Committee on Professional Ethics, as Reporter to the ABA Task Force on the Attorney-Client Privilege, as a member of the Multistate Professional Responsibility Examination drafting committee, and as Co-Chair of the ABA Criminal Justice Section's Committee on Ethics, Gideon and Professionalism. He previously served as a member of the Departmental Disciplinary Committee of the Appellate Division, First Department, as a member of the New York City Conflicts of Interest Board and as Reporter to the ABA Commission on Multijurisdictional Practice. Prof. Green was a member of the NYSBA House of Delegates, the NYCLA Board of Directors and the ABA Litigation

Section's Council. He also served as Chair of the Professional Responsibility Section of the Association of American Law Schools. Prior to joining the Fordham law faculty, Prof. Green was a law clerk to Second Circuit Judge James L. Oakes and to Supreme Court Justice Thurgood Marshall, and was an Assistant U.S. Attorney and Chief Appellate Attorney in the Office of the U.S. Attorney for the Southern District of New York.

Marjorie E. Gross (Chair, Subcommittee II) of New York City is Deputy Superintendent and General Counsel of the New York State Banking Department. She has practiced banking and securities law since 1974, primarily as in-house counsel for banks. She is a member of the NYSBA Committee on Professional Ethics and Committee to Review the Code of Judicial Conduct, and was a member of the NYSBA committees that considered adoption of the ABA Model Rules in 1985 and that amended the Code of Professional Responsibility in 1990 and 1999. Ms. Gross has also chaired the NYCLA Committee on Professional Ethics and was an Adviser to the American Law Institute's Restatement of the Law Governing Lawyers.

Ralph L. Halpern is a partner in the Buffalo law firm of Jaeckle, Fleischmann & Mugel, LLP. He earned his J.D. degree, *cum laude*, from the University of Buffalo in 1953, where he was Associate Editor of the Law Review. He has served in the Judge Advocate General's Corps of the U.S. Army. Mr. Halpern has been a member of the NYSBA House of Delegates, Chair of the NYSBA Committee on Professional Ethics, Secretary and Vice-Chair of the NYSBA International Law and Practice Section, and the chair of several additional NYSBA committees. He has served as a member of the House of Delegates of the ABA and is a member of the American Judicature Society, the American Law Institute and the Bar Association of Erie County.

Kristie H. Hanson is a 1989 graduate of South Texas College of Law. She is licensed in Texas and New York. After clerking for Texas District Court Judge Daniel Downey, she practiced corporate law in Houston, Texas. In 1990, she returned to her native Schenectady, where she has maintained a general practice since 1990 concentrating in Social Security Disability, personal injury and bankruptcy cases. In addition to serving on COSAC, Ms. Hanson has served on the NYSBA Committee on Professional Discipline. She is also a member of the New York Bankruptcy Bar Association and the Schenectady County Bar Association.

Steven C. Krane (Chair) is a partner in Proskauer Rose LLP in New York City and Chair of the firm's Law Firm Advisory Practice Group. Mr. Krane is a past President of the NYSBA from 2001-02, and has chaired COSAC and its predecessor, the Special Committee to Review the Code of Professional Responsibility, since 1995. From 1999 to 2003 he also served as Vice-Chair of the NYSBA Special Committee on the Law Governing Firm Structure and Operation. He was a member of the NYSBA Committee on Professional Ethics, and has been a member of the ABA Standing Committee on Ethics and Professional Responsibility since 2004 and that committee's Chair since 2006. Mr. Krane also served for nine years on the Committee on Professional and Judicial Ethics of the NYCB (three years each as Chair, Secretary and member). In 2007, he was named Co-Chair of the New York State Judicial Institute on Professionalism in the Law. He has been a member of the Attorney Advertising Committee of the Administrative Board of the Courts of the State of New York since its formation in 2005. Mr. Krane was a member of the Departmental Disciplinary Committee of the Appellate Division, First Department, where he was a Hearing Panel Chair. He also served as a Hearing Panel Chair for

the Committee on Grievances of the United States District Court for the Southern District of New York, and currently serves as a Special Referee for the Grievance Committee for the Ninth Judicial District. Mr. Krane has written and lectured extensively on attorney ethics issues and for several years taught professional responsibility at the Columbia Law School. He is a graduate of the New York University School of Law and served as law clerk to Judge Judith S. Kaye of the New York Court of Appeals.

Gerard M. LaRusso is an attorney in private practice in Rochester. He received his B.A. from Rutgers in 1967, his J.D. from the St. John's University School of Law in 1970, and his LL.M. from New York University in 1974. Mr. LaRusso served as Chief Counsel for the Fourth Department Disciplinary Committees from 1989 to 2002, and as Principal Counsel for the Seventh Judicial District Grievance Committee from 1977 to 1989. He has been a member of the NYSBA Committee on Professional Discipline since 1991 and was named its Chair in 2004.

Howard A. Levine (Special Counsel) is senior counsel to Whiteman Osterman & Hanna in Albany, and concentrates his practice in arbitration, mediation, and appellate and commercial litigation. Prior to joining the firm in 2003, Judge Levine had served in a variety of public-service positions. He spent over 30 years as a member of the judiciary beginning in 1971, serving as a Family Court Judge for Schenectady County, as a Justice of the Supreme Court, Fourth Judicial District, as an Associate Justice of the Appellate Division, Third Department and as an Associate Judge of the New York State Court of Appeals. Prior to 1970, Judge Levine was an associate at the law firm of Hughes, Hubbard, Blair & Reed in New York City, in private practice in Schenectady, an Assistant District Attorney for Schenectady County, and the District Attorney of Schenectady County.

Susan B. Lindenauer is the retired General Counsel of The Legal Aid Society of New York City. After graduating from the Columbia Law School *cum laude*, Ms. Lindenauer began her legal career as an associate at Cleary, Gottlieb, Steen & Hamilton. She is currently a Vice President of the NYSBA for the First Judicial District and a member of its Executive Committee. She also serves on the Board of Directors of NYCLA, where she is Co-Chair of the Task Force on Judicial Selection. She is a member of the Board of the New York Bar Foundation and Vice-Chair of the Fellows of the Foundation. Ms. Lindenauer is also a member of the Board of Visitors of the Columbia Law School and a former President of the Columbia Law School Association. Ms. Lindenauer has also served on a variety of committees formed to improve the legal system, including chairing the Criminal Justice Section of the NYSBA, the NYSBA Committee on Legal Aid and the NYCB Committee on Legal Assistance. She has also served as a member of the Chief Judge's Commission on the Jury.

Sarah Diane McShea has practiced the law of lawyering in New York City since 1980. Her private practice is devoted to advising lawyers, law firms, corporate law departments and government agencies on legal ethics and professional practice issues. She represents lawyers in disciplinary matters, litigates sanctions and disqualification motions, provides risk-management and advisory ethics opinions, represents bar applicants and serves as an expert witness on professional responsibility issues. Ms. McShea has taught professional responsibility as an Adjunct Professor at Brooklyn Law School, the St. John's University School of Law and the Columbia Law School. She is a member of the Editorial Board of the ABA/BNA Lawyers' Manual on Professional Conduct. She is Chair of the NYSBA Law Practice Continuity

Committee and Co-Chair of the NYSBA Professional Discipline Committee. Ms. McShea is a past President of the Association of Professional Responsibility Lawyers and frequently lectures at CLE programs around the country. She was Deputy Chief Counsel and staff counsel to the Departmental Disciplinary Committee of the Appellate Division, First Department (1980-89) and Chief of the Public Corruption Bureau, Kings County District Attorney's Office (1990-93). She is a graduate of Yale College and the Boston University School of Law.

Ronald C. Minkoff is a shareholder of Frankfurt Kurnit Klein & Selz, P.C., in New York City, where he is Chair of the Professional Responsibility Group. He is a member of the ABA Standing Committee on Professional Responsibility, the Policy Implementation Committee of the ABA Center for Professional Responsibility, the NYSBA Professional Discipline Committee, and the NYCB Council on Judicial Advocacy. He is a past President of the Association of Professional Responsibility Lawyers, a nationwide organization devoted to the law of lawyering, and chaired the NYCB Joint Subcommittee on the Model Rules of Judicial Conduct and the NYCB Committee on Professional Discipline. Mr. Minkoff is also an Adjunct Professor of Professional Responsibility at Brooklyn Law School, where he has taught for ten years. He has written and lectured extensively on a variety of professional responsibility subjects, including conflicts of interest, partnership disputes, the "no contact" rule, Sarbanes-Oxley and many others.

Sandra S. O'Loughlin is a partner in the Buffalo office of Hiscock & Barclay, LLP, and an Adjunct Professor and Lecturer at the State University of New York at Buffalo School of Law. Ms. O'Loughlin is a member of the National Association of Bond Lawyers, a member of the ABA Business Law Section, and for 20 years served as a member, then Chair, of the Character and Fitness Committee for the Appellate Division, Fourth Department, Eighth Judicial District. In addition to her service on COSAC, she is a member of the NYSBA Committee on Securities Regulation. Over the years, she has served on other NYSBA committees, including its Special Committee on Unlawful Practice of Law and, for over 15 years, its Committee on Professional Ethics. Ms. O'Loughlin has also chaired the Professional Ethics Committee of the Bar Association of Erie County and serves as a member of its Grievance Committee. She graduated *cum laude* from the State University of New York at Buffalo School of Law, where she served as the Notes and Comments Editor of the Law Review.

Anne Patrice Richter is the founder of McManus, Collura & Richter, P.C., in New York City. She graduated from the College of William and Mary with a B.A. in 1983 and in 1990 received her J.D. from New York Law School where she served as the Notes and Comments Editor of the Journal of International and Comparative Law. Prior to founding her current firm, Ms. Richter was a member of Conway, Farrell, Curtin & Kelly, P.C., where she practiced professional liability defense law, and an Assistant Vice President of General Reinsurance Corporation.

David M. Rubin is a partner in the law firm of Golenbock Eiseman Assor Bell & Peskoe LLP in New York City, specializing in real estate transactions and litigation. He has been a member of the NYCB Committee on Professional and Judicial Ethics and a speaker at PLI ethics courses. He is currently a member of the NYCB Complaint Mediation Panel and a member of the Panel of Arbitrators of the American Arbitration Association.

David M. Schraver (Chair, Subcommittee III) is a partner in the law firm of Nixon Peabody LLP in Rochester, where his practice involves civil litigation in state and federal courts. Mr. Schraver is listed in *The Best Lawyers in America* for business litigation. Mr. Schraver graduated cum laude from Harvard College and is a magna cum laude graduate of the University of Michigan Law School, where he was a Note and Comment Editor of the *Michigan Law Review*. He served in the U.S. Navy Judge Advocate General's Corps from 1971 to 1974. Mr. Schraver is a past President of the Monroe County Bar Association, Vice President of the NYSBA for the Seventh Judicial District, Chair of the NYSBA Finance Committee and a past member of the NYSBA Committee on Professional Ethics. He is also a member of the ABA House of Delegates.

Roy D. Simon (Chief Reporter and Vice-Chair) is the Howard Lichtenstein Distinguished Professor of Legal Ethics at the Hofstra University School of Law in Hempstead. He graduated from Williams College and the New York University School of Law, where he was Editor-in-Chief of the *Law Review*. After clerking for United States District Judge Robert Merhige in Richmond, Virginia, and practicing law at Jenner & Block in Chicago, he became a law professor at Washington University in St. Louis in 1983. He joined the Hofstra law faculty in 1992. Prof. Simon annually writes *Simon's New York Code of Professional Responsibility Annotated*, annually co-authors *Regulation of Lawyers: Statutes and Standards* (with Prof. Stephen Gillers), and writes a monthly column for the *New York Professional Responsibility Report*. He currently serves on the NYSBA Committee on Professional Ethics, the Nassau County Bar Association's Professional Ethics Committee, and the NYCB's Committee on Professional Responsibility. He has served on the NYCB's Committee on Professional and Judicial Ethics, Committee on Professional Discipline, and Task Force on the Role of the Lawyer in corporate Governance. Prof. Simon has also chaired the Section on Professional Responsibility of the Association of American Law Schools.

M. David Tell (Chair, Subcommittee I) was a member of Wormser, Kiely, Galef & Jacobs LLP in New York City, where until retirement at the end of 2004 he primarily practiced real estate and hospitality law. Mr. Tell has been active for many years in the NYSBA and is currently a member of its Committee on Attorney Professionalism in addition to COSAC, having also served in the NYSBA House of Delegates. He served two terms as a member of the Nassau County Bar Association Board of Directors, is Chair of that Association's Grievance Committee, was a member of its Special Financial Oversight Committee, and was formerly the Chair and is currently a member of its Ethics Committee. Mr. Tell represents the Nassau County Bar Association in the ABA House of Delegates. Currently a member of the NYCB Committee on Professional Discipline, Mr. Tell is a past member of the NYCB's Committee on Professional and Judicial Ethics and Committee on Professional Responsibility.

Judson Vickers is a Senior Counsel in the Legal Counsel Division of the New York City Law Department. Before joining the Law Department, he clerked for Judge Carol Bagley Amon in the United States District Court for the Eastern District of New York and was a litigation associate at the law firm of Gordon Altman Butowsky Weitzen Shalov & Wein.

Michael Whiteman is a founding member of Whiteman Osterman & Hanna, LLP, in Albany, where he has concentrated his practice in the areas of utility law and regulation, corporate organization and transactions, government contracts and professional, business and government

ethics and responsibility. A graduate of Harvard College (*magna cum laude*) and the Harvard Law School (*cum laude*), Mr. Whiteman later served as Counsel to Governors Nelson A. Rockefeller and Malcolm Wilson. He is a member of the NYSBA Committee on Professional Ethics, which he chaired from 1987 to 1991, and was Chair of the NYSBA's Special Committee to Study Issues Affecting Same Sex Couples.

Steven Wechsler (Associate Reporter, Subcommittee I) is Professor of Law at the Syracuse University College of Law. He received his B.S. from Cornell University in 1967 and his M.B.A., with high distinction, from the University of Michigan Graduate School of Business Administration in 1973. He attended the University of Michigan Law School, where he was Associate Editor of the Michigan Law Review. Prof. Wechsler received his J.D., *magna cum laude*, in 1975 and was awarded the Order of the Coif. After graduation, he worked as an associate at the Denver law firm of Holme Roberts & Owen until 1979, when he began his academic career. Prof. Wechsler teaches contracts, professional responsibility, and negotiation skills. He has served as Associate Dean for Academic Affairs and Associate Dean for Research and Library Services at the College of Law. He was a member of the Grievance Committee for the Fifth Judicial District and is now a member of the NYSBA Committee on Professional Ethics. Prof. Wechsler is a frequent lecturer at CLE programs and writes in the area of professional responsibility. He has written several articles for the New York Professional Responsibility Report.

Ellen Yaroshefsky is Clinical Professor of Law and the Executive Director of the Jacob Burns Ethics Center at the Benjamin N. Cardozo School of Law in New York City. She is also the director of Cardozo's annual two-week Intensive Trial Advocacy Program and is Cardozo's Trial Team supervisor. Additionally, Prof. Yaroshefsky is Of Counsel to Hinshaw & Culbertson, LLP, concentrating her practice in the law of lawyering. She represents lawyers and law firms in criminal, civil and disciplinary matters and serves as an expert witness on legal ethics issues. She practiced as a criminal defense lawyer in Seattle, Washington until 1982, when she joined the Center for Constitutional Rights in New York. She was in private practice from 1988 to 1992, litigating civil rights and criminal cases. Since 1992, she has been a full-time member of the Cardozo law faculty. Prof. Yaroshefsky serves as an ethics consultant and frequently lectures on topics involving the law of lawyering, criminal advocacy and trial practice to a wide variety of bar associations and other groups. She has served on various committees of the NYCB and is currently a member of its Committee on Professional Responsibility.

Carol L. Ziegler (Associate Reporter, Subcommittee III) received her B.A. from Cornell University and her J.D. from the New York University School of Law. In addition to her private practice in Brooklyn, she teaches professional responsibility and legal ethics as an Adjunct Professor at Brooklyn Law School and the Columbia Law School. From 1988 to 2004, she was a full-time faculty member at Brooklyn Law School, where she also served as an Associate Dean for ten years. Prof. Ziegler previously served as General Counsel to the New York City Commission on Human Rights, Special Assistant Counsel and Counsel to the Chancellor of the New York City Public Schools and as a staff attorney for Brooklyn Legal Services Corporation A and the Public Education Association. She was a member of the NYSBA Committee on Professional Ethics and the NYCB Committee on Professional Discipline and currently serves as a member of the Magistrate Selection Panel for the United States District Court for the Eastern District of New York.

**RESOLUTION ADOPTED NOVEMBER 5, 2005 TO GOVERN
CONSIDERATION OF THE REPORT OF THE
COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT
(AS AMENDED JUNE 24, 2006)**

RESOLVED, that the House of Delegates hereby adopts the following procedure to govern consideration, at the January 27, 2006 and subsequent meetings, of the report of the Committee on Standards of Attorney Conduct:

- 1. Presentation of report.** At the January 27, 2006 meeting, the committee shall present an overview of its report on an informational basis only. Thereafter, at the April 1, 2006 meeting, there shall be formal consideration and vote on the committee's recommendation that New York adopt the format of the Model Rules of Professional Conduct. If that recommendation is approved, the committee shall present its report in the following segments, corresponding to the proposed rules:

June 24, 2006: Rules 1.1, 1.2, 1.3, 1.4, 3.1, 3.2, 3.5, 3.6, 3.7, 3.9, 8.1, 8.2, 8.3, 8.4.

November 4, 2006: Rules 1.15, 1.17, 3.8, 5.1, 5.2, 5.3, 7.4, 7.6.

January 26, 2007: Rules 1.11, 1.12, 2.1, 2.3, 2.4, 4.2, 4.3, 4.4, 6.1, 6.2, 6.3, 6.4, 6.5.

March 31, 2007: Rules 1.5, 1.14, 5.4, 5.5, 5.6, 5.7, 5.8, 8.5.

June 30, 2007: Rules 1.7, 1.8, 1.9, 1.10.

November 3, 2007: Rules 1.6, 1.13, 1.16, 1.18, 3.3, 3.4, 4.1, 1.0, Preamble, Scope.

- 2. Comments on recommendation regarding format change.** Any comments regarding the recommendation that New York adopt the format of the Model Rules of Professional Conduct must be submitted in writing to the Secretary of the Association no later than March 1, 2006. All comments submitted by this deadline shall be distributed to the members of the House in advance of the April 1, 2006 meeting.
- 3. Consideration of report at April 1, 2006 meeting.** Consideration of the recommendation that New York adopt the format of the Model Rules of Professional Conduct shall take place in the following manner:
 - a. The committee shall be given an opportunity to present its recommendation.
 - b. All those wishing to speak with regard to the recommendation may do so only once for no more than three minutes.
 - c. The committee may respond to questions and comments as appropriate.

- d. Procedural motions shall be considered out of order until debate on substantive issues is concluded.
- e. A vote on the recommendation will be taken at the conclusion of the debate.

If the recommendation is approved, the House shall consider the proposed rules as set forth in Paragraph 1.

4. **Amendments.** Any amendments to the committee’s proposed rules must be submitted in writing to the Secretary of the Association in accordance with the following schedule:

Meeting Date	Comment Deadline
June 24, 2006	May 26, 2006
November 4, 2006	October 6, 2006
January 26, 2007	December 29, 2006
March 31, 2007	March 1, 2007
June 30, 2007	May 25, 2007
November 3, 2007	October 5, 2007

- a. All amendments must be in the style used by the committee with deletions noted by strikeovers and new material by underscoring, and be accompanied by a brief explanation of the proposed changes; otherwise they shall not be considered. All amendments complying with this procedure shall be distributed to the members of the House in advance of the meeting at which they are to be considered.
- b. Only one level of amendment will be permitted. Thus, if an amendment to a proposed rule is pending, no amendment of that proposed amendment is in order.
- c. No amendments will be permitted from the floor of the House.
- d. In advance of each meeting, the committee may review comments and amendments submitted in accordance with this paragraph and amend its proposals in response to such comments and amendments.

5. **Consideration of report at June 24, 2006 and subsequent meetings.** Consideration of the proposed rules, as scheduled in Paragraph 1 above, shall be considered in the following manner:

- a. A representative of the committee shall have three minutes to present each rule. The proponents of any amendments shall have three minutes to present them.
- b. All those wishing to speak with regard to a particular rule/amendment may do so only once for no more than three minutes, except the sponsor of any amendment may speak a second time for two minutes, and a representative of the committee shall have two minutes to close.
- c. A vote on each rule shall be taken, requiring a majority vote for adoption.

- d. Procedural motions shall be considered out of order until debate on all substantive amendments has been concluded.
- 6.** Upon conclusion of debate and vote on the complete set of rules, a vote will be taken to authorize the committee and officers to make any necessary stylistic changes that may be necessary for the sake of uniformity and to authorize transmittal of the rules, as they may have been amended, to the Appellate Division in the four Judicial Departments.

NEW YORK STATE BAR ASSOCIATION PROPOSED RULES OF PROFESSIONAL CONDUCT

**AS APPROVED BY THE HOUSE OF DELEGATES
OF THE NEW YORK STATE BAR ASSOCIATION
ON NOVEMBER 3, 2007**

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients and an officer of the legal system with special responsibility for the quality of justice. As a representative of clients, a lawyer assumes many roles, including advisor, advocate, negotiator, and evaluator. As an officer of the legal system, each lawyer has a duty to uphold the legal process; to demonstrate respect for the legal system; to seek improvement of the law; and to promote access to the legal system and the administration of justice. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because, in a constitutional democracy, legal institutions depend on popular participation and support to maintain their authority.

[2] The touchstone of the client-lawyer relationship is the lawyer's obligation to assert the client's position under the rules of the adversary system, to maintain the client's confidential information except in limited circumstances, and to act with loyalty during the period of the representation.

[3] A lawyer's responsibilities in fulfilling these many roles and obligations are usually harmonious. In the course of law practice, however, conflicts may arise among the lawyer's responsibilities to clients, to the legal system and to the lawyer's own interests. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Nevertheless, within the framework of the Rules, many difficult issues of professional discretion can arise. The lawyer must resolve such issues through the exercise of sensitive professional and moral judgment, guided by the basic principles underlying the Rules.

[4] The legal profession is largely self-governing. An independent legal profession is an important force in preserving government under law, because abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice law. To the extent that lawyers meet these professional obligations, the occasion for government regulation is obviated.

[5] The relative autonomy of the legal profession carries with it special responsibilities of self-governance. Every lawyer is responsible for observance of the Rules of Professional Conduct and also should aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves. Compliance with the Rules depends primarily upon the lawyer's understanding of the Rules and desire to comply with the professional norms they embody for the benefit of clients and the legal system, and, secondarily, upon reinforcement by peer and public opinion.

PREAMBLE AND SCOPE

So long as its practitioners are guided by these principles, the law will continue to be a noble profession.

SCOPE

[6] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms “shall” or “shall not.” These Rules define proper conduct for purposes of professional discipline. Others, generally cast in the term “may,” are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer’s professional role. Many of the Comments use the term “should.” Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules. The Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

[7] 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.

[8] The Rules provide a framework for the ethical practice of law. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.

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

[10] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide whether to agree to a settlement or to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state’s attorney in state government, and in 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

PREAMBLE AND SCOPE

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

[11] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

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

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

**RULE 1.0:
TERMINOLOGY**

(a) “Belief” or “believes” denotes that the person involved actually believes the fact in question to be true. A person’s belief may be inferred from circumstances.

(b) “Confirmed in writing,” when used in reference to consent from a client, former client, or other person, denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person’s oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) “Domestic partner” denotes a person at least eighteen years of age who has either: (i) registered as a domestic partner with any registry of domestic partners or civil unions maintained by the employer of either party or by any country, state, county, city, town or village, or (ii) maintained a committed personal relationship with a lawyer or client as evidenced by factors including, but not limited to, economic interdependence, shared residence, children in common, intent to marry and common ownership of real or personal property. Not all of these factors must exist for a person to be considered a domestic partner for the purposes of these Rules.

(d) “Domestic relations matter” denotes representation of a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support, alimony, or to enforce or modify a judgment or order in connection with any such claim, action or proceeding.

(e) “Firm” or “law firm” includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.

(f) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. It does not include conduct, although characterized as fraudulent by statute or administrative rule, that lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

(g) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information reasonably adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

(h) “Knowingly,” “known,” “know,” or “knows” denotes actual knowledge of the fact in question. A person’s actual knowledge may be inferred from circumstances.

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(i) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional legal corporation or a member of an association authorized to practice law.

(j) “Person” includes an individual, a corporation, an association, a trust, a partnership, and any other organization or entity.

(k) “Professional legal corporation” means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.

(l) “Qualified legal assistance organization” means an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof.

(m) “Reasonable” or “reasonably,” when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer.

(n) “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.

(o) “Reasonable lawyer,” when used in the context of conflict of interest determinations, denotes that a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation.

(p) “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.

(q) “Screened” or “screening” 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 or the firm is obligated to protect under these Rules or other law.

(r) “Sexual relations” denotes sexual intercourse or the touching of an intimate part of the lawyer or another person for the purpose of sexual arousal, sexual gratification or sexual abuse.

(s) “State” includes the District of Columbia, Puerto Rico, and other federal territories and possessions.

(t) “Substantial,” when used in reference to degree or extent, denotes a material matter of clear and weighty importance.

(u) “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.

(v) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording and email. 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] Some Rules require that a person’s oral consent be “confirmed in writing.” E.g., Rules 1.5(e)(2) (client’s consent to division of fees with lawyer in another firm must be confirmed in writing), 1.7(b)(4) (client’s informed consent to conflict of interest must be confirmed in writing) and 1.9(a) (former client’s informed consent to conflict of interest must be confirmed in writing). The definition of “confirmed in writing” provides three distinct methods of confirming a person’s consent: (i) a writing from the person to the lawyer, (ii) a writing from the lawyer to the person, or (iii) consent by the person on the record in any proceeding before a tribunal. The confirming writing need not recite the information that the lawyer communicated to the person in order to obtain the person’s consent. For the definition of “informed consent” see Rule 1.0(g). If it is not feasible for the lawyer to obtain or transmit a written confirmation at the time the client gives oral consent, then the lawyer must obtain or transmit the confirming writing within a reasonable time thereafter. If a lawyer has obtained a client’s informed oral consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (e) will depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. For example, a group of lawyers could be regarded as a firm for purposes of determining whether a conflict of interest exists but not for application of the advertising rules.

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

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

Fraud

[5] When used in these Rules, the terms “fraud” and “fraudulent” refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform, so long as the necessary scienter is present and the conduct in question could be reasonably expected to induce detrimental reliance.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. E.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client’s or other person’s options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent. Other considerations may apply in representing impaired clients. See Rule 1.14.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client’s or other person’s silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person’s consent be confirmed in writing. E.g., Rules 1.7(b) and 1.9(a). For definitions of “writing” and “confirmed in writing” see paragraphs (v) and (b), respectively. Other Rules

require that a client's consent be obtained in a writing signed by the client. E.g., Rules 1.8(a) and (g). For the meaning of "signed," see paragraph (v).

Screened

[8] The definition of "screened" or "screening" applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rule 1.10, Rule 1.11, Rule 1.12 or Rule 1.18. See those Rules for the particular requirements of establishing effective screening.

[9] The purpose of screening is to ensure that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should promptly be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. In any event, procedures should be adequate to protect confidential information.

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

REPORTERS' NOTES

Rule 1.0 is equivalent to the Definitions section (22 N.Y.C.R.R. § 1200.1) in the existing Disciplinary Rules, but the Rule adds 13 new definitions (encompassing 19 new defined terms), and the Rule lists all definitions in alphabetical order. The increase in the number of defined terms should increase the clarity, precision, and consistency of the Rules.

Terms are included in the Terminology section only if they appear in more than one Rule. Terms that appear in only one Rule are defined in the Rule in which they appear.

The terms in Rule 1.0 that are not defined in the existing Disciplinary Rules are: (i) "Belief" and "believes," (ii) "Confirmed in writing," (iii) "Domestic partner," (iv) "Informed consent," (v) "Knowingly," "known," or "knows," (vi) "Partner;" (vii) "Reasonable" or "reasonably," (viii) "Reasonable belief" or "reasonably believes;" (ix) "Reasonable lawyer," (x) "Screened" or "Screening," (xi) "Sexual relations," (xii) "Substantial," and (xiii) "Writing" or "written" (including a "signed" writing). Only a few of these terms require additional explanation.

"Confirmed in writing" is a phrase found in Rule 1.5, Rule 1.7, Rule 1.9, Rule 1.11, Rule 1.12 and Rule 1.18, all of which reflect the view that confirmation in writing avoids later disputes about whether consent was given. To reduce compliance burdens on lawyers, Rule 1.0(b) defines the phrase "confirmed in writing" so that the requirement of written confirmation may be satisfied by any of three distinct methods: (i) a writing from the consenting person to the lawyer, (ii) a writing promptly sent by the lawyer to the consenting person, and (iii) a statement

on the record in a proceeding before a tribunal. If a lawyer cannot readily obtain or transmit a written confirmation at the time a person gives oral consent, then the lawyer may satisfy the Rule by obtaining or transmitting written confirmation within a reasonable time after obtaining oral consent. (“Writing” itself is defined in Rule 1.0(v) to mean “a tangible or electronic record of a communication or representation,” a definition sufficiently flexible to keep up with new technologies in coming years.)

“Domestic partner” appears in two Rules. Rule 1.8(c) restricts a lawyer’s right to solicit a substantial gift from a client for the benefit of the lawyer or a person “related” to the lawyer, or to prepare an instrument making such a gift. The word “related” is defined in Rule 1.8(c) to include (among others) a “domestic partner.” Rule 1.8(j)(2) provides that the restriction on sexual relations with clients shall not apply to sexual relations between lawyers and their spouses or “domestic partners” The definition in Rule 1.0(c) is drawn in part from a New York City ordinance that defines the term.

“Screened” and “screening” appear in Rule 1.10, Rule 1.11, Rule 1.12 and Rule 1.18, all of which govern situations in which adequate and timely screening of a personally disqualified lawyer avoids imputation of a conflict of interest. Those Rules set forth particular requirements for establishing an effective screen. The definition in Rule 1.0(q) reflects the underlying policy of assuring all affected parties that confidential information known by a personally disqualified lawyer remains protected.

Rule 1.0 also retains all of the definitions in existing 22 N.Y.C.R.R. § 1200.1, and most are unchanged. However, some existing definitions have been modified in relatively minor ways for the sake of clarification or completeness. Specifically:

The definition of “Firm” or “Law firm” has been expanded to include “a lawyer or lawyers in a law partnership,” one of the most common forms of law practice.

The definition of “Fraud” includes a new first sentence defining it as “conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.” The second sentence (formerly the only sentence) is essentially unchanged.

The definition of “Sexual relations,” currently found in DR 5-111(A) [22 N.Y.C.R.R. § 1200.29-a(a)], has been revised to make clear that it includes the touching of an intimate part of “the lawyer or” another person, a meaning surely intended in the existing definition.

The definition of “Tribunal” makes clear that it includes an arbitrator only “in a binding arbitration proceeding,” and adds that a tribunal includes “a legislative body, administrative agency or other body acting in an adjudicative capacity.” To explain the new phrase, the definition adds that a legislative body, administrative agency or other body acts in an “adjudicative capacity” when a neutral official, after the parties have presented evidence or made legal arguments, “will render a binding legal judgment directly affecting a party’s interests in a particular matter.” This construction excludes legislative bodies that are merely gathering evidence or conducting investigations for the benefit of the general public or to assist in drafting legislation, regulations, or policies.

**RULE 1.1:
COMPETENCE**

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

(b) A lawyer shall not intentionally, recklessly or repeatedly:

(1) fail to provide competent representation to a client;

(2) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(3) prejudice or damage the client during the course of the representation except as permitted or required by Rule 1.6, Rule 1.16 or Rule 3.3.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. One such circumstance would be where the lawyer, by representations made to the client, has led the client reasonably to expect a special level of expertise in the matter undertaken by the lawyer.

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

[3] In an emergency, a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required and where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See Rule 6.2, Comment [2].

Thoroughness and Preparation

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

Competent Representation

[5A] A lawyer who intentionally, recklessly or repeatedly fails to provide competent representation to a client is subject to discipline. In general, however, a lawyer is not subject to discipline for a single instance of ordinary negligence by itself. “Recklessly,” as used in paragraph (b), encompasses gross negligence.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject. See 22 N.Y.C.R.R. Part 1500.

REPORTERS’ NOTES

Rule 1.1 mandates and defines competent representation and prohibits a lawyer from engaging in incompetent representation, failing to seek a client’s legitimate objectives, or prejudicing or damaging a client unless permitted or required by other Rules.

Rule 1.1(a) requires a lawyer to represent clients competently. The existing Disciplinary Rules do not directly mandate competent representation. Rather, DR 6-101(A)(2) and (3) [22 N.Y.C.R.R. § 1200.30(a)(2) and (3)] provide only that a lawyer shall not “[h]andle a legal matter without preparation adequate in the circumstances” or “[n]eglect a legal matter entrusted to the lawyer.” Rule 1.1 affirmatively requires a lawyer to “provide competent representation to a client.”

The existing Disciplinary Rules do not define or describe competent representation. Rule 1.1(a), while not setting out a formal definition, describes competent representation by saying that it requires “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Rule 1.1(b) preserves concepts from DR 6-101 [22 N.Y.C.R.R. § 1200.30] and DR 7-101 [22 N.Y.C.R.R. § 1200.32]. Rule 1.1(b)(1), which borrows from the title of DR 6-101 [22

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N.Y.C.R.R. § 1200.31] (“Failing to Act Competently”), provides that a lawyer shall not “fail to provide competent representation.” Rule 1.1(b)(2), which parallels DR 7-101(A)(1) [22 N.Y.C.R.R. § 1200.32(a)(1)], prohibits a lawyer from failing to “seek the objectives of the client through reasonably available means permitted by law and these Rules.” Rule 1.1(b)(3), which parallels DR 7-101(A)(3) [22 N.Y.C.R.R. § 1200.32(a)(3)], prohibits a lawyer from prejudicing or damaging a client during the course of the representation except as permitted or required by the provisions addressing confidentiality, withdrawal, perjury, or lying to others (respectively Rule 1.6, Rule 1.16, Rule 3.3 and Rule 4.1).

With respect to all of these, however, Rule 1.1(b) makes the conduct described a disciplinable offense only if it is engaged in “intentionally, recklessly or repeatedly.” This is consistent with the practice of disciplinary authorities, who seldom invoke DR 6-101 [22 N.Y.C.R.R. § 1200.30] or DR 7-101 [22 N.Y.C.R.R. § 1200.32] to prosecute isolated and careless instances of incompetence, lack of zeal, or damage to a client. A lawyer will still be liable to a client for damages for legal malpractice or breach of fiduciary duty for even a single instance of incompetence, lack of zeal, or damage to the client, but lawyers should not have to worry that a single careless act or omission can subject them to professional discipline. Rather, the disciplinary machinery should be invoked only if a lawyer has acted intentionally, recklessly or repeatedly, as the Rule specifies.

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

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

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

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

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

Comment

Allocation of Authority Between Client and Lawyer

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

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

See Rule 1.16(b)(4). Likewise, the client may resolve the disagreement by discharging the lawyer, in which case the lawyer must withdraw from the representation. See Rule 1.16(a)(3).

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

[4] 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

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

Agreements Limiting Scope of Representation

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

[6A] In obtaining consent from the client, the lawyer must adequately disclose the limitations on the scope of the engagement and the matters that will be excluded. In addition, the lawyer must disclose the reasonably foreseeable consequences of the limitation. In making such disclosure, the lawyer should explain that if the lawyer or the client determines during the representation that additional services outside the limited scope specified in the engagement are necessary or advisable to represent the client adequately, then the client may need to retain separate counsel, which could result in delay, additional expense, and complications.

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

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

Criminal, Fraudulent and Other Prohibited Transactions

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

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. When the representation will result in violation of the Rules of Professional Conduct or other law, the lawyer must advise the client of any relevant limitation on the lawyer's conduct and remonstrate with the client. See Rules 1.4(a)(5) and 1.16(a)(1). Persuading a client to take necessary preventive or corrective action that will bring the client's conduct within the bounds of the law is a challenging but appropriate endeavor. If the client fails to take necessary corrective action and the lawyer's continued representation would assist client conduct that is criminal or fraudulent, the lawyer is required to withdraw. See Rule 1.16(a)(1). In some circumstances, withdrawal alone might be insufficient. In those cases the lawyer may be required to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 1.6(b)(3); Rule 4.1, Comment [3].

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

[12] Paragraph (d) prohibits a lawyer from assisting a client's crime or fraud on a third person whether or not the defrauded party is a party to the transaction. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise, but does preclude such a retainer for an enterprise known to be engaged in unlawful activity. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

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

REPORTERS' NOTES

Rule 1.2 addresses the division of authority between lawyer and client, addresses the extent of a lawyer's right to limit the scope of a representation, and prohibits a lawyer from assisting a client in wrongful conduct.

Rule 1.2(a) generally requires a lawyer to abide by a client's decisions regarding the "objectives" of a representation, including a client's decision whether to settle a civil matter and a criminal defense client's decision whether to enter a plea, waive a jury trial, or testify. This portion of the Rule accords with existing DR 7-101(A)(1) [22 N.Y.C.R.R. § 1200.32(a)(1)], which provides that a lawyer shall not intentionally "[f]ail to seek the lawful objectives of the client," and adds specific examples that are currently spelled out in EC 7-7 but not in the Disciplinary Rules. Rule 1.2(a) also accords generally with DR 7-101(B)(1) [22 N.Y.C.R.R. § 1200.32(b)(1)], which provides that a lawyer representing a client may, "[w]here permissible, exercise professional judgment to waive or fail to assert a right or position of the client." Rule 1.2(a) also requires a lawyer to consult with a client concerning the "means" a lawyer will use. This portion of the Rule captures ideas in existing DR 7-101(A)(1) [22 N.Y.C.R.R. § 1200.32(a)(1)], which provides that a lawyer does not violate the obligation of zealous advocacy "by acceding to reasonable requests by opposing counsel that do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process." It also parallels portions of EC 7-7 and EC 7-8.

Rule 1.2(b), providing that a lawyer's representation of a client does not constitute an endorsement of the client's views or activities, is taken verbatim from the last sentence of EC 2-27. It has no counterpart in the existing Disciplinary Rules but deserves mention to encourage lawyers to perform pro bono work for unpopular or unsavory clients and to accept court appointments to represent them.

Rule 1.2(c) permits a lawyer to limit the scope of the representation if the limitation is reasonable and the client gives informed consent. This Rule reflects common understanding among lawyers but has no equivalent in the existing Disciplinary Rules. The Rule is a fitting complement to the written letter of engagement rule in 22 N.Y.C.R.R. Part 1215, which requires a lawyer to explain the scope of the engagement.

Rule 1.2(d) parallels existing DR 7-102(A)(7) [22 N.Y.C.R.R. § 1200.33(a)(7)], which provides that a lawyer shall not "[c]ounsel or assist a client in conduct that the lawyer knows to be illegal or fraudulent," but Rule 1.2(d) substitutes the more specific word "criminal" for "illegal." Rule 1.2(d) also clarifies the prohibition by adding that 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." The clarification is consistent with existing DR 7-106(A) [22 N.Y.C.R.R. § 1200.37(a)], which permits a lawyer to "take appropriate steps in good faith to test the validity of" a ruling or standing rule of a tribunal.

RULE 1.3: DILIGENCE

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

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. Notwithstanding the foregoing, the lawyer should not use offensive tactics or fail to treat 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 diligently and promptly. Lawyers are encouraged to adopt and follow effective office procedures and systems; neglect may occur when such arrangements are not in place or are ineffective.

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

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

[5] To avoid possible prejudice to client interests, a sole practitioner is well advised to prepare a plan that designates another competent lawyer to review client files, notify each

client of the lawyer's death or disability, and determine whether there is a need for immediate protective action.

REPORTERS' NOTES

Rule 1.3 provides that a lawyer "shall act with reasonable diligence and promptness in representing a client." The Rule thus expresses affirmatively the concept in existing DR 6-101(A)(3) [22 N.Y.C.R.R. § 1200.30(a)(3)] that a lawyer shall not "[n]eglect a legal matter entrusted to the lawyer." But Rule 1.3 goes further, because it obligates a lawyer to act with reasonable diligence and promptness even when the lawyer's actions fall well above the minimal "neglect" threshold. Rule 1.3 should thus help to keep litigation and transactions moving forward even when a lawyer is in no danger of discipline for neglect.

**RULE 1.4:
COMMUNICATION**

- (a) A lawyer shall:
- (1) promptly inform the client of:
 - (i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(g), is required by these Rules; and
 - (ii) any information required by court rule or other law to be communicated to a client;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with a client's reasonable requests for information; and
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- (c) In domestic relations matters, as defined in Rule 1.0(d), a lawyer shall provide a prospective client with a statement of client's rights and responsibilities at the initial conference and prior to the signing of a written retainer.

Comment

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

Communicating with Client

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

[2A] The New York Court Rules require every lawyer with an office located in New York to post in that office, in a manner visible to clients of the lawyer, a “Statement of Client’s Rights.” *See* 22 N.Y.C.R.R. § 1210.1. Paragraph (c) requires a lawyer in a domestic relations matter, as defined in Rule 1.0(d), to provide a prospective client with the “Statement of Client’s Rights and Responsibilities,” as further set forth in 22 N.Y.C.R.R. § 1400.2, at the initial conference and, in any event, prior to the signing of a written retainer agreement.

[3] Paragraph (a)(2) requires that the lawyer reasonably consult with the client about the means to be used to accomplish the client’s objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases, the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client’s behalf. Likewise, for routine matters such as scheduling decisions not materially affecting the interests of the client, the lawyer need not consult in advance, but should keep the client reasonably informed thereafter. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

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

Explaining Matters

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

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from

diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to those who the lawyer reasonably believes to be appropriate persons within the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

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

REPORTERS’ NOTES

Rule 1.4 governs a lawyer’s duties to communicate with a client, a subject covered in EC 7-8 but not in the existing Disciplinary Rules. The Rule thereby builds on the common-law duty of agents (here, lawyers) to communicate with their principals (clients).

Rule 1.4(a)(1)(i) provides that a lawyer shall promptly inform the client of decisions requiring the client’s informed consent. This is consistent with the first two sentences of EC 7-8 but is not expressly mandated by any existing Disciplinary Rule. Rule 1.4(a)(1)(ii) provides that a lawyer shall promptly inform the client of any information that a court rule or other law requires the lawyer to communicate to a client. The Rule therefore alerts lawyers that communication obligations may stem from legal authorities outside of the Rules.

Rule 1.4(a)(2) requires that a lawyer “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” The Rule mirrors Rule 1.2(a), which provides that a lawyer, “as required by Rule 1.4, shall consult with the client as to the means” by which the client’s objectives are to be accomplished. Stating the same principle in both places is justified because the subject matter fits comfortably under both Rule 1.2 (allocation of authority) and Rule 1.4 (communication). The existing Disciplinary Rules do not expressly obligate a lawyer to consult with the client regarding the means by which client objectives are to be accomplished.

Rule 1.4(a)(3) requires a lawyer to “keep the client reasonably informed about the status of the matter,” and Rule 1.4(a)(4) requires a lawyer to “promptly comply with a client’s reasonable requests for information.” These Rules will help avoid client frustration and dissatisfaction, and will thus increase public confidence in the legal profession. The Rules have no direct counterpart in the existing Disciplinary Rules.

Rule 1.4(a)(5) requires a lawyer to “consult with the client about any relevant limitation on the lawyer’s conduct” This duty complements the lawyer’s duty in Rule 1.2(d) not to counsel or assist the client in criminal or fraudulent conduct. The earlier clients understand that

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a lawyer is prohibited from fulfilling certain of their expectations, the earlier the clients can either abandon their plans or revise them to conform to the law.

Rule 1.4(b) requires that a lawyer “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” This complements Rule 1.4(a)(1)(i). The requirement to explain a matter sufficiently for the client to make decisions is currently addressed in EC 7-8 but not in the Disciplinary Rules.

Rule 1.4(c) requires a lawyer in domestic relations matters to “provide a prospective client with a statement of client’s rights and responsibilities at the initial conference and prior to the signing of a written retainer.” This carries forward existing DR 2-106(F) [22 N.Y.C.R.R. § 1200.11(f)] verbatim. However, because the duty to provide a client with a statement of client’s rights and responsibilities is essentially a duty to communicate, and because the statement covers various subjects beyond fees, the language is placed here rather than in Rule 1.5, governing fees. However, a reinforcing Rule, which conditions a lawyer’s right to a fee on timely providing the statement of client’s rights and responsibilities, is included in Rule 1.5(d)(iv).

**RULE 1.5:
FEES AND DIVISION OF FEES**

(a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

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

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client before or within a reasonable time after commencing the representation, except when the lawyer will charge a previously represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating 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, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

- (d) A lawyer shall not enter into an arrangement for, charge or collect:
 - (1) a contingent fee for representing a defendant in a criminal case;
 - (2) a fee proscribed by law or rule of court;
 - (3) a fee based on fraudulent billing;
 - (4) any fee in a domestic relations matter if:
 - (i) the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement;
 - (ii) a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement. A lawyer shall not include in the written retainer agreement a nonrefundable fee clause;
 - (iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence; or
 - (iv) the lawyer has not provided a prospective client with a statement of client's rights and responsibilities at the initial conference and prior to the signing of a written retainer agreement.
- (e) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:
 - (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation; and
 - (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and
 - (3) the total fee is not excessive.
- (f) Where representation is in a civil matter, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the justices of the Appellate Divisions.

(g) Rule 1.5(e) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement.

Comment

[1] Paragraph (a) requires that lawyers charge fees that are not excessive or illegal under the circumstances. The factors specified in paragraphs (a)(1) through (a)(8) are not exclusive, nor will each factor be relevant in each instance. The time and labor required for a matter may be affected by the actions of the lawyer's own client or by those of the opposing party and counsel. Paragraph (a) also requires that expenses for which the client will be charged must not be excessive or illegal. A lawyer may seek payment for services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging an amount to which the client has agreed in advance or by charging an amount that reflects the cost incurred by the lawyer, provided in either case that the amount charged is not excessive.

[1A] A billing is fraudulent if it is knowingly and intentionally based on false or inaccurate information. Thus, under an hourly billing arrangement, it would be fraudulent to knowingly and intentionally charge a client for more than the actual number of hours spent by the lawyer on the client's matter; similarly, where the client has agreed to pay the lawyer's cost of in-house services, such as for photocopying or telephone calls, it would be fraudulent knowingly and intentionally to charge a client more than the actual costs incurred. Fraudulent billing requires an element of scienter and does not include inaccurate billing due to an innocent mistake.

[1B] A supervising lawyer who submits a fraudulent bill for fees or expenses to a client based on submissions by a subordinate lawyer has not automatically violated this Rule. Whether the lawyer is responsible for a violation must be determined by reference to Rule 5.1, Rule 5.2 and Rule 5.3.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Court rules regarding engagement letters require that such an understanding be memorialized in writing in certain cases. *See* 22 N.Y.C.R.R. Part 1215. Even where not required, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the excessiveness standard of paragraph (a). In determining whether a particular contingent fee is excessive, or whether it is excessive to charge any form of contingent fee, a lawyer must consider the factors that are

relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may regulate the type or amount of the fee that may be charged.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may charge a minimum fee, if that fee is not excessive. 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). A fee paid in property instead of money may, however, be subject to the requirements of Rule 1.8(a), because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made if its terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client’s interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. In matters in litigation, the court’s approval for the lawyer’s withdrawal may be required. See Rule 1.16(c). It is proper, however, to define the extent of services in light of the client’s ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

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

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not affiliated in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. 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 a writing given to the client. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the client’s agreement must be confirmed in writing. Contingent fee arrangements must comply with paragraph (c). Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a

partnership. See Rule 5.1. A lawyer should refer a matter only to a lawyer who the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm. Paragraph (g) recognizes that this Rule does not prohibit payment to a previously associated lawyer pursuant to a separation or retirement agreement.

Disputes over Fees

[9] A lawyer should seek to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. The New York courts have established a procedure for resolution of fee disputes through arbitration and the lawyer must comply with the procedure when it is mandatory. Even when it is voluntary, the lawyer should conscientiously consider submitting to it.

REPORTERS' NOTES

Rule 1.5 deals with legal fees, expenses, and the division of fees among lawyers not in the same firm. These subjects are currently covered in DR 2-106 [22 N.Y.C.R.R. § 1200.11] and DR 2-107 [22 N.Y.C.R.R. § 1200.12].

Rule 1.5(a) retains the prohibition on illegal or excessive fees found in DR 2-106(A) [22 N.Y.C.R.R. § 1200.11(a)]. It sets out the same standard as DR 2-106(B) [22 N.Y.C.R.R. § 1200.11(b)] and the same eight factors to be considered under that rule as guides in determining whether a fee is excessive. Rule 1.5(a) extends that prohibition to an illegal expense. This addition explicitly protects clients from all illegal charges, not just illegal fees.

Rule 1.5(b) requires the lawyer to communicate the basis or rate of fees and expenses to the client before or within a reasonable time after commencing the representation. In many engagements, this communication will already be required to be made in writing under the written letter of engagement rule (22 N.Y.C.R.R. Part 1215). This additional disciplinary requirement in Rule 1.5(b) is an improvement in two ways. First, it mandates an important disclosure in cases where the written letter of engagement rule would not apply. (The required disclosure under Rule 1.5(b) would not have to be in writing, but at least would have to be made.) Second, under the existing Code, failure to abide by the written letter of engagement rule may lead to loss of fees, but is not a disciplinary offense. Rule 1.5(b) elevates this important duty of disclosure to the disciplinary level.

Rule 1.5(c) preserves the same disclosure requirements upon commencing employment in a contingent fee matter as are now found in DR 2-106(D) [22 N.Y.C.R.R. § 1200.11(d)], and Rule 1.5(c) adds a new disclosure requirement. Specifically, Rule 1.5(c) requires that a lawyer “clearly notify the client of any expenses for which a client will be liable whether or not the client is the prevailing party.” This will enable clients to make more informed selection of counsel and will reduce disputes between lawyers and clients regarding expenses.

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Rule 1.5(d) imposes the same restrictions on contingent fee arrangements as are now set out in DR 2-106(C)(1), (2) and (3) [22 N.Y.C.R.R. § 1200.11(c)(1), (2) and (3)]. These include a prohibition on a contingent fee in the defense of a criminal case; limitations on a contingent fee in a domestic relations matter; and any fee proscribed by law or rule of court. However, Rule 1.5(d) imposes two new restrictions on fees not found in current DR 2-106(C) [22 N.Y.C.R.R. § 1200.11(c)]. First, the prohibition on charging a fee based on a fraudulent billing, which is now found only in the general rule of DR 1-102(A)(4) [22 N.Y.C.R.R. § 1200.3(a)(4)] (prohibiting conduct involving fraud, deceit, dishonesty, and misrepresentation), is made explicit with regard to bills for legal services. Second, the existing prohibition on a fee that is contingent on securing a divorce or upon the amount of money or property obtained for a client in a domestic relations matter is extended to also prohibit a fee that is contingent upon success in obtaining child custody or visitation. This additional prohibition supports important public policies relating to the welfare of children by ensuring that the lawyer has no financial stake in the outcome of a custody or visitation dispute.

Rule 1.5(d)(4)(iv) serves the same purpose as existing DR 2-106(F) [22 N.Y.C.R.R. § 1200.11(f)], which requires a lawyer to give a client in a domestic relations matter the statement of client's rights and responsibilities at the initial conference. However, rather than simply requiring the lawyer to provide the statement, Rule 1.5(d)(4)(iv) conditions the lawyer's right to charge or collect a fee on providing the statement. This connection between the provision of the statement and the ability to collect a fee will strengthen the incentive for lawyers to give the statement to domestic relations clients in a timely manner.

Rule 1.5(e) imposes the same restrictions on the division of fees among lawyers not in the same firm as found in current DR 2-107(A) [22 N.Y.C.R.R. § 1200.12(a)], and adds two new requirements. First, Rule 1.5(e) requires the lawyer to inform the client not only that there will be a division of fees, but also to disclose the actual share that each lawyer will receive. This additional information may help the client decide whether to consent to the proposed arrangement. Second, Rule 1.5(e) requires the consent of the client to be confirmed in writing. This requirement will help ensure that the client has actually received the mandated disclosures and has consented to the arrangement. In combination, the two new disclosures should reduce the number of disputes that arise when clients protest such fee divisions at the end of a matter.

Rule 1.5(f), requiring mandatory fee arbitration in certain cases, is identical to DR 2-106(E) [22 N.Y.C.R.R. § 1200.11(e)].

Rule 1.5(g), creating an exception to the fee-sharing rule for payments to former partners or associates upon retirement or separation, is substantially similar to DR 2-107(B) [22 N.Y.C.R.R. § 1200.12(b)] but replaces the phrase "former partner or associate," with the broader phrase "lawyer formerly associated in a law firm," which will take into account "of counsel" lawyers, non-equity partners, and other relationships that fall outside the "partner" or "associate" labels.

**RULE 1.6:
CONFIDENTIALITY OF INFORMATION**

(a) A lawyer shall not reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

- (1) the client gives informed consent, as defined in Rule 1.0(g);
- (2) the disclosure is impliedly authorized to carry out the representation; or
- (3) the disclosure is permitted by paragraph (b).

“Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. “Confidential information” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime;
- (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
- (4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer’s firm or the law firm;
- (5) (i) to defend the lawyer or the lawyer’s employees and associates against an accusation of wrongful conduct by any person concerning the lawyer’s representation of the client made in a proceeding that has been brought or that the lawyer reasonably believes will be brought; or
(ii) to establish or collect a fee;
- (6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall exercise reasonable care to prevent the lawyer’s employees, associates, and others whose services are utilized by the lawyer from disclosing or using

confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

Comment

Scope of the Professional Duty of Confidentiality

[1] This Rule governs the disclosure of information protected by the professional duty of confidentiality. Such information is described in these Rules as “confidential information” as defined in this Rule. Other rules also deal with confidential information. See Rule 1.9(c)(1) for the lawyer’s duties with respect to the use of such information to the disadvantage of clients and former clients; Rule 1.9(c)(2) for the lawyer’s duty not to reveal information relating to the lawyer’s prior representation of a former client; Rule 1.14(c) for information relating to representation of a client with diminished capacity; Rule 1.18(b) for the lawyer’s duties with respect to information provided to the lawyer by a prospective client; Rule 3.3 for the lawyer’s duty of candor to a tribunal; and Rule 8.3(d) for information gained by a lawyer or judge while participating in an approved lawyer assistance program.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, or except as permitted or required by these Rules, the lawyer must not reveal information gained during and related to the representation, whatever its source. See Rule 1.0(g) for the definition of informed consent. The lawyer’s duty of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer, even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Typically, clients come to lawyers 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 thereby upheld.

[3] The principle of client-lawyer confidentiality is given effect in three related bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes. The attorney-client privilege and the work-product doctrine apply when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client. The professional duty of client-lawyer confidentiality, in contrast, applies to a lawyer in all settings and at all times, prohibiting the lawyer from disclosing confidential information unless permitted or required by these Rules or to comply with other law or court order. The confidentiality duty applies not only to matters communicated in confidence by the client, which are protected by the attorney-client privilege, but also to all information gained during and relating to the representation, whatever its source. The confidentiality duty, for example, prohibits a lawyer from volunteering confidential information to a friend or to any other person except in compliance with the provisions of this Rule, including the Rule’s reference to other law that may compel disclosure. See Comments [12]-[13]; see also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing confidential information as defined by this Rule. This prohibition also applies to disclosures by a lawyer that do not in

themselves reveal confidential information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation with persons not connected to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client.

[4A] Paragraph (a) protects all factual information "gained during or relating to the representation of a client," but not information obtained before a representation begins or after it ends. See Rule 1.18, dealing with duties to prospective clients. Information relates to the representation if it has any possible relevance to the representation or is received because of the representation. The accumulation of legal knowledge or legal research that a lawyer acquires through practice ordinarily is not client information protected by this Rule. However, in some circumstances, including where the client and the lawyer have so agreed, a client may have a proprietary interest in a particular product of the lawyer's research. Information that is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. Information that is in the public domain is not protected unless the information is difficult or expensive to discover. For example, a public record is confidential information when it may be obtained only through great effort or by means of a Freedom of Information request or other process.

Use of Information Related to Representation

[4B] The duty of confidentiality also prohibits a lawyer from using confidential information to the advantage of the lawyer or a third person or to the disadvantage of a client or former client unless the client or former client has given informed consent. See Rule 1.0(g) for the definition of "informed consent." This part of paragraph (a) applies when information is used to benefit either the lawyer or a third person, such as another client, a former client or a business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not (absent the client's informed consent) use that information to buy a nearby parcel that is expected to appreciate in value due to the client's purchase, or to recommend that another client buy the nearby land, even if the lawyer does not reveal any confidential information. The duty also prohibits disadvantageous use of confidential information unless the client gives informed consent, except as permitted or required by these Rules. For example, a lawyer assisting a client in purchasing a parcel of land may not make a competing bid on the same land. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client, even to the disadvantage of the former client, after the client-lawyer relationship has terminated. See Rule 1.9(c)(1).

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Implied disclosures are permissible when they (i) advance the best interest of the client and (ii) are either reasonable under the circumstances or customary in the professional community. In addition, 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. Lawyers are also impliedly authorized to reveal information about a client with diminished capacity when necessary to take protective action to safeguard the client's interests. See Rules 1.14(b) and (c).

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions that prevent substantial harm to important interests, deter wrongdoing by clients, prevent violations of the law, and maintain the impartiality and integrity of judicial proceedings. Paragraph (b) permits, but does not require, a lawyer to disclose information relating to the representation to accomplish these specified purposes.

[6A] The lawyer's exercise of discretion conferred by paragraphs (b)(1) through (b)(3) requires consideration of a wide range of factors and should therefore be given great weight. In exercising such discretion under these paragraphs, the lawyer should consider such factors as: (i) the seriousness of the potential injury to others if the prospective harm or crime occurs, (ii) the likelihood that it will occur and its imminence, (iii) the apparent absence of any other feasible way to prevent the potential injury, (iv) the extent to which the client may be using the lawyer's services in bringing about the harm or crime, (v) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action, and (vi) any other aggravating or extenuating circumstances. In any case, disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to prevent the threatened harm or crime. When a lawyer learns that a client intends to pursue or is pursuing a course of conduct that would permit disclosure under paragraphs (b)(1), (b)(2) or (b)(3), the lawyer's initial duty, where practicable, is to remonstrate with the client. In the rare situation in which the client is reluctant to accept the lawyer's advice, the lawyer's threat of disclosure is a measure of last resort that may persuade the client. When the lawyer reasonably believes that the client will carry out the threatened harm or crime, the lawyer may disclose confidential information when permitted by paragraphs (b)(1), (b)(2) or (b)(3). A lawyer's permissible disclosure under paragraph (b) does not waive the client's attorney-client privilege; neither the lawyer nor the client may be forced to testify about communications protected by the privilege, unless a tribunal or body with authority to compel testimony makes a determination that the crime-fraud exception to the privilege, or some other exception, has been satisfied by a party to the proceeding. For a lawyer's duties when representing an organizational client engaged in wrongdoing, see Rule 1.13(b).

[6B] Paragraph (b)(1) 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 risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to

eliminate the threat or reduce the number of victims. Wrongful execution of a person is a life-threatening and imminent harm under paragraph (b)(1) once the person has been convicted and sentenced to death. On the other hand, an event that will cause property damage but is unlikely to cause substantial bodily harm is not a present and substantial risk under paragraph (b)(1); similarly, a statistical likelihood that a mass-distributed product is expected to cause some injuries to unspecified persons over a period of years is not a present and substantial risk under this paragraph.

[6C] Paragraph (b)(2) recognizes that society has important interests in preventing a client's crime. Disclosure of the client's intention is permitted to the extent reasonably necessary to prevent the crime. In exercising discretion under this paragraph, the lawyer should consider such factors as those stated in Comment [6A].

[6D] Some crimes, such as criminal fraud, may be ongoing in the sense that the client's past material false representations are still deceiving new victims. The law treats such crimes as continuing crimes in which new violations are constantly occurring. The lawyer whose services were involved in the criminal acts that constitute a continuing crime may reveal the client's refusal to bring an end to a continuing crime, even though that disclosure may also reveal the client's past wrongful acts, because refusal to end a continuing crime is equivalent to an intention to commit a new crime. Disclosure is not permitted under paragraph (b)(2), however, when a person who may have committed a crime employs a new lawyer for investigation or defense. Such a lawyer does not have discretion under paragraph (b)(2) to use or disclose the client's past acts that may have continuing criminal consequences. Disclosure is permitted, however, if the client uses the new lawyer's services to commit a further crime, such as obstruction of justice or perjury.

[6E] Paragraph (b)(3) permits a lawyer to withdraw a legal opinion or to disaffirm a prior representation made to third parties when the lawyer reasonably believes that third persons are still relying on the lawyer's work and the work was based on "materially inaccurate information or is being used to further a crime or fraud." See Rule 1.16(a)(1), requiring the lawyer to withdraw when the lawyer knows or reasonably should know that the representation will result in a violation of law. Paragraph (b)(3) permits the lawyer to give only the limited notice that is implicit in withdrawing an opinion or representation, which may have the collateral effect of inferentially revealing confidential information. The lawyer's withdrawal of the tainted opinion or representation allows the lawyer to prevent further harm to third persons and to protect the lawyer's own interest when the client has abused the professional relationship, but paragraph (b)(3) does not permit explicit disclosure of the client's past acts unless such disclosure is permitted under paragraph (b)(2).

[7] [Omitted.]

[8] [Omitted.]

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about compliance with these Rules and other law by the lawyer, another lawyer in the lawyer's firm, or the law firm. In many 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 these Rules, court orders and other law.

[10] Where a legal claim or charge of any kind alleges misconduct of the lawyer related to the representation of a current or former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. Such a claim 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, such as a person claiming to have been defrauded by the lawyer and client acting together or by the lawyer acting alone. However, the lawyer's right to respond under paragraph (b)(5) does not arise until a client, former client or third person makes an accusation of such wrongdoing and the lawyer reasonably believes that an action or proceeding making such a claim will be brought. Paragraph (b)(5) does not permit a lawyer to disclose confidential information to counter adverse public criticism of the lawyer when a proceeding is unlikely to be brought. The lawyer may respond directly to the person who has made an accusation that permits disclosure, provided that (i) the lawyer reasonably believes an action or proceeding will be brought and (ii) the lawyer's response complies with Rule 4.2 and Rule 4.3, and other Rules or applicable law. A lawyer may make the disclosures authorized by paragraph (b)(5) through counsel. The right to respond also applies to accusations of wrongful conduct concerning the lawyer's law firm, employees or associates.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) 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.

[12] Paragraph (b) does not mandate any disclosures. However, other law may require that a lawyer disclose confidential information. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of confidential information appears to be required by other law, the lawyer must consult with the client to the extent required by Rule 1.4 before making the disclosure, unless such consultation would be prohibited by other law. If the lawyer concludes that other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A tribunal or governmental entity claiming authority pursuant to other law to compel disclosure may order a lawyer to reveal confidential information. Absent informed consent of the client to comply with the order, the lawyer should assert on behalf of the client nonfrivolous arguments that the order is not authorized by law, the information sought is protected against disclosure by an applicable privilege or other law, or the order is invalid or defective for some other reason. In the event of an adverse ruling, the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of an appeal or further challenge, unless such consultation would be prohibited by other law. If such review is not sought or is unsuccessful, paragraph (b)(6) permits the lawyer to comply with the order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified in paragraphs (b)(1) through (b)(6). Before making a disclosure, the lawyer should, where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a

disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose, particularly when accusations of wrongdoing in the representation of a client have been made by a third party rather than by the client. If the disclosure will be made in connection with an adjudicative 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 the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may, however, be required by other Rules or by other law. See Comments [12]-[13]. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). E.g., Rules 8.1(c) and 8.3(d)(1). Rule 3.3(b), on the other hand, requires disclosure in some circumstances whether or not disclosure is permitted or prohibited by this Rule.

Withdrawal

[15A] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw pursuant to Rule 1.16(a)(1). Withdrawal may also be required or permitted for other reasons under Rule 1.16. After withdrawal, the lawyer is required to refrain from disclosing or using information protected by Rule 1.6, except as this Rule permits such disclosure. Neither this Rule, nor Rule 1.9(c), nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal. For withdrawal or disaffirmance of an opinion or representation, see paragraph (b)(3) and Comment [6E]. Where the client is an organization, the lawyer may be in doubt whether the organization will actually carry out the contemplated conduct. Where necessary to guide conduct in connection with this Rule, the lawyer may, and sometimes must, make inquiry within the organization. See Rules 1.13(b) and (c).

Duty to Preserve Confidentiality

[16] Paragraph (c) requires a lawyer to exercise reasonable care to prevent disclosure of information related to the representation by employees, associates and others whose services are utilized in connection with the representation. See also Rules 1.1, 5.1 and 5.3. However, a lawyer may reveal the information permitted to be disclosed by this Rule through an employee.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty 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 use a means of communication or security measures not required by this Rule, or may

give informed consent (as in an engagement letter or similar document) to the use of means or measures that would otherwise be prohibited by this Rule.

[18] [Omitted.]

REPORTERS' NOTES

Rule 1.6 governs a lawyer's duty of confidentiality. The Rule largely carries forward the language of existing DR 4-101 [22 N.Y.C.R.R. § 1200.19] but clarifies the scope of protected information and adds certain new exceptions that accord with practice and custom.

Rule 1.6(a) begins with a prohibition essentially parallel to DR 4-101(B) [22 N.Y.C.R.R. § 1200.19(b)], commanding lawyers not to "reveal confidential information ... or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person" unless certain conditions are satisfied. Rule 1.6(a) differs from DR 4-101 [22 N.Y.C.R.R. § 1200.19], however, by permitting a lawyer to reveal confidential information when "impliedly authorized." That exception accords with existing practice even though it is not expressly articulated in the text of DR 4-101(C) [22 N.Y.C.R.R. § 1200.19(c)]. In effect, DR 4-101 [22 N.Y.C.R.R. § 1200.19] authorizes a lawyer to reveal confidential information whenever the client has not instructed the lawyer to keep the information inviolate and disclosure would neither embarrass nor harm the client. That is essentially the scope of the "impliedly authorized" exception in Rule 1.6(a).

Rule 1.6(a) also redefines "confidential information." It abandons the dichotomy in DR 4-101(A) [22 N.Y.C.R.R. § 1200.19(a)] between "confidences" and "secrets," which many lawyers found confusing, instead using the unitary term "confidential information." Rule 1.6(a) then defines "confidential information" to include information "gained during or relating to the representation of a client, whatever its source," that is "(a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." The three listed categories are substantially similar to the categories in DR 4-101(A) [22 N.Y.C.R.R. § 1200.19(a)].

However, Rule 1.6(a) makes clear that confidential information does not ordinarily include "(i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates." These two exclusions reflect prevailing customs, common understandings, and pragmatic considerations in the legal profession.

Rule 1.6(b) includes four of the five exceptions to confidentiality currently in DR 4-101(C) [22 N.Y.C.R.R. § 1200.19(c)] and adds two new exceptions. (The fifth exception currently in DR 4-101(C) [22 N.Y.C.R.R. § 1200.19(c)], the client's informed consent, is also preserved but appears in Rule 1.6(a).) As in DR 4-101(C) [22 N.Y.C.R.R. § 1200.19(c)], all of the exceptions in Rule 1.6(b) are discretionary rather than mandatory. They provide that a lawyer "may" (not "must") "reveal or use confidential information to the extent that the lawyer reasonably believes necessary." However, the prefatory language to Rule 1.6(b) differs from the prefatory language to DR 4-101(C) [22 N.Y.C.R.R. § 1200.19(c)] in two ways.

RULE 1.6

First, DR 4-101(C) [22 N.Y.C.R.R. § 1200.19(c)] says that a lawyer may “reveal” confidential information but does not expressly say – as Rule 1.6(b) does – that a lawyer may also “use” information that fits within an exception. Rule 1.6(b) thus recognizes that if a lawyer is permitted to “reveal” information to others who have no duty of confidentiality, then the lawyer should logically also be permitted to “use” the information in ways that are less damaging to the client than revealing it. For example, because a lawyer may reveal to the police, “My client intends to break in to the jewelry store tonight,” the lawyer should also be permitted to tell the police, “Keep an eye on the jewelry store tonight,” which “uses” the confidential information to prevent the crime but does not “reveal” the information, thus better protecting the client.

Second, all of the exceptions in Rule 1.6(b) permit a lawyer to use or reveal confidential information only “to the extent that the lawyer reasonably believes necessary.” In contrast, DR 4-101(C) [22 N.Y.C.R.R. § 1200.19(c)] contains the limiting word “necessary” only in the text of the exceptions for the intention of a client to commit a crime and for collecting a fee or defending against an accusation of wrongful conduct. Rule 1.6(b) thus provides greater guidance to lawyers and extends greater protection to clients than does DR 4-101(C) [22 N.Y.C.R.R. § 1200.19(c)].

Rule 1.6(b)(1) permits a lawyer to use or reveal confidential information necessary to “prevent reasonably certain death or substantial bodily harm.” This exception has no counterpart in the existing Disciplinary Rules. It recognizes that protecting human life is a paramount value that justifies an exception to the duty of confidentiality whether the threat of death or substantial physical harm comes from the lawyer’s client or from a third party, and whether the conduct that threatens death or injury is criminal or not. For example, if a lawyer learns from a construction-worker client that a building is dangerously unstable and is reasonably certain to collapse onto a busy street, the lawyer should be permitted to reveal confidential information necessary to prevent injury and death even if the client is not the responsible party and even if the cause of the building collapse would be negligence or recklessness but not a crime.

Rule 1.6(b)(2) permits a lawyer to reveal confidential information necessary “to prevent the client from committing a crime.” This is substantially similar to DR 4-101(C)(3) [22 N.Y.C.R.R. § 1200.19(c)(3)], which permits a lawyer to reveal “the intention of a client to commit a crime and the information necessary to prevent the crime.”

Rule 1.6(b)(3) is substantially identical to DR 4-101(C)(5) [22 N.Y.C.R.R. § 1200.19(c)(5)].

Rule 1.6(b)(4) permits a lawyer to reveal confidential information “to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer’s firm or the law firm.” This exception has no counterpart in the existing Disciplinary Rules but reflects established custom and is supported by strong policies. Lawyers have for many decades consulted bar association ethics committees regarding ethics questions, and lawyers routinely consult other lawyers (either inside or outside their law firms) for advice on ethics matters. Obtaining client consent to consult with another lawyer is sometimes practical, but often it is not (for example, where the inquiring lawyer needs advice on responding to a client’s possible fraud, or on whether the lawyer must disclose a minor conflict of interest to a client). The ethics rules should make clear that lawyers can obtain advice regarding their options

and obligations under the law and the ethics rules. Permitting lawyers to consult lawyers outside their own firms will help to achieve that objective, and because a consultation with another lawyer for the purpose of seeking advice is itself privileged, the exception poses no threat to a client's confidential information.

Rule 1.6(b)(5) is substantially similar to DR 4-101(C)(4) [22 N.Y.C.R.R. § 1200.19(c)(4)] but separates the fee-collection and self-defense exceptions in that Rule into two separate paragraphs, and narrows the self-defense exception to give greater protection to clients.

Rule 1.6(b)(5)(i), like DR 4-101(C)(4) [22 N.Y.C.R.R. § 1200.19(c)(4)], permits a lawyer to use or reveal confidential information “to defend the lawyer or the lawyer’s employees and associates against an accusation of wrongful conduct” by any person, but under Rule 1.6(b)(5)(i) the exception applies only when the accusation is “concerning the lawyer’s representation of the client” and is “made in a proceeding that has been brought or that the lawyer reasonably believes will be brought.” Narrowing the self-defense exception reflects a policy of protecting the client’s confidential information despite the lawyer’s discomfort unless the lawyer is under attack in a formal proceeding or reasonably expects to become the target of an attack in a formal proceeding. An accusation against the lawyer in the press or in an informal setting should not be sufficient to negate the client’s right to confidentiality.

Rule 1.6(b)(5)(ii), which permits a lawyer to use or reveal confidential information “to establish or collect a fee,” is substantially identical to DR 4-101(C)(4) [22 N.Y.C.R.R. § 1200.19(c)(4)].

Rule 1.6(b)(6) is substantially similar to DR 4-101(C)(2) [22 N.Y.C.R.R. § 1200.19(c)(2)] but uses the phrase “to comply with other law or court order” rather than “required by law or court order.” The intended meaning is the same.

Rule 1.6(c) is essentially identical to DR 4-101(D) [22 N.Y.C.R.R. § 1200.19(d)].

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

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

(1) the representation of one client will be directly adverse to another client;
or

(2) there is a significant risk that the lawyer's independent professional judgment on behalf of a client will be adversely affected by, or that the representation will be materially limited by, the lawyer's responsibilities to another client, a former client or a third person, or by the lawyer's own financial, business, property or other personal interests.

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

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Comment

General Principles

[1] Loyalty and independent judgment are essential aspects of a lawyer's relationship with a client. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Concurrent conflicts of interest, which can impair a lawyer's independent professional judgment, can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. A lawyer should not permit these competing responsibilities or interests to impair the lawyer's ability to exercise independent professional judgment on behalf of each client. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rules 1.0(g) and (b), respectively.

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer, acting reasonably, to: (i) identify clearly the client or clients, (ii) determine whether a conflict of

interest exists, i.e., whether the lawyer's judgment may be impaired or the lawyer's loyalty may be divided if the lawyer accepts or continues the representation, (iii) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable under paragraph (b); and if so (iv) consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include all of the clients referred to in paragraph (a)(1) and any clients whose representation might be adversely affected under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). See Rule 1.10(f), which requires every law firm to create, implement and maintain a conflict-checking system.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16(a)(1). Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9; see also Comments [5], [29A].

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

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. For example, absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken may reasonably fear that the lawyer will pursue that client's case less effectively out of deference to the other client, that is, that the lawyer's exercise of independent professional judgment on behalf of that client will be adversely affected 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 appearing as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing

economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

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

Identifying Conflicts of Interest: Adverse Impact on Lawyer's Independent Professional Judgment

[8] Even if the representation is not directly adverse, a conflict of interest exists if there is a significant risk that a lawyer's exercise of independent professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. For example, the independent professional judgment of a lawyer asked to represent several individuals operating a joint venture is likely to be adversely affected to the extent that the lawyer is unable to recommend or advocate all possible positions that each client might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

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

Personal-Interest Conflicts

[10] The lawyer's own financial, property, business or other personal interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 5.7 on responsibilities regarding nonlegal services and Rule 1.8 pertaining to a number of personal-interest conflicts, including business transactions with clients. Personal-interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm. See Rule 1.10(a).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers, before the lawyer agrees to undertake the representation. Thus, a lawyer who has a significant intimate or close family relationship with another lawyer ordinarily may not represent a client in a matter where that other lawyer is representing another party, unless each client gives informed consent, as defined in Rule 1.0(g). The disqualification arising from a significant intimate or close family relationship is personal and ordinarily is not imputed to members of firms with which the lawyers are associated. See Rule 1.10(a).

[12] A lawyer is prohibited from engaging in sexual relations with a client in domestic relations matters. In all other matters a lawyer's sexual relations with a client are circumscribed by the provisions of Rule 1.8(j).

Interest of Person Paying for Lawyer's Services

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

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. As paragraph (b) indicates, however, some conflicts are nonconsentable. If a lawyer does not reasonably believe that the conditions set forth in paragraph (b) can be met, the lawyer should neither ask for the client's consent nor provide representation on the basis of the client's consent. A client's consent to a nonconsentable conflict is ineffective. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

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

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, federal criminal statutes prohibit

certain representations by a former government lawyer despite the informed consent of the former governmental client. In addition, there are some instances where conflicts are nonconsentable under decisional law.

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

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances, including the material and reasonably foreseeable ways that the conflict could adversely affect the interests of that client. Informed consent also requires that the client be given the opportunity to obtain other counsel if the client so desires. See Rule 1.0(g). The information that a lawyer is required to communicate to a client depends on the nature of the conflict and the nature of the risks involved, and a lawyer should take into account the sophistication of the client in explaining the potential adverse consequences of the conflict. There are circumstances in which it is appropriate for a lawyer to advise a client to seek the advice of a disinterested lawyer in reaching a decision as to whether to consent to the conflict. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and risks involved. See Comments [30] and [31] concerning the effect of common representation on confidentiality.

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one client 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 is that each party obtains separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests. Where the fact, validity or propriety of client consent is called into question, the lawyer has the burden of establishing that the client's consent was properly obtained in accordance with the Rule.

Client Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of (i) a document from the client, (ii) a document that the lawyer promptly transmits to the client confirming an oral informed consent, or (iii) a statement by the client made on the record of any proceeding before a tribunal, whether before, during or after a trial or hearing. See Rule 1.0(b) for the definition of "confirmed in

writing.” See also Rule 1.0(v) (“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. The Rule does not require that the information communicated to the client by the lawyer necessary to make the consent “informed” be in writing or in any particular form in all cases. See Rules 1.0(b) and (g). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing. See Comment [18].

Revoking Consent

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

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the conditions set forth in paragraph (b). The effectiveness of advance waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. At a minimum, the client should be advised generally of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients and matters that may present such conflicts. The more comprehensive the explanation and disclosure 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 understanding necessary to make the consent “informed” and the waiver effective. See Rule 1.0(g). The lawyer should also disclose the measures that will be taken to protect the client should a conflict arise, including procedures such as screening that would be put in place. See Rule 1.0(q) for the definition of “screening.” The adequacy of the disclosure necessary to obtain valid advance consent to conflicts may also depend on the sophistication and experience of the client. For example, if the client is unsophisticated about legal matters generally or about the particular type of matter at hand, the lawyer should provide more detailed information about both the nature of the anticipated conflict and the adverse consequences to the client that may ensue should the potential conflict become an actual one. In other instances, such as where the client is a child or an incapacitated or impaired person, it may be impossible to inform the client sufficiently, and the lawyer should not seek an advance waiver. 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, an advance waiver is more likely to be effective, particularly if, for example, the client is independently represented or

advised by in-house or other counsel in giving consent. Thus, in some circumstances, even general and open-ended waivers by experienced users of legal services may be effective.

[22A] Even if a client has validly consented to waive future conflicts, however, the lawyer must reassess the propriety of the adverse concurrent representation under paragraph (b) when an actual conflict arises. If the actual conflict is materially different from the conflict that has been waived, the lawyer may not rely on the advance consent previously obtained. Even if the actual conflict is not materially different from the conflict the client has previously waived, the client's advance consent cannot be effective if the particular circumstances that have created an actual conflict during the course of the representation would make the conflict nonconsentable under paragraph (b). See Comments [14]-[17] and [28] addressing nonconsentable conflicts.

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 co-plaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal as well as civil cases. Some examples are those in which a lawyer is asked to represent codefendants in a criminal case, co-plaintiffs or codefendants in a personal injury case, an insured and insurer, or beneficiaries of the estate of a decedent. In a criminal case, the potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, multiple representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's representation of another client in a different case; for example, when a decision favoring one client will create a precedent likely to weaken seriously the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of this risk include: (i) where the cases are pending, (ii) whether the issue is substantive or procedural, (iii) the temporal relationship between the matters, (iv) the significance of the issue to the immediate and long-term interests of the clients involved, and (v) the clients' reasonable expectations in retaining the lawyer. Similar concerns may be present when lawyers advocate on behalf of clients before other entities, such as regulatory authorities whose regulations or rulings may significantly implicate clients' interests. If there is significant risk of an adverse effect on the lawyer's independent professional judgment, then absent informed consent of the affected clients, the lawyer must decline the representation.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be

clients of the lawyer for purposes of applying paragraph (a)(1). Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is a significant risk that the lawyer's independent professional judgment will be adversely affected include: (i) the importance of the matter to each client, (ii) the duration and intimacy of the lawyer's relationship with the client or clients involved, (iii) the functions being performed by the lawyer, (iv) the likelihood that significant disagreements will arise, (v) the likelihood that negotiations will be contentious, (vi) the likelihood that the matter will result in litigation, and (vii) the likelihood that the client will suffer prejudice from the conflict. The issue is often one of proximity (how close the situation is to open conflict) and degree (how serious the conflict will be if it does erupt). See Comments [8], [29] and [29A].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present at the outset or may arise during the representation. In order to avoid the development of a disqualifying conflict, the lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared (and regardless of whether it is shared, may not be privileged in a subsequent dispute between the parties) and that the lawyer will have to withdraw from one or both representations if one client decides that some matter material to the representation should be kept secret from the other. See Comment [31].

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation if their interests are fundamentally antagonistic to one another, but common representation is permissible where the clients are generally aligned in interest, even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. Examples include helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, and arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In civil matters, two or more clients may wish to be represented by a single lawyer in seeking to establish or adjust a relationship between them on an amicable and mutually advantageous basis. For example, clients may wish to be represented by a single lawyer in helping to organize a business, working out a financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution of an estate or resolving a dispute between clients. The alternative to common representation can be that each party may have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation that might otherwise be avoided, or that some parties will have no lawyer at all. Given these and other relevant factors, clients may prefer common representation to separate representation or no representation. A lawyer should consult with each client concerning the implications of the common representation, including the advantages and the risks involved, and the effect on the attorney-client privilege, and obtain each client's informed consent, confirmed in writing, to the common representation.

[29A] Factors may be present that militate against a common representation. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, absent the informed consent of all clients, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. See Rule 1.9(a). In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between or among commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, it is unlikely that the clients' interests can be adequately served by common representation. For example, a lawyer who has represented one of the clients for a long period or in multiple matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

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

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. At the outset of the common representation and as part of the process of obtaining each client's informed consent, the lawyer

should advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential even as among the commonly represented clients. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the two clients and agree to keep that information confidential with the informed consent of both clients.

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

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, simply by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Although a desire to preserve good relationships with clients may strongly suggest that the lawyer should always seek informed consent of the client organization before undertaking any representation that is adverse to its affiliates, Rule 1.7 does not require the lawyer to obtain such consent unless: (i) the lawyer has an understanding with the organizational client that the lawyer will avoid representation adverse to the client's affiliates, (ii) the lawyer's obligations to either the organizational client or the new client are likely to adversely affect the lawyer's exercise of independent professional judgment on behalf of the other client, or (iii) the circumstances are such that the affiliate should also be considered a client of the lawyer. Whether the affiliate should be considered a client will depend on the nature of the lawyer's relationship with the affiliate or on the nature of the relationship between the client and its affiliate. For example, the lawyer's work for the client organization may be intended to benefit its affiliates. The overlap or identity of the officers and boards of directors, and the client's overall mode of doing business, may be so extensive that the entities would be viewed as "alter egos." Under such circumstances, the lawyer may conclude that the affiliate is the lawyer's client despite the lack of any formal agreement to represent the affiliate.

[34A] Whether the affiliate should be considered a client of the lawyer may also depend on: (i) whether the affiliate has imparted confidential information to the lawyer in furtherance of the representation, (ii) whether the affiliated entities share a legal department and general counsel, and (iii) other factors relating to the legitimate expectations of the client as to whether the lawyer also represents the affiliate. Where the entities are related only through stock ownership, the ownership is less than a controlling interest, and the lawyer has had no significant

dealings with the affiliate or access to its confidences, the lawyer may reasonably conclude that the affiliate is not the lawyer's client.

[34B] Finally, before accepting a representation adverse to an affiliate of a corporate client, a lawyer should consider whether the extent of the possible adverse economic impact of the representation on the entire corporate family might be of such a magnitude that it would materially limit the lawyer's ability to represent the client opposing the affiliate. In those circumstances, Rule 1.7 will ordinarily require the lawyer to decline representation adverse to a member of the same corporate family, absent the informed consent of the client opposing the affiliate of the lawyer's corporate client.

Lawyer as Corporate Director

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

REPORTERS' NOTES

Rule 1.7 deals with a lawyer's professional obligation to avoid conflicts of interest that are based on the lawyer's obligations to other clients or a third party, or that arise because of a lawyer's own personal interests. Rule 1.7 thus combines into a single provision what the Code currently addresses in separate and lengthier Disciplinary Rules. For example, conflicts arising from a lawyer's own interests are covered in DR 5-101 [22 N.Y.C.R.R. § 1200.20] and conflicts arising from the simultaneous representation of multiple clients are covered in DR 5-105 [22 N.Y.C.R.R. § 1200.24]. Likewise, New York's rules on multiple representation contain separate and redundant paragraphs to govern both "acceptance" of employment (DR 5-105(A) [22 N.Y.C.R.R. § 1200.24(a)]) and "continuing" employment (DR 5-105(B) [22 N.Y.C.R.R. § 1200.24(b)]), whereas Rule 1.7 covers both aspects of employment in the same paragraph.

Rule 1.7(a) sets out the basic prohibition against concurrent conflicts of interest and defines two categories of concurrent conflicts: (i) those involving "direct adversity" between clients, and (ii) those that create a "significant risk" that a lawyer's independent professional judgment will be adversely affected by, or the representation will be materially limited by, the lawyer's competing responsibilities or interests.

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Rule 1.7(b)(1) separates consentable from nonconsentable conflicts by adopting a straightforward objective standard that asks whether the lawyer seeking consent “reasonably believes” that the lawyer will be able to provide “competent and diligent representation” to each affected client. Currently, with respect to personal-interest conflicts, DR 5-101 [22 N.Y.C.R.R. § 1200.20] asks whether a hypothetical disinterested lawyer would believe that “the representation of the client will not be adversely affected” by the lawyer’s own interests, and with respect to multiple-client conflicts, DR 5-105(C) [22 N.Y.C.R.R. § 1200.24(c)] asks whether a hypothetical disinterested lawyer would believe that the lawyer “can competently represent” the interest of each client. In contrast, Rule 1.7 adopts a uniform standard for both types of conflicts to determine whether a conflict is consentable.

When a conflict is “consentable,” the Rule also requires that each affected client give “informed consent” as defined in Rule 1.0(g). These elements are similar to the elements of consent reflected in DR 5-101(A) [22 N.Y.C.R.R. § 1200.20(a)] and DR 5-105(C) [22 N.Y.C.R.R. § 1200.24(c)].

Rule 1.7(b)(4) requires that client consent be “confirmed in writing,” a term defined in Rule 1.0. This new requirement will give a client another opportunity to reflect on the consent, and will create an evidentiary record that will help to resolve any later dispute between lawyer and client over the fact or scope of the waiver.

Rule 1.7(b)(3) provides that conflicts in which a lawyer or law firm asserts a claim on behalf of one client against another client in the same litigation or other proceeding before a tribunal (for example, the same lawyer or law firm represents both the plaintiff and the defendant in a lawsuit) are prohibited per se. This is consistent with New York law but is not expressly covered in the Disciplinary Rules.

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

- (a) A lawyer shall not enter into a business transaction with a client unless:
- (1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
 - (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
 - (3) the client gives informed consent, in a 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.
- (b) [Reserved]
- (c) A lawyer shall not:
- (1) solicit any substantial gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or
 - (2) 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, domestic partner, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

- (d) Prior to conclusion of all aspects of the matter giving rise to the representation or proposed representation of the client or prospective client, a lawyer shall not negotiate or enter into any arrangement or understanding with:
- (1) a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the representation or proposed representation; or
 - (2) any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of the representation of a client or prospective client.
- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

RULE 1.8

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

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

(3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

(f) A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless:

(1) the client gives informed consent;

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

(3) the client's confidential information is protected as required by Rule 1.6.

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

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or

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

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

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

(2) contract with a client for a reasonable contingent fee in a civil case subject to Rule 1.5(d) or other law or court rule.

- (j) A lawyer shall not:
- (1) (i) as a condition of entering into or continuing any professional representation by the lawyer or the lawyer's firm, require or demand sexual relations with any person;
 - (ii) employ coercion, intimidation or undue influence in entering into sexual relations incident to any professional representation by the lawyer or the lawyer's firm; or
 - (iii) in domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client.
- (2) Rule 1.8(j)(1) shall not apply to sexual relations between lawyers and their spouses or domestic partners or to ongoing consensual sexual relationships that predate the initiation of the client-lawyer relationship.
- (k) Subject to Rule 1.10(a), 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's investment on behalf of a client. For these reasons business transactions between a lawyer and client are not advisable. If a lawyer nevertheless elects to enter into a business transaction with a current client, the requirements of paragraph (a) must be met even when the transaction is not 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, such as 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.

[2] Paragraphs (a)(1), (a)(2) and (a)(3) set out the conditions that a lawyer must satisfy under this Rule. Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated in writing to the client 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 writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement and the existence of reasonably available alternatives, and should explain why the

advice of independent legal counsel is desirable. See Rule 1.0(g) for the definition of “informed consent.”

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer’s financial interest otherwise poses a significant risk that the lawyer’s representation of the client will be materially adversely affected by the lawyer’s financial interest in the transaction. Here the lawyer’s role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer’s dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer’s interests at the client’s expense. Moreover, the lawyer must obtain the client’s informed consent. In some cases, the lawyer’s interest may be such that Rule 1.7 will preclude the lawyer from seeking the client’s consent to the transaction. A lawyer has a continuing duty to monitor the inherent conflicts of interest that arise out of the lawyer’s business transaction with a client or because the lawyer has an ownership interest in property in which the client also has an interest. A lawyer is also required to make such additional disclosures to the client as are necessary to obtain the client’s informed consent to the continuation of the representation.

[3A] The self-interest of a lawyer resulting from a business transaction with a client may interfere with the lawyer’s exercise of independent judgment on behalf of the client. If such interference will occur should a lawyer agree to represent a prospective client, the lawyer should decline the proffered employment. After accepting employment, a lawyer should not acquire property rights that would adversely affect the lawyer’s professional judgment in representing the client. Even if the property interests of a lawyer do not presently interfere with the exercise of independent judgment, but the likelihood of interference can be reasonably foreseen by the lawyer, the lawyer should explain the situation to the client and should decline employment or withdraw unless the client gives informed consent to the continued representation, confirmed in writing. A lawyer should not seek to persuade a client to permit the lawyer to invest in an undertaking of the client nor make improper use of a professional relationship to influence the client to invest in an enterprise in which the lawyer is interested.

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

[4A] Rule 1.8(a) does not apply to business transactions with former clients, but the line between current and former clients is not always clear. A lawyer entering into a business transaction with a former client may not use information relating to the representation to the disadvantage of the former client unless the information has become generally known. See Rule 1.9(c).

[4B] The Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example,

banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[4C] This Rule also does not apply to ordinary fee arrangements between client and lawyer reached at the inception of the client-lawyer relationship, which are governed by Rule 1.5. The requirements of the Rule ordinarily must be met, however, when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of the lawyer's fee. For example, the requirements of paragraph (a) must be met if a lawyer agrees to take stock (or stock options) in the client in lieu of cash fees. Such an exchange creates a risk that the lawyer's judgment will be skewed in favor of closing a transaction to such an extent that the lawyer may fail to exercise independent professional judgment as to whether it is in the client's best interest for the transaction to close. This may occur where the client expects the lawyer to provide independent professional advice in structuring a securities-for-services exchange. If the lawyer is expected to play any role in advising the client regarding the securities-for-services exchange, especially if the client lacks sophistication, the requirements of fairness, full disclosure and written consent set forth in paragraph (a) must be met. When a lawyer represents a client in a transaction concerning literary property, Rule 1.8(d) does not prohibit the lawyer from agreeing that the lawyer's fee shall consist of a share of the ownership of the literary property or a share of the royalties or license fees from the property, but the lawyer must comply with Rule 1.8(a).

[4D] An exchange of securities for legal services will also trigger the requirements of Rule 1.7 if the lawyer's ownership interest in the client would, or reasonably may, affect the lawyer's exercise of independent professional judgment on behalf of the client. For example, where a lawyer has agreed to accept securities in a client corporation as a fee for negotiating and documenting an equity investment, or for representing a client in connection with an initial public offering, there is a risk that the lawyer's judgment will be skewed in favor of closing the transaction to such an extent that that the lawyer may fail to exercise independent professional judgment. (The lawyer's judgment may be skewed because unless the transaction closes, the securities will be worthless.) Unless a lawyer reasonably concludes that he or she will be able to provide competent, diligent and loyal representation to the client, the lawyer may not undertake or continue the representation, even with the client's consent. To determine whether a reasonable possibility of such an adverse effect on the representation exists, the lawyer should analyze the nature and relationship of the particular interest and the specific legal services to be rendered. Some salient factors may be (i) the size of the lawyer's investment in proportion to the holdings of other investors, (ii) the potential value of the investment in relation to the lawyer's or law firm's earnings or other assets, and (iii) whether the investment is active or passive.

[4E] If the lawyer reasonably concludes that the lawyer's representation of the client will not be adversely affected by the agreement to accept client securities as a legal fee, the Rules permit the representation, but only if full disclosure is made to the client and the client's informed consent is obtained and confirmed in writing. See Rules 1.0(b) (defining "confirmed in writing"), 1.0(g) (defining "informed consent"), and 1.7.

[4F] A lawyer must also consider whether accepting securities in a client as payment for legal services constitutes charging or collecting an unreasonable or excessive fee in violation

of Rule 1.5. Determining whether a fee accepted in the form of securities is unreasonable or excessive requires a determination of the value of the securities at the time the agreement is reached and may require the lawyer to engage the services of an investment professional to appraise the value of the securities to be given. The lawyer and client can then make their own advised decisions as to whether the securities-for-fees exchange results in a reasonable fee.

[5] [Omitted.]

Gifts to Lawyers

[6] A lawyer may accept a gift from a client if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client. Before accepting a substantial gift offered by a client, a lawyer should urge the client to secure disinterested advice from an independent, competent person who is cognizant of all of the circumstances. 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.

[6A] This Rule does not apply to success fees, bonuses and the like from clients for legal services. These are governed by Rule 1.5.

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is related to the donee, as set forth in paragraph (c).

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or named to another 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 adversely affect the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary or Media Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the subject matter of the representation creates a conflict between the interest of the client and the personal interests of the lawyer. The lawyer may be tempted to subordinate the interests of the client to the lawyer's own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from the client television, radio, motion picture, newspaper, magazine, book, or other literary or media rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of the literary or media rights to the prejudice of the client. To prevent this adverse impact on the representation, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter

giving rise to the representation, even though the representation has previously ended. Likewise, arrangements with third parties, such as book, newspaper or magazine publishers or television, radio or motion picture producers, pursuant to which the lawyer conveys whatever literary or media rights the lawyer may have, should not be entered into prior to the conclusion of all aspects of the matter giving rise to the representation.

[9A] Rule 1.8(d) does not prohibit a lawyer representing a client in a transaction concerning intellectual property from agreeing that the lawyer's fee shall consist of an ownership share in the property, if the arrangement conforms to paragraph (a) and Rule 1.5.

Financial Assistance

[9B] Paragraph (e) eliminates the former requirement that the client remain "ultimately liable" to repay any costs and expenses of litigation that were advanced by the lawyer regardless of whether the client obtained a recovery. Accordingly, a lawyer may make repayment from the client contingent on the outcome of the litigation, and may forgo repayment if the client obtains no recovery or a recovery less than the amount of the advanced costs and expenses. A lawyer may also, in an action in which the lawyer's fee is payable in whole or in part as a percentage of the recovery, pay court costs and litigation expenses on the lawyer's own account. However, like the former New York rule, paragraph (e) limits permitted financial assistance to court costs directly related to litigation. Examples of permitted expenses include filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses do not include living or medical expenses other than those listed above.

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition against a lawyer lending a client money for court costs and litigation expenses, including the expenses of medical examination and testing and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fee agreements and help ensure access to the courts. Similarly, an exception is warranted permitting lawyers representing indigent or pro bono clients to pay court costs and litigation expenses whether or not these funds will be repaid.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent clients under circumstances in which a third person will compensate them, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Third-party payers frequently have interests that may differ from those of the client. A lawyer is therefore prohibited from accepting or continuing such a representation unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c), prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another.

[12] Sometimes it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the representation will be materially limited, or the lawyer's independent professional judgment on behalf of the client will be adversely affected, by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing. See Rules 1.0(b) (definition of "confirmed in writing"), 1.0(g) (definition of "informed consent"), and 1.0(v) (definition of "writing" or "written").

Aggregate Settlements

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

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited 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 currently represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for the lawyer's own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

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

Acquiring Proprietary Interest in Litigation

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

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is often unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that if the sexual relationship leads to the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairing the lawyer's exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict the extent to which client confidences will be protected by the attorney-client evidentiary privilege. A client's sexual involvement with the client's lawyer, especially if the sexual relations create emotional involvement, will often render it unlikely that the client could rationally determine whether to consent to the conflict created by the sexual relations. If a client were to consent to the conflict created by the sexual relations without fully appreciating the nature and implications of that conflict, there is a significant risk of harm to client interests. Therefore, sexual relations between lawyers and their clients are dangerous and inadvisable. Out of respect for the desires of consenting adults, however, paragraph (j) does not flatly prohibit client-lawyer sexual relations in matters other than domestic relations matters. Even when sexual relations between a lawyer and client are permitted under paragraph (j), however, they may lead to incompetent representation in violation of Rule 1.1. Because domestic relations clients are often emotionally vulnerable, domestic relations matters entail a heightened risk of exploitation of the client. Accordingly, lawyers are flatly prohibited from

entering into sexual relations with domestic relations clients during the course of the representation even if the sexual relationship is consensual and even if prejudice to the client is not immediately apparent. For a definition of “sexual relations” for the purposes of this Rule, see Rule 1.0(r).

[17A] The prohibitions in paragraph (j)(1) apply to all lawyers in a firm who know of the representation, whether or not they are personally representing the client. The Rule prohibits any lawyer in the firm from exploiting the client-lawyer relationship by directly or indirectly requiring or demanding sexual relations as a condition of representation by the lawyer or the lawyer’s firm. Paragraph (j)(1)(i) thus seeks to prevent a situation where a client may fear that a willingness or unwillingness to have sexual relations with a lawyer in the firm may have an impact on the representation, or even on the firm’s willingness to represent or continue representing the client. The Rule also prohibits the use of coercion, undue influence or intimidation to obtain sexual relations with a person known to that lawyer to be a client or a prospective client of the firm. Paragraph (j)(1)(ii) thus seeks to prevent a lawyer from exploiting the professional relationship between the client and the lawyer’s firm. Even if a lawyer does not know that the firm represents a person, the lawyer’s use of coercion or intimidation to obtain sexual relations with that person might well violate other Rules or substantive law. Where the representation of the client involves a domestic relations matter, the restrictions stated in paragraphs (j)(1)(i) and (j)(1)(ii), and not the per se prohibition imposed by paragraph (j)(1)(iii), apply to lawyers in a firm who know of the representation but who are not personally representing the client. Nevertheless, because domestic relations matters may be volatile and may entail a heightened risk of exploitation of the client, the risk that a sexual relationship with a client of the firm may result in a violation of other Rules is likewise heightened, even if the sexual relations are not per se prohibited by paragraph (j).

[17B] A law firm’s failure to educate lawyers about the restrictions on sexual relations – or a firm’s failure to enforce those restrictions against lawyers who violate them – may constitute a violation of Rule 5.1, which obligates a law firm to make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

[18] Sexual relationships between spouses or domestic partners or those that predate the client-lawyer relationship are not prohibited. For a definition of “domestic partner” for the purposes of this Rule, see Rule 1.0(c). Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer’s ability to represent the client will be materially limited by the sexual relationship and therefore constitute an impermissible conflict of interest. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) applies to sexual relations between a lawyer for the organization (whether inside counsel or outside counsel) and a constituent of the organization who supervises, directs or regularly consults with that lawyer or a lawyer in that lawyer’s firm concerning the organization’s legal matters.

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. See Rule 1.10(a), regarding imputation of conflicts of interest based on a lawyer's own financial, business, property, or other personal interests.

[20A] The prohibition on sexual relations set forth in paragraph (j) is personal and is not imputed to associated lawyers who are not involved in representing a particular client. Accordingly, where a lawyer who is personally representing a client has sexual relations with that client in violation of paragraph (j), the other lawyers in the firm are not subject to discipline solely because those improper sexual relations occurred. There may be circumstances, however, where a violation of paragraph (j) by one lawyer in a firm gives rise to violations of other Rules by the other lawyers in the firm through imputation. For example, sexual relations between a lawyer and a client may give rise to a violation of Rule 1.7(a) (prohibiting a personal-interest conflict that creates a "significant risk" that the representation will be materially limited or the lawyer's independent professional judgment on behalf of a client will be adversely affected), and such a conflict under Rule 1.7 may be imputed to all other lawyers in the firm under Rule 1.10(a).

REPORTERS' NOTES

Rule 1.8 collects in one place ten different types of conflicts of interest that have historically caused problems and therefore deserve particularized, detailed regulation.

Rule 1.8(a)

Rule 1.8(a) generally prohibits a lawyer from entering into a business transaction with a client, but sets out stringent conditions that a lawyer must satisfy to overcome this general prohibition. Rule 1.8(a) is substantially similar to DR 5-104(A) [22 N.Y.C.R.R. § 1200.23(a)], but differs in two ways. First, DR 5-104(A) [22 N.Y.C.R.R. § 1200.23(a)] regulates business transactions between a lawyer and client only "if they have differing interests therein." Second, DR 5-104(A) [22 N.Y.C.R.R. § 1200.23(a)] applies only "if the client expects the lawyer to exercise independent professional judgment for the protection of the client." Rule 1.8(a) eliminates both of these qualifying phrases, so that Rule 1.8(a) applies to all business transactions between a lawyer and client, regardless of whether they have "differing interests" and regardless of whether the client expects the lawyer to exercise judgment to protect the client. By applying the general prohibition to all client-lawyer business transactions, Rule 1.8(a) avoids difficult inquiries about interests and expectations, and thus provides lawyers with a clearer mandate to avoid any client-lawyer business transaction that fails to satisfy the conditions set forth in paragraphs (a)(1), (a)(2) and (a)(3).

Rule 1.8(a)(1) is substantially the same as DR 5-104(A)(1) [22 N.Y.C.R.R. § 1200.23(a)(1)], but eliminates the phrase "terms on which the lawyer the interest" (emphasis

supplied), which may have incorrectly suggested to some lawyers that the Rule applied only when a lawyer was a buyer, not a seller.

Rule 1.8(a)(2) incorporates the current requirement in DR 5-104(A)(2) [22 N.Y.C.R.R. § 1200.23(a)(2)] that the lawyer advise the client to seek independent legal advice, but strengthens this mandate by adding two requirements: (i) the advice to the client to seek independent counsel must be in writing, and (ii) the client must be given a reasonable opportunity to seek the advice of independent counsel.

Rule 1.8(a)(3) incorporates the client consent requirement in DR 5-104(A)(3) [22 N.Y.C.R.R. § 1200.23(a)(3)] but uses more specific language, requiring that the lawyer disclose “the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction,” which provides more specific guidance than the existing requirement that the lawyer disclose “the lawyer’s inherent conflict of interest.”

Rule 1.8(b)

The substance of ABA Model Rule 1.8(b), which governs a lawyer’s use of information related to the representation for the advantage of the lawyer or to the disadvantage of the client, has been moved (together with ABA Comment [5]) to Rule 1.6 (a). Paragraph (b) has been reserved to avoid relettering of the subsequent paragraphs so that it will be easier to compare the remainder of Rule 1.8 to the rules of other jurisdictions in the future.

Rule 1.8(c)

Rule 1.8(c) governs a lawyer’s solicitation of gifts from clients. It consists of two paragraphs. Paragraph (c)(1) prohibits a lawyer from soliciting a “substantial” gift from a client, including a testamentary gift for the benefit of the lawyer or a person related to the lawyer. Paragraph (c)(2) prohibits a lawyer from preparing 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 closely related to the client. Rule 1.8(c) defines the term “related persons” for purposes of the Rule. The Disciplinary Rules currently do not expressly address a lawyer’s solicitation of gifts from clients. Rather, the issue is addressed in EC 5-5, which is consistent with the substance of Rule 1.8(c).

Rule 1.8(d)

Rule 1.8(d) retains the substance of DR 5-104(B) [22 N.Y.C.R.R. § 1200.23(b)]. The Rule, like the current New York rule, is designed to prevent perceived abuses associated with literary and media deals relating to famous or infamous clients.

Rule 1.8(e)

Rule 1.8(e) is substantially identical to DR 5-103(B) [22 N.Y.C.R.R. § 1200.22(b)] (as amended February 1, 2007), which governs financial assistance to clients in connection with contemplated or pending litigation.

Rule 1.8(f)

Rule 1.8(f) retains the basic restrictions currently stated in DR 5-107(A)-(B) [22 N.Y.C.R.R. § 1200.26(a)-(b)] regarding lawyers who accept anything of value from third parties in connection with the representation of a client.

Rule 1.8(g)

Rule 1.8(g), governing aggregate settlements, retains the substance of DR 5-106(A) [22 N.Y.C.R.R. § 1200.25(a)] but creates an exception for “court approval” (such as in class actions) and replaces the existing consent language with a requirement that “each client gives informed consent in a writing signed by the client.” The requirement that each client give written consent should provide stronger protection to clients against overreaching by lawyers.

Rule 1.8(h)

Rule 1.8(h) relates to claims of legal malpractice. Paragraph (h)(1) retains the substance of the first part of DR 6-102(A) [22 N.Y.C.R.R. § 1200.31(a)]. Paragraph (h)(2) retains the substance of the second part of DR 6-102(A) [22 N.Y.C.R.R. § 1200.31(a)] but provides stronger protection for an unrepresented client or former client by requiring the lawyer both (i) to advise the client or former client in writing that it is desirable to seek independent representation, and (ii) to provide a reasonable opportunity for the client or former client to do so.

Rule 1.8(i)

Rule 1.8(i), which restricts a lawyer’s proprietary interests in litigation, is substantially the same as DR 5-103(A) [22 N.Y.C.R.R. § 1200.22(a)].

Rule 1.8(j)

Rule 1.8(j), regulating sexual relations between lawyers and clients, retains the substance of DR 5-111 [22 N.Y.C.R.R. § 1200.29-a] but has been revised in several places for reasons of clarity.

Paragraph (j)(1)(1) is substantially the same as DR 5-111(B)(1) [22 N.Y.C.R.R. § 1200.29-a(b)(1)], but prohibits a demand for sexual relations with “any person” (not just a client or third party) as a condition of entering into or continuing the professional representation of the client by the lawyer “or the lawyer’s firm.” The Rule thereby prohibits a lawyer who will not be involved in a prospective representation from saying to a client, “My partner will not represent you unless you have sex with me,” and it prohibits a lawyer who will be involved in the representation from saying, “I will not represent you unless you have sex with my partner.”

Paragraph (j)(1)(ii) is substantially the same as DR 5-111(B)(2) [22 N.Y.C.R.R. § 1200.29-a(b)(2)] but prohibits the use of coercion, intimidation or undue influence in entering into sexual relations “incident to any professional representation by the lawyer or the lawyer’s firm.” The Rule thus prohibits one lawyer in a firm (for example, an influential partner in the firm) from using coercion, intimidation, or undue influence to obtain sexual favors from the client of another lawyer in the firm. For example, a senior partner could not tell a client, “If you

sleep with me, I will make sure that our best lawyers work on your case.” This meaning is presumably intended by the current Rule but is not expressly stated.

Paragraph 1.8(j)(1)(iii) is identical to DR 5-111(B)(3) [22 N.Y.C.R.R. § 1200.29-a(b)(3)].

Rule 1.8(j)(2) is nearly identical to DR 5-111(C) [22 N.Y.C.R.R. § 1200.29-a(c)], but adds the phrase “or domestic partners,” a term that applies to many relationships. (The term “domestic partner” is defined in Rule 1.0(c).)

Rule 1.8(k)

Rule 1.8(k) is a broad imputation Rule, similar to DR 5-105(D) [22 N.Y.C.R.R. § 1200.24(d)]. It provides that the prohibitions in Rules 1.8(a) through (i) that apply to one lawyer also apply to every lawyer associated in a firm with that lawyer. The effect of Rule 1.8(k) is to make all of the provisions of Rule 1.8 subject to the general principles of imputation except paragraph (j), which governs client-lawyer sexual relations. This limitation is consistent with DR 5-111(D) [22 N.Y.C.R.R. § 1200.29-a(d)], which does not impute restrictions on sexual relations to lawyers in a firm who are not participating in the representation of the client. However, the addition of the phrase “or the lawyer’s firm” in Rules 1.8(j)(1)(i) and (ii) make clear that those subparagraphs apply to all lawyers in a firm who know that the person is a client of the firm, regardless of whether they are participating in the representation.

**RULE 1.9:
DUTIES TO FORMER CLIENTS**

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

(b) Unless the former client gives informed consent, confirmed in writing, 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) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and paragraph (c) that is material to the matter.

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

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

Comment

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

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

and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

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

[4] [Moved to Comment to Rule 1.10.]

[5] [Moved to Comment to Rule 1.10.]

[6] [Moved to Comment to Rule 1.10.]

[7] Independent of the prohibition against subsequent representation, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6, 1.9(c).

[8] Paragraph (c) generally extends the confidentiality protections of Rule 1.6 to a lawyer’s former clients. Paragraph (c)(1) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Paragraph (c)(2) provides that a lawyer may not reveal information acquired in the course of representing a client except as these Rules would permit or require with respect to a current client. See Rules 1.6, 3.3.

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

REPORTERS’ NOTES

Rule 1.9 generally imposes on a lawyer the same duties to former clients as are currently found in DR 5-108(A) [22 N.Y.C.R.R. § 1200.27(a)].

Rule 1.9(a) is substantially identical to DR 5-108(A)(1) [22 N.Y.C.R.R. § 1200.27(a)(1)] but adds that the former client’s informed consent must be “confirmed in writing.” The written confirmation requirement will impress upon the former client the seriousness of consenting to a conflict, and will reduce disputes about whether the former client consented to the conflict.

Rule 1.9(b) is substantially identical to DR 5-108(B) [22 N.Y.C.R.R. § 1200.27(b)], which concerns lawyers who have moved from one private law firm to another.

Rule 1.9(c) is similar to DR 5-108(A)(2) [22 N.Y.C.R.R. § 1200.27(a)(2)], regarding confidentiality obligations to former clients, but differs from it in three ways:

First, Rule 1.9(c) not only forbids a lawyer to “use” confidential information absent an exception to the confidentiality rule (Rule 1.6) but also forbids a lawyer to “reveal” it. The prohibition against revealing confidential information is not explicitly stated in DR 5-108(A)(2) [22 N.Y.C.R.R. § 1200.27(a)(2)] with respect to former clients but is expressly stated in DR 4-101(B)(1) [22 N.Y.C.R.R. § 1200.19(b)(1)] with respect to current clients, so logically it should protect former clients as well.

Second, Rule 1.9(c)(2) prohibits a lawyer from using a former client’s confidential information only if such use would be “to the disadvantage of the former client” (unless other Rules would permit or require the lawyer to use the information regarding a current client or the information has become “generally known”). Permitting a lawyer to “use” a former client’s confidential information unless using the information would disadvantage the former client is consistent with the expectations of most former clients, and enables lawyers to work more efficiently and less expensively on behalf of current clients because they do not have to “reinvent the wheel.” As a practical matter, this change will make little difference because information that would not be likely to harm or embarrass a former client is generally not a “confidence” or “secret” under the existing Code. The change thus permits a lawyer to use confidential information for the benefit of an existing client when the former client would suffer no harm.

Third, to gather various distinct imputation provisions into a single Rule, the issue now covered by DR 5-108(C) [22 N.Y.C.R.R. § 1200.27(c)] regarding imputation of conflicts after a lawyer has terminated an association with a firm has been moved to Rule 1.10, regarding imputation of conflicts of interest, which governs related imputation issues.

**RULE 1.10:
IMPUTATION OF CONFLICTS OF INTEREST**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless (i) the prohibition is based on a lawyer's own financial, business, property or other personal interests, and (ii) under the circumstances, a reasonable lawyer would conclude that there is no significant risk that the representation will be materially limited or the independent judgment of the participating lawyers in the firm will be adversely affected.

(b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless:

(1) the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter; or

(2) if the newly associated lawyer did acquire information protected by Rule 1.6 or Rule 1.9(c) with respect to the former client that is material to the current matter, a reasonable lawyer would conclude that any such information, if used, is not likely to be to the former client's material disadvantage, and the firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client; and

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and others in the firm.

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

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

(f) A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:

- (1) the firm agrees to represent a new client; or
- (2) the firm agrees to represent an existing client in a new matter; or
- (3) the firm hires or associates with another lawyer; or
- (4) an additional party is named or appears in a pending matter.

(g) Substantial failure to keep records or to implement or maintain a conflict-checking system that complies with paragraph (f) shall be a violation regardless of whether there is another violation of these Rules.

Comment

Definition of “Firm”

[1] For purposes of these Rules, the term “firm” includes, but is not limited to, (i) a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law, and (ii) lawyers employed in a legal services organization, a government law office or the legal department of a corporation or other organization. See Rule 1.0(e). Whether two or more lawyers constitute a “firm” within this definition will depend on the specific facts. See Rule 1.0, Comments [2]-[4].

Principles of Imputed Disqualification

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

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

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events that took place before admission to the bar, such as

work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(q), 5.3.

Lawyers Moving Between Firms

[4A] The principles of imputed disqualification are modified when lawyers have been associated in a firm and then end their association. The nature of contemporary law practice and the organization of law firms have made the fiction that the law firm is the same as a single lawyer unrealistic in many situations. In crafting a rule to govern imputed conflicts, there are several competing considerations. First, the former client must be reasonably assured that the client's confidentiality interests are not compromised. Second, the principles of imputed disqualification should not be so broadly cast as to preclude others from having reasonable choice of counsel. Third, the principles of imputed disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after leaving a firm. In this connection, it should be recognized that today most lawyers practice in firms, that many limit their practice to, or otherwise concentrate in, one area of law, and that many move from one association to another multiple times in their careers. If the principles of imputed disqualification were defined too strictly, the result would be undue curtailment of the opportunity of lawyers to move from one practice setting to another, of the opportunity of clients to choose counsel, and of the opportunity of firms to retain qualified lawyers. For these reasons, a functional analysis that focuses on preserving the former client's reasonable confidentiality interests, rather than an unqualified rule, is appropriate in balancing the competing interests.

[5] Paragraph (b) permits a law firm, under certain circumstances, to represent a client with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, under Rule 1.7 the law firm may not represent a client with interests adverse to those of a current client of the firm. Moreover, the firm may not represent the client where the matter is the same or substantially related to a matter in which (i) the formerly associated lawyer represented the client and (ii) the firm or any lawyer currently in the firm has material information protected by Rule 1.6 and Rule 1.9(c) that is likely to be significant to the matter.

[5A] In addition to information that may be in the possession of one or more of the lawyers remaining in the firm, information in documents or files retained by the firm itself may preclude the firm from opposing the former client in the same or substantially related matter if (i) the information is protected by Rule 1.6 and Rule 1.9(c) and likely to be significant and material to the current matter, and (ii) the documents or files containing confidential client information are retained in a place or in a form that is accessible to lawyers participating in the current adverse matter. A law firm seeking to avoid disqualification under this Rule should therefore take reasonable steps to ensure that any confidential information relating to the prior representation that is maintained in the firm's hard copy or electronic files is not accessible to any lawyer who is participating in the current adverse representation.

[5B] Rule 1.10(c) permits a law firm under certain circumstances to represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or the firm with which the lawyer was previously associated, represented a client whose interests are materially adverse to that client. Paragraph (c)(1) provides that the principles of imputed disqualification do not apply where the newly associated lawyer did not acquire any confidential information of the previously represented client that is material to the current matter.

[5C] If the newly associated lawyer did acquire confidential information that is material to the current matter, general principles of imputation apply, but imputed disqualification may be avoided if the former client's confidential information is sufficiently protected. In balancing the confidentiality interests of a former client and the interests of other clients in exercising their choice of counsel, the lawyer or firm must determine whether the confidential information is likely to be to the former client's material disadvantage, taking into account factors such as whether the lawyer had a substantial role in the prior representation, including the nature and amount of work performed by the lawyer on the matter, the responsibility that the lawyer assumed for the matter, the degree to which the client relied on the lawyer to manage the case, and similar considerations. If a reasonable lawyer would conclude that the information is not likely to be to the former client's material disadvantage, the firm may avoid imputed disqualification by assuring that the newly associated lawyer is effectively screened from any participation in the current matter in accordance with the provisions of paragraph (c)(2).

Using Screening to Avoid Imputed Disqualification

[5D] Paragraph (c)(2) sets out the basic procedural requirements that a law firm must satisfy to ensure that a personally disqualified lawyer is effectively screened from participation in the matter. This Rule requires that the firm promptly: (i) notify, as appropriate, lawyers and relevant nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client, and (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and others in the firm.

[5E] In contrast to other Rules that permit the use of screening to avoid imputed disqualification, this Rule does not require that the lawyer or law firm advise the former client of the circumstances that warranted implementation of the screening procedures or the actions taken to comply with this Rule. In some circumstances, however, it may be prudent to do so, so that the firm can learn promptly of and consider any objections that the former client may have to the firm's adverse representation in the current matter. Effective notice to the former client may sometimes be given through communication with a lawyer or law firm that currently represents the former client.

[5F] A firm seeking to avoid disqualification under this Rule should also consider its ability to implement, maintain, and monitor the screening procedures permitted by paragraph (c)(2) before undertaking or continuing the representation. In deciding whether the screening procedures permitted by this Rule will be effective to avoid imputed disqualification, a firm should consider a number of factors, including how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the

personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining, the procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. The size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, but it is not a dispositive factor. A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraph (c)(2).

[5G] In order to prevent any lawyer in the firm from acquiring confidential information about the matter from the newly associated lawyer, it is essential that notification be given and screening procedures implemented promptly. If the matter requiring screening is already pending before the personally disqualified lawyer joins the firm, the procedures required by this Rule should be implemented before the lawyer joins the firm. If a newly associated lawyer joins a firm before a conflict requiring screening arises, the requirements of this Rule should be satisfied as soon as practicable after the conflict arises. If any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm's disqualification. Other factors may affect the likelihood that screening procedures will be effective in preventing the flow of confidential information between the personally disqualified lawyer and other lawyers in the firm in a given matter.

[5H] The bookkeeping and accounting problems that may arise from prohibiting a personally disqualified lawyer from being apportioned a share of the fees from a matter make it inadvisable to impose an unqualified rule prohibiting this practice. Although this Rule does not prohibit a personally disqualified lawyer from being apportioned a share of the fees in the matter, if the disqualified lawyer's share of the fee would represent a significant increase in that lawyer's compensation over what the lawyer would otherwise earn, permitting the lawyer to be apportioned a share in the fee may create incentives that would call into question the effectiveness of the screening procedures. In such situations, a firm seeking to avoid imputed disqualification under this Rule would be well-advised to prohibit the personally disqualified lawyer from sharing in the fees in the matter.

Client Consent

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

future, see Rule 1.7, Comments [22]-[22A]. For a definition of “informed consent,” see Rule 1.0(g).

Former and Current Government Lawyers

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b), not this Rule. The imputation of conflicts among current government lawyers employed by the same office, agency or department is governed by Rule 1.11(e), not this Rule.

Relationship Between this Rule and Rule 1.8(k)

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8(k), that Rule determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

Conflict-Checking Procedures

[9] Under paragraph (f), every law firm, no matter how large or small (including sole practitioners), is responsible for creating, implementing and maintaining a system to check proposed engagements against current and previous engagements and against new parties in pending matters. The system must be adequate to detect conflicts that will or reasonably may arise if: (i) the firm agrees to represent a new client, (ii) the firm agrees to represent an existing client in a new matter, (iii) the firm hires or associates with another lawyer, or (iv) an additional party is named or appears in a pending matter. The system will thus render effective assistance to lawyers in the firm in avoiding conflicts of interest. See also Rule 5.1.

[9A] Failure to create, implement and maintain a conflict-checking system adequate for this purpose is a violation of this Rule by the firm. In cases in which a lawyer, despite reasonably diligent efforts to do so, could not acquire the information that would have revealed a conflict because of the firm’s failure to maintain an adequate conflict-checking system, the firm shall be responsible for the violation. However, a lawyer who knows or should know of a conflict in a matter that the lawyer is handling remains individually responsible for the violation of these Rules, whether or not the firm’s conflict-checking system has identified the conflict. In cases in which a violation of paragraph (f) by the firm is a substantial factor in causing a violation of these Rules by a lawyer, the firm, as well as the individual lawyer, is responsible for the violation. As to whether a client-lawyer relationship exists or is continuing, see Scope [9]-[10]; Rule 1.3, Comment [4].

[9B] The records required to be maintained under paragraph (f) must be in written form. See Rule 1.0(v) for the definition of “written,” which includes tangible or electronic records. To be effective, a conflict-checking system may also need to supplement written information with recourse to the memory of the firm’s lawyers through in-person, telephonic, or electronic communications. An effective conflict-checking system as required by this Rule may not, however, depend solely on recourse to lawyers’ memories or other such informal sources of information.

[9C] The nature of the records needed to render effective assistance to lawyers will vary depending on the size, structure, history, and nature of the firm's practice. At a minimum, however, a firm must record information that will enable the firm to identify (i) each client that the firm represents, (ii) each party in a litigated, transactional or other matter whose interests are materially adverse to the firm's clients, and (iii) the general nature of each matter.

[9D] To the extent that the records made and maintained for the purpose of complying with this Rule contain confidential information, a firm must exercise reasonable care to protect the confidentiality of these records. See Rule 1.6(c).

[9E] The nature of a firm's conflict-checking system may vary depending on a number of factors, including the size and structure of the firm, the nature of the firm's practice, the number and location of the firm offices, and the relationship among the firm's separate offices. In all cases, however, an effective conflict-checking system should record and maintain information in a way that permits the information to be checked systematically and accurately when the firm is considering a proposed engagement. A small firm or a firm with a small number of engagements may be able to create and maintain an effective conflict-checking system through the use of hard-copy rather than electronic records. But larger firms, or firms with a large number of engagements, may need to create and maintain records in electronic form so that the information can be accessed quickly and efficiently.

Organizational Clients

[9F] Representation of corporate or other organizational clients makes it prudent for a firm to maintain additional information in its conflict-checking system. For example, absent an agreement with the client to the contrary, a conflict may arise when a firm desires to oppose an entity that is part of a current or former client's corporate family (e.g., an affiliate, subsidiary, parent or sister organization). See Rule 1.7, Comments [34]-[34A]. Although a law firm is not required to maintain records showing every corporate affiliate of every corporate client, if a law firm frequently represents corporations that belong to large corporate families, the law firm should make reasonable efforts to institute and maintain a system for alerting the firm to potential conflicts with the members of the corporate client's family.

[9G] Under certain circumstances, a law firm may also need to include information about the constituents of a corporate client. Although Rule 1.13 provides that a firm is the lawyer for the entity and not for any of its constituents, confusion may arise when a law firm represents small or closely held corporations with few shareholders, or when a firm represents both the corporation and individual officers or employees but bills the corporate client for the legal services. In other situations, a client-lawyer relationship may develop unintentionally between the law firm and one or more individual constituents of the entity. Accordingly, a firm that represents corporate clients may need a system for determining whether or not the law firm has a client-lawyer relationship with individual constituents of an organizational client. If so, the law firm should add the names of those constituents to the data base of its conflict-checking system.

REPORTERS' NOTES

Rule 1.10 deals with the imputation of one lawyer's conflict of interest to all other lawyers with whom the personally disqualified lawyer is "associated" in a firm.

Rule 1.10(a) generally retains the imputation rules now found in DR 5-105(D) [22 N.Y.C.R.R. § 1200.24(d)], but differs from DR 5-105(D) [22 N.Y.C.R.R. § 1200.24(d)] in two significant ways: (i) personal-interest conflicts are not always imputed to the entire law firm, and (ii) screening of lawyers who have moved from one firm to another will avoid disqualifying conflicts under limited conditions. These differences deserve extended explanation.

Imputation of personal conflicts within a law firm.

Rule 1.10(a) provides that conflicts based on a lawyer's own financial, business, property, or other personal interests *are* imputed *unless* "under the circumstances, a reasonable lawyer would conclude that there is no significant risk that the representation will be materially limited or the independent judgment of the participating lawyers in the firm will be adversely affected." Creating an exception to automatic imputation for personal-interest conflicts has three purposes.

First, a lawyer's personal interests are difficult to check when taking on a new matter and difficult to monitor during a matter. Indeed, for these practical reasons, the current New York rule, DR 5-105(E) [22 N.Y.C.R.R. § 1200.24(c)], does not require a law firm to check new engagements against conflicts based on individual lawyers' personal interests. Moreover, many lawyers might consider it intrusive if a law firm routinely inquired into and maintained records of their individual financial, business, property, social, political, or other personal interests.

Second, it is difficult for law firms to ascertain who else in the law firm knows about the personally disqualified lawyer's personal interests and to determine what effects those interests might have on the lawyers in the firm handling the matter in question.

Third, and most important, the disqualified lawyer's personal-interest conflicts often do not pose a significant risk of impairing the quality of the representation or the independent professional judgment of the other lawyers in the firm. Because automatic imputation deprives a client of choice of counsel and often creates delays and increases legal fees, a case-by-case functional standard is preferable to a per se rule.

The absence of imputation will not have an effect on situations in which the personal interests of one lawyer in the firm in fact do have an impact on other lawyers involved in the representation of a firm client. Assume, for example, that a powerful partner has a conflicting personal interest of which a junior lawyer is aware, and that awareness may limit materially the junior lawyer's independent professional judgment on behalf of a client. In that case, the junior lawyer has a personal conflict of interest under Rule 1.7 without the need for any imputation, because of the risk that the junior lawyer will seek to curry favor with the powerful partner at the expense of the client.

Screening to avoid imputation of conflicts of newly hired lawyers.

Rule 1.10(c)(2) permits a law firm to accept or continue a representation in narrow circumstances even if a lateral lawyer (the “newly associated lawyer”) *did* acquire confidential information regarding the former firm’s client that is material to the current matter, but only if three safeguards are satisfied.

The primary safeguard for the former client is that the confidential information acquired by the lateral lawyer must be relatively insignificant (i.e., “a reasonable lawyer would conclude that any such information, if used, is not likely to be to the former client’s material disadvantage”). Even if this factor is met, the firm must act promptly and reasonably to add two additional safeguards: (i) the firm must notify, “as appropriate” (the language of existing DR 1-104(C) [22 N.Y.C.R.R. § 1200.5(c)]), lawyers and nonlawyers in the firm that “the personally disqualified lawyer is prohibited from participating in the representation of the current client,” and (ii) the firm must “implement effective screening procedures” to prevent any exchange of information about the matter between the lateral lawyer (the “personally disqualified lawyer”) and others in the firm.

The purpose of the screening provision for lateral hires is to strike a better balance between the right of clients to confidentiality, the right of clients to choose counsel, and the reality of lawyer mobility, especially among young lawyers who frequently change firms several times (not always by choice) before settling down.

Many lawyers who change firms have informally acquired some confidential information about many of their former firm’s clients – or at least cannot prove that they did *not* acquire such information – and therefore are personally disqualified from opposing those clients after they join a new firm. Moreover, under current rules the lateral lawyer’s entire firm is disqualified by imputation. But in many cases the costs of disqualification significantly outweigh the benefits. The client whose lawyer is disqualified loses the right to choice of counsel and may have to face substantial delays and added costs while a substitute lawyer gets up to speed. The court system (or the general economic system, in non-litigated matters) suffers delay and disruption.

But if the confidential information possessed by the lateral lawyer would be unlikely to disadvantage the former client even if it were used, and if the hiring firm promptly employs effective measures to prevent the information from being used, then the risk to confidentiality is minimal. Rule 1.10(c)(2) facilitates the benefits to clients and the legal system of allowing relatively free lateral movement of lawyers (reallocating lawyer talent more efficiently), with little or no danger to a former client’s confidential information.

Rule 1.10(b) is essentially identical to existing DR 5-108(C) [22 N.Y.C.R.R. § 1200.27(c)], regarding imputation when a conflicted lawyer has terminated an association with a firm.

Rule 1.10(c)(1), governing confidentiality duties to former clients, is essentially identical to existing DR 5-108(B) [22 N.Y.C.R.R. § 1200.27(b)].

Rule 1.10(d) provides that disqualification under this Rule may be waived under the same conditions as conflicts delineated in Rule 1.7 (the general rule on conflicts of interest). This is

not a substantive change from existing law – clients may waive imputed conflicts – but Rule 1.10(d) expressly states a concept that is not expressly stated in DR 5-105(D) [22 N.Y.C.R.R. § 1200.24(d)].

Rule 1.10(e) preserves (by cross-reference to Rule 1.11) the special treatment now accorded by the last clause of DR 5-105(D) [22 N.Y.C.R.R. § 1200.24(d)] for conflicts arising from the work of lawyers moving from government service to private practice, or vice versa.

Paragraphs (f) and (g) of Rule 1.10 essentially retain the current New York rule, DR 5-105(E) [22 N.Y.C.R.R. § 1200.24(e)], requiring a law firm to implement a conflict-checking system to assist lawyers in avoiding a violation of the conflict of interest rules. However, Rule 1.10(f) refines the current New York rule by explicitly requiring the conflict-checking system to enable the law firm to detect conflicts that will or reasonably may develop if the law firm agrees to (i) represent a new client, (ii) undertake a new matter for an existing client, or (iii) hire a new lawyer, or associate with another lawyer, or if (iv) an additional party is named or appears in a pending matter. DR 5-105(E) [22 N.Y.C.R.R. § 1200.24(e)] requires conflict checking only for “new engagements,” which encompasses both representing new clients and undertaking new matters for existing clients, but that is too narrow. Conflicts also may arise when law firms hire lateral lawyers or form other relationships with lawyers from other law firms (such as co-counsel or of counsel), and when a new party enters a pending matter. Rule 1.10(f) therefore expressly provides that new associations and new parties trigger the conflict-checking requirement. The result should be fewer surprises for clients and fewer motions to disqualify in the courts.

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

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

(1) shall comply with Rule 1.9(c); and

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

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

(1) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(2) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm; and

(3) if the firm appears before or communicates with the appropriate government agency regarding the matter, promptly advise the appropriate government agency in writing of the circumstances that warranted the implementation of the screening procedures required by this Rule and of the actions that have been taken to comply with this Rule.

(c) Except as law may otherwise expressly provide, 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 that, 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 that 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 and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b).

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

and (1) shall comply with Rule 1.7 and Rule 1.9, but is not subject to Rule 1.10;

(2) shall not:

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

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

(e) When a lawyer is disqualified from representation under paragraph (d), no lawyer serving in the same government office, agency or department may knowingly undertake or continue representation in the matter unless:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation; and

(2) the office, agency or department acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the office, agency or department that the personally disqualified lawyer is prohibited from participating in the matter;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the office; and

(iii) where the disqualification is based on the application of Rule 1.9, advise the personally disqualified lawyer's former client in writing of the circumstances that warranted implementation of the screening procedures required by this Rule and of the actions taken to comply with this Rule, unless notice to the former client is prohibited by law or Rule 1.6.

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

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

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

Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflicts of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(g) for the definition of “informed consent.”

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraphs (b) and (e) set forth special imputation rules for former and current government lawyers, respectively, each with screening and notice provisions. See Comments [6]-[7B] concerning imputation of the conflicts of former government lawyers; see Comments [9B]-[9D] concerning imputation of the conflicts of current government lawyers.

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

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

[4A] By requiring a former government lawyer to comply with Rule 1.9(c), Rule 1.11(a)(1) protects information obtained while working for the government to the same extent as

information learned while representing a private client. Accordingly, unless the information acquired during government service is “generally known” or these Rules would otherwise permit or require its use or disclosure, the information may not be used or revealed to the government’s disadvantage. This provision applies regardless of whether the lawyer was working in a “legal” capacity. Thus, information learned by the lawyer while in public service in an administrative, policy or advisory position also is covered by Rule 1.11(a)(1). Paragraph (c) of Rule 1.11 adds further protections against exploitation of confidential information. Paragraph (c) prohibits a lawyer who has information about a person acquired when the lawyer was a public officer or employee, that the lawyer knows is confidential government information, from representing a private client whose interests are adverse to that person in a matter in which the information could be used to that person’s material disadvantage. A firm with which the lawyer is associated may undertake or continue representation in the matter only if the lawyer who possesses the confidential government information is timely and effectively screened. Thus, the purpose and effect of the prohibitions contained in Rule 1.11(c) are to prevent the lawyer’s subsequent private client from obtaining an unfair advantage because the lawyer has confidential government information about the client’s adversary.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a municipality and subsequently is employed by a federal agency. Because the conflict of interest is governed by paragraph (d), the subsequent government employer may avoid imputed disqualification by adhering to the provisions of paragraph (e). The question 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].

Former Government Lawyers: Using Screening to Avoid Imputed Disqualification

[6] Paragraphs (b) and (c) contemplate the use of screening procedures that permit the law firm of a personally disqualified former government lawyer to avoid imputed disqualification. This Rule omits the additional requirement of the previous New York rule that “[t]here are no other circumstances in the particular representation that create an appearance of impropriety.” Nevertheless, there may be circumstances where representation by the personally disqualified lawyer’s firm may undermine the public’s confidence in the integrity of the legal system. Such a circumstance may arise, for example, where the personally disqualified lawyer occupied a highly visible government position prior to entering private practice, or where the facts and circumstances of the representation itself create a risk that the representation will appear to be improper. Where the particular circumstances create such a risk, a law firm may find it prudent to decline the representation, but Rule 1.11 does not require it to do so. See Rule 1.0(q) for the definition of “screened” and “screening.”

[6A] The bookkeeping and accounting problems that may arise from prohibiting a personally disqualified lawyer from being apportioned a share of the fees from a matter make it inadvisable to impose an unqualified rule prohibiting this practice. Although this Rule does not prohibit a personally disqualified lawyer from being apportioned a share of the fees in the matter, if the disqualified lawyer’s share of the fee would represent a significant increase in that lawyer’s compensation over what the lawyer would otherwise earn, permitting the lawyer to be

apportioned a share in the fee may create incentives that would call into question the effectiveness of the screening procedures. In such situations, a firm seeking to avoid imputed disqualification under this Rule would be well-advised to prohibit the personally disqualified lawyer from sharing in the fees in the matter.

[7] A firm seeking to avoid disqualification under this Rule should also consider its ability to implement, maintain, and monitor the screening procedures permitted by paragraphs (b) and (c) before undertaking or continuing the representation. In deciding whether the screening procedures permitted by this Rule will be effective to avoid imputed disqualification, a firm should consider a number of factors, including how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining, the procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. The size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, it is not a dispositive factor. A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraphs (b) and (c).

[7A] In order to prevent any lawyer in the firm from acquiring confidential information about the matter from the newly associated lawyer, it is essential that notification be given and screening procedures implemented promptly. If the matter requiring screening is already pending before the personally disqualified lawyer joins the firm, the procedures required by this Rule should be implemented before the lawyer joins the firm. If a newly associated lawyer joins a firm before a conflict requiring screening arises, the requirements of this Rule should be satisfied as soon as practicable after the conflict arises. If any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm's disqualification. Other factors may affect the likelihood that screening procedures will be effective in preventing the flow of confidential information between the personally disqualified lawyer and other lawyers in the firm in a given matter.

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

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

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

[9A] Paragraph (d) prohibits a lawyer serving as a government officer or employee from participating in a matter in which the lawyer participated personally and substantially while in private practice or other non-governmental employment, unless the lawyer's former client and the appropriate government agency give their informed consents confirmed in writing. Under prior law, the lawyer was permitted to participate notwithstanding the otherwise disqualifying conflict of interest if the lawyer determined that under applicable law no one else was, or by lawful designation could be, authorized to act in the lawyer's stead. Thus, the decision to proceed was made by the individual government lawyer claiming necessity. Rule 1.11(e) provides that if, because of the lawyer's personal disqualification under paragraph (d) or the imputation of the lawyer's disqualification to the other lawyers in the same government office, agency or department under paragraph (e), there is no lawyer authorized to handle the matter, the appropriate course of action for the government agency is to seek the authority to act from an appropriate tribunal, where the matter can be reviewed in an open and objective forum. Courts and other tribunals have the inherent authority to authorize continued representation notwithstanding an otherwise disqualifying conflict of interest.

Current Government Lawyers: Using Screening to Avoid Imputed Disqualification

[9B] Paragraph (e) permits a current government lawyer to undertake or continue a representation notwithstanding the disqualification of another lawyer in the same office, agency or department if (i) the lawyer reasonably believes that the lawyer can provide competent and diligent representation in the matter, and (ii) the office acts promptly and reasonably to comply with the notice and screening requirements of paragraph (e)(2).

[9C] Where the conflict arises from the government lawyer's prior representation of a client, the office, agency or department is required to notify the former client of the circumstances warranting the use of screening and the actions that have been taken to comply with the requirements of this Rule, unless providing notice would be in violation of law or Rule 1.6. The requirement that the government lawyer's former client be notified is suspended under circumstances where notice would make information public that the agency is required to keep secret. For example, a prosecutor's office would not be required to notify a personally disqualified lawyer's former client if that former client is now the subject of a pending grand jury investigation.

[9D] Whether a lawyer's belief that the lawyer can provide competent and diligent representation is reasonable may depend on various factors including, for example, the nature of the conflict or the role of the personally disqualified lawyer in the office, agency or department in which the lawyer also serves. Thus, all other things being equal, it may be reasonable for a lawyer to conclude that the lawyer can act competently and diligently in the matter where the personally disqualified lawyer does not occupy a supervisory position; it may be unreasonable for a lawyer to reach this conclusion where the personally disqualified lawyer is the head of the office, agency or department.

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

REPORTERS’ NOTES

Rule 1.11 contains special conflict of interest rules for former and current government lawyers. Like the special rules of DR 9-101(B) [22 N.Y.C.R.R. § 1200.45(b)], these rules facilitate the movement of lawyers between government service and private practice, thus enabling the government to attract talented lawyers to public service.

Rule 1.11(a) regulates lawyers who formerly served in government. Paragraph (a)(1) reminds those lawyers that they must abide by Rule 1.9(c), the same Rule that governs all other lawyers regarding a former client’s confidential information. This reminder is consistent with DR 5-108(A)(2) [22 N.Y.C.R.R. § 1200.27(a)(2)], but DR 5-108 [22 N.Y.C.R.R. § 1200.27] does not expressly mention former government lawyers. Paragraph (a)(2) is substantially similar to the first part of DR 9-101(B)(1) [22 N.Y.C.R.R. § 1200.45(b)(1)], but with one difference: the Rule continues to disqualify lawyers from matters in which they “participated personally and substantially” while in government service, but the Rule also creates an exception that permits the former government lawyer to participate if “the appropriate government agency gives its informed consent, confirmed in writing, to the representation.” This change may not be significant because DR 9-101(B) [22 N.Y.C.R.R. § 1200.45(b)] begins with the phrase “[e]xcept as otherwise permitted by law,” and a government agency presumably can consent to a conflict only if the law permits it to do so, thereby falling within the initial exception to DR 9-101(B) [22 N.Y.C.R.R. § 1200.45(b)].

Rule 1.11(a) omits the requirement in DR 9-101(B)(1)(ii) [22 N.Y.C.R.R. § 1200.45(b)(1)(ii)] that there be “no other circumstances in the particular representation that create an appearance of impropriety.” That standard may unfairly subject a lawyer or law firm to professional discipline based on highly subjective and undefined criteria on which reasonable people may disagree.

Rule 1.11(b) is generally comparable in substance to the second part of DR 9-101(B) [22 N.Y.C.R.R. § 1200.45(b)]. However, when Rule 1.11(a) disqualifies a former government lawyer, Rule 1.11(b) permits other lawyers in the firm to undertake or continue the representation in question only if the firm acts promptly and reasonably to: (i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client, (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm, and (iii) if the firm appears before or communicates with the appropriate government agency regarding the matter, advise the appropriate government agency in writing of the circumstances that warranted the implementation of the screening procedures required by the Rule and of the actions that have been taken to comply with the Rule. Thus, Rule 1.11(b) retains the concept that a law firm may avoid imputed disqualification by screening the personally disqualified former government lawyer, but the Rule specifies the components and goals of the screening in more detail and

requires notice to the government under certain conditions. The notification provision, which has no counterpart in the existing New York Code, does not apply unless and until the law firm appears before or communicates with the government. Otherwise, the notification provision might chill the rights of clients, causing some clients not to seek outside advice about sensitive internal matters (such as possible fraud or criminal conduct) and causing other clients not to hire highly qualified law firms.

Rule 1.11(c) defines “confidential government information,” a term used but not defined in the current New York Code. The definition should help lawyers and courts to apply the Rule more easily and consistently.

Rule 1.11(d) governs conflicts that arise when lawyers move from the private sector into government service. Generally, Rule 1.11(d) carries forward the prohibition in DR 9-101(B)(3)(i) [22 N.Y.C.R.R. § 1200.45(b)(3)(i)] against a current government lawyer participating in a matter in which the lawyer participated “personally and substantially” while in private practice or other nongovernmental employment. Rule 1.11(d) also limits the imputation of conflicts within government law offices. Currently, DR 9-101(B)(3)(i) [22 N.Y.C.R.R. § 1200.45(b)(3)] uses a “rule of necessity” that permits an otherwise personally disqualified lawyer to handle a matter if applicable law provides that no one else is, or can be, authorized to act in that lawyer’s place. The “rule of necessity” is flawed because it leaves the decision whether to invoke the rule to the unreviewed discretion of the affected government lawyer. Rule 1.11(d) cures this flaw by allowing the personally disqualified lawyer to avoid disqualification and imputation only if “the appropriate government agency gives its informed consent, confirmed in writing.” This formulation entrusts the disqualification decision to an agency rather than an individual.

Rule 1.11(d) also carries forward the ban on a lawyer’s negotiating for private employment with any person involved as a party or as a lawyer for a party in a matter in which the government lawyer has participated “personally and substantially.” However, Rule 1.11(d) exempts a lawyer who is serving as “a law clerk to a judge, other adjudicative officer or arbitrator,” provided the law clerk has notified the judge or other adjudicative officer. The rationale for this special rule is two-fold: (i) law clerks are not decision-makers, and (ii) many law clerks hold short-term positions and therefore have special needs for flexibility in pursuing future employment. The required notification allows judges to take into account the possibility of any bias and to respond accordingly, such as by reassigning a clerk to different matters.

Rule 1.11(e) governs the imputation of conflicts caused by lawyers in government service who have conflicts of interest under Rule 1.11(d). The Rule essentially applies the same screening requirements found in Rule 1.11(b) to lawyers who have moved from government to private practice. But Rule 1.11(e) adds a third requirement: where a government lawyer is disqualified based on Rule 1.9 (which prohibits a lawyer from opposing a former client in a substantially related matter), the government agency must advise the personally disqualified lawyer’s former client in writing of the circumstances that warranted implementation of the screening procedures required by this Rule and of the actions taken to comply with this Rule, unless notice to the former client is prohibited by law or by Rule 1.6.

RULE 1.11

Rule 1.11(f) defines the crucial term “matter” (a definition not found in the current Code) to refer only to “a particular matter involving a specific party or parties.” The effect of this definition is to exclude the process of agency rulemaking from the scope of Rule 1.11, because rulemaking involves the general public, not specific parties.

**RULE 1.12:
SPECIAL CONFLICTS OF INTEREST FOR FORMER JUDGES, ARBITRATORS,
MEDIATORS OR OTHER THIRD-PARTY NEUTRALS**

(a) Except as stated in paragraph (d), and unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as:

- (1) a judge or other adjudicative officer;
- (2) an arbitrator, mediator or other third-party neutral; or
- (3) a law clerk to such a person.

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

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

- (1) notify all lawyers, and nonlawyer personnel, as appropriate, within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;
- (2) determine that no lawyer representing the current client has acquired any information from the personally disqualified lawyer that is material and significant to the current matter;
- (3) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and others in the firm; and
- (4) advise the parties and any appropriate tribunal of the circumstances that warranted the implementation of the screening procedures required by this Rule and of the actions that have been taken to comply with this Rule.

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

Comment

[1] This Rule generally parallels Rule 1.11. The term “personally and substantially” signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also, the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. See Rule 1.11, Comment [4]. The term “adjudicative officer” includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service may not “act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto.” Although phrased differently from this Rule, those Canons have the same meaning.

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

[3] Although lawyers who serve as third-party neutrals do not obtain 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. Paragraph (c) therefore provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in paragraph (c). “Screened” and “screening” are defined in Rule 1.0(q).

[4A] The bookkeeping and accounting problems that may arise from prohibiting a personally disqualified lawyer from being apportioned a share of the fees from a matter make it inadvisable to impose an unqualified rule prohibiting this practice. Although this Rule does not prohibit a personally disqualified lawyer from being apportioned a share of the fees in the matter, if the disqualified lawyer’s share of the fee would represent a significant increase in that lawyer’s compensation over what the lawyer would otherwise earn, permitting the lawyer to be apportioned a share in the fee may create incentives that would call into question the effectiveness of the screening procedures. In such situations, a firm seeking to avoid imputed disqualification under this Rule would be well-advised to prohibit the personally disqualified lawyer from sharing in the fees in the matter.

[4B] A firm seeking to avoid disqualification under this Rule should also consider its ability to implement, maintain, and monitor the screening procedures permitted by paragraph (c) before undertaking or continuing the representation. In deciding whether the screening procedures permitted by this Rule will be effective to avoid imputed disqualification, a firm

should consider a number of factors, including how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining, the procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. The size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, it is not a dispositive factor. A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraph (c).

[4C] In order to prevent any lawyer in the firm from acquiring confidential information about the matter from the newly associated lawyer, it is essential that notification be given and screening procedures implemented promptly. If the matter requiring screening is already pending before the personally disqualified lawyer joins the firm, the procedures required by this Rule should be implemented before the lawyer joins the firm. If a newly associated lawyer joins a firm before a conflict requiring screening arises, the requirements of this Rule should be satisfied as soon as practicable after the conflict arises. If any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm's disqualification. Other factors may affect the likelihood that screening procedures will be effective in preventing the flow of confidential information between the personally disqualified lawyer and others in the firm in a given matter.

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

REPORTERS' NOTES

Rule 1.12 contains special conflict of interest rules for lawyers who have previously served as judges or other adjudicative officers, including third-party neutrals.

Rule 1.12(a) elaborates on the narrow language of DR 9-101(A) [22 N.Y.C.R.R. § 1200.45(a)], which prohibits a lawyer from accepting private employment in a matter if the lawyer acted "on the merits" of that matter "in a judicial capacity." Borrowing language from DR 9-101(B) [22 N.Y.C.R.R. § 1200.45(b)] and Rule 1.11, Rule 1.12(a) prohibits a lawyer from representing anyone in connection with a matter in which the lawyer participated "personally and substantially" as (i) a judge "or other adjudicative officer," (ii) an "arbitrator, mediator or other third-party neutral," or (iii) a law clerk to such a person. However, unlike DR 9-101(A) [22 N.Y.C.R.R. § 1200.45(a)], which has no provision for waiver, Rule 1.12(a) permits a disqualified

lawyer to overcome the prohibition if “all parties to the proceeding give their informed consent, confirmed in writing”

Rule 1.12(b) mirrors Rule 1.11 by prohibiting a judge (or an adjudicative officer, arbitrator, mediator, or third-party neutral) from negotiating for employment with any party or lawyer for a party involved in a matter in which the judge is participating “personally and substantially.” The Rule makes an exception for law clerks, but only after the law clerk has notified the judge. The notification provision gives the judge the opportunity to be on the alert for any signs of bias on the law clerk’s part and to change the law clerk’s assignments if warranted.

Rule 1.12(c) applies when a former judge or adjudicative officer is personally disqualified. It permits the former judge’s law firm to avoid imputed disqualification by erecting the same kind of screening used in Rule 1.11 to avoid imputed disqualification based on the conflicts of other former government lawyers.

**RULE 1.13:
ORGANIZATION AS CLIENT**

(a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) 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, the highest authority that can act on behalf of the organization, as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information if permitted by Rule 1.6, and may resign in accordance with Rule 1.16.

(d) 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 concurrent 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, members, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Rule apply equally to unincorporated associations. "Other constituents" as used in this Rule means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, for example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews between the lawyer and the client's employees or other constituents made in the course of that investigation are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The

lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[2A] There are times when the organization's interests may differ from those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent whose interest differs from that of the organization: (i) that a conflict or potential conflict of interest exists, (ii) that the lawyer does not represent the constituent in connection with the matter, unless the representation has been approved in accordance with Rule 1.13(d), (iii) that the constituent may wish to obtain independent representation, and (iv) that any attorney-client privilege that applies to discussions between the lawyer and the constituent belongs to the organization and may be waived by the organization. Care must be taken to ensure that the constituent understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent, and that discussions between the lawyer for the organization and the constituent may not be privileged.

[2B] Whether such a warning should be given by the lawyer for the organization to any constituent may turn on the facts of each case.

Acting in the Best Interest of the Organization

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer, even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. 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 organization 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. Under Rule 1.0(h), a lawyer's knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. The terms "reasonable" and "reasonably" connote a range of conduct that will satisfy the requirements of Rule 1.13. In determining what is reasonable in the best interest of the organization, the circumstances at the time of determination are relevant. Such circumstances may include, among others, the lawyer's area of expertise, the time constraints under which the lawyer is acting, and the lawyer's previous experience and familiarity with the client.

[4] 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 within the organization and the apparent motivation of the person involved, the policies of the organization concerning 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 constituent'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 lawyer'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 information relating to the representation to persons outside the organization. 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 interest of the organization. See Rule 1.4.

[5] Paragraph (b) also makes clear that when it is reasonably necessary 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 organization's highest authority to which a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, Rule 1.8, Rule 1.16, Rule 3.3 or Rule 4.1. Rules 1.6(b)(2) and (b)(3) may permit the lawyer in some circumstances to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] The authority of a lawyer to disclose information relating to a representation under Rule 1.6 does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation 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 past violation of law. Having a lawyer who cannot disclose confidential information concerning past acts relevant to the representation for which the lawyer was retained enables an organizational client to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer for an organization who reasonably believes that the lawyer's discharge was because of actions taken pursuant to paragraph (b), or who withdraws in circumstances that require or permit the lawyer to take action under paragraph (b), must proceed as "reasonably necessary in the best interest of the organization." Under some circumstances, the duty of communication under Rule 1.4 and the duty under Rule 1.16(d) to protect a client's interest upon termination of the representation, in conjunction with this Rule, may require the lawyer to inform the organization's highest authority of the lawyer's discharge or withdrawal, and of what the lawyer reasonably believes to be the basis for the discharge or withdrawal.

Government Agency

[9] The duties defined in this Rule apply to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Defining or identifying the client of a lawyer representing a government entity depends on applicable federal, state and local law and is a matter beyond the scope of these Rules. See Scope [9]. Moreover, in a matter involving the conduct of government officials, a government lawyer may have greater authority under applicable law to question such conduct than would 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. 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 [10].

[10] See Comment [2A].

[11] See Comment [2B].

Concurrent Representation

[12] Paragraph (d) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder, subject to the provisions of Rule 1.7. If the corporation’s informed consent to such a concurrent representation is needed, the lawyer should advise the principal officer or major shareholder that any consent given on behalf of the corporation by the conflicted officer or shareholder may not be valid, and the lawyer should explain the potential consequences of an invalid consent.

Derivative Actions

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

[14] 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 normal incidents of an organization’s affairs, to be defended by the organization’s lawyer like any other suits. 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.

REPORTERS' NOTES

Rule 1.13 explains a lawyer's responsibilities when representing a corporation or other organization. It generally parallels existing DR 5-109 [22 N.Y.C.R.R. § 1200.28].

Rule 1.13(a) is identical to existing DR 5-109(A) [22 N.Y.C.R.R. § 1200.28(a)], requiring that under certain circumstances a lawyer for an organization shall explain that "the lawyer is the lawyer for the organization and not for any of the constituents."

Rule 1.13(b) governs a lawyer's options and obligations upon learning of wrongdoing within the represented organization. The Rule begins with language from the first sentence of DR 5-109(B) [22 N.Y.C.R.R. § 1200.28(b)] ("[i]f a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation ..."), but the rest of DR 5-109(B) [22 N.Y.C.R.R. § 1200.28(b)] is replaced by a single sentence providing that a lawyer "*shall* refer the matter to higher authority in the organization, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization" (typically the board of directors or its equivalent) unless the lawyer "reasonably believes that it is not necessary in the best interest of the organization to do so" (Emphasis supplied.) The use of "shall" in Rule 1.13(b) resolves an ambiguity in DR 5-109(B) [22 N.Y.C.R.R. § 1200.28(b)], which uses the word "may" (rather than "shall") and therefore appears to make referral to higher authority optional even when referral to higher authority is necessary to serve the best interest of the organization in the circumstances. Because a lawyer for an organization owes a duty of loyalty to the organization rather than to individual constituents, and because ultimate authority over the affairs of the organization rests with the highest authority that can act on behalf of the organization, a lawyer who knows of wrongdoing or intended wrongdoing by an organization's constituents should be required to inform the highest authority in the organization unless the referral would be contrary to the organization's best interest.

Rule 1.13(c) provides that if a lawyer is unable to remedy the wrongdoing by referring the matter to higher authority within the organization as mandated by Rule 1.13(b), the lawyer has two options: (i) the lawyer "may reveal confidential information if permitted by Rule 1.6" (the confidentiality rule), and (ii) the lawyer "may resign in accordance with Rule 1.16" (the withdrawal rule). This formulation essentially follows existing DR 5-109(C) [22 N.Y.C.R.R. § 1200.28(c)] but makes clear that an exception to the duty of confidentiality may permit disclosure outside the organization even if the lawyer resigns or intends to resign. In contrast to ABA Model Rule 1.13(c), the Rule does not expand the existing exceptions to the duty of confidentiality, but simply reminds lawyers that the existing exceptions may apply.

Rule 1.13(d) permits a lawyer representing an organization also to represent other constituents, subject to Rule 1.7 (the general conflict of interest rule), provided consent is given by the shareholders or by an appropriate official other than the individual to be represented. This Rule, which has no counterpart in DR 5-109, ensures that the very individual whose interest conflicts with the interest of the organization does not have authority to consent to that conflict on behalf of the organization.

**RULE 1.14:
CLIENT WITH DIMINISHED CAPACITY**

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

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably 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 or guardian.

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

(d) In the absence of a pre-existing relationship or contractual agreement, express or implied, a lawyer generally may not act on behalf of a purported client. A "purported client" is a person who has contact with a lawyer and who would be a client but for the inability to enter into an express agreement. In certain circumstances, a lawyer may act as lawyer for a purported client even without express or limited agreement from the purported client, and may take those actions necessary to maintain the status quo or to avoid irreversible harm, if:

(1) an emergency situation exists in which the purported client's substantial health, safety, financial or liability interests would be irreparably damaged;

(2) the purported client, in the lawyer's good-faith judgment, lacks the ability to make or express considered judgments about action required to be taken because of an impairment of decision-making capacity;

(3) time is of the essence; and

(4) the lawyer reasonably believes in good faith that no other lawyer who has an established relationship with the purported client is available or willing to act on behalf of the purported client.

(e) A lawyer should not be subject to professional discipline for invoking or failing to invoke the permissive conduct authorized by this Rule if the lawyer has a reasonable basis for the lawyer's action or inaction.

Comment

[1] The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. The conventional client-lawyer relationship is based on the assumption

that the client, when properly advised and assisted, is capable of making decisions about important matters. Any condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities upon the lawyer. When the client is a minor or suffers from a diminished mental capacity, maintaining the conventional client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon and reach conclusions about matters affecting the client's own well-being.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client attentively and with respect.

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

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, with or without a disability, the question 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 reasonably believes that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a conventional client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take reasonably necessary protective measures. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making 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 interest, and the goals of minimizing intrusion into the client's decision-making autonomy and maximizing respect for the client's family and social connections.

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

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

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that a minor or a person with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be unnecessarily expensive or traumatic for the client. Seeking a guardian without the client's consent (including doing so over the client's objection) is appropriate only in the limited circumstances where a client's diminished capacity is such that the lawyer reasonably believes that no other practical method of protecting the client's interests is readily available. The lawyer should always consider less restrictive protective actions before seeking the appointment of a guardian. The lawyer should act as petitioner in such a proceeding only when no other person is available to do so.

[7A] Prior to withdrawing from the representation of a client whose capacity is in question, the lawyer should consider taking reasonable protective action. See Rule 1.16(d).

Disclosure of the Client's Condition

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

Emergency Legal Assistance

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

undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would have with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved, and to any other counsel involved, the nature of the lawyer's relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Whether a lawyer should seek compensation for such emergency actions will depend upon the circumstances.

REPORTERS' NOTES

Rule 1.14 provides guidance to a lawyer whose client has diminished capacity due to minority, mental impairment, or any other reason. The Rule has no analogue in the current Disciplinary Rules, but the subject matter is covered in EC 7-11 and EC 7-12.

Rule 1.14(a) states the general rule that in dealing with a client with diminished capacity, the lawyer should maintain a conventional client-lawyer relationship as far as reasonably possible.

Rule 1.14(b) creates an exception to the general rule, allowing the lawyer to take action to protect the client with diminished capacity from substantial physical, financial or other harm that could not be otherwise avoided. This provision recognizes that preventing substantial harm to an impaired person should, in dire situations, take precedence over the general obligation to treat impaired clients in the same manner as non-impaired clients.

Rule 1.14(c) provides for a limited exception to the confidentiality rules in Rule 1.6, permitting disclosure only to the extent reasonably necessary to protect the client's interests. This exception is a necessary companion to Rule 1.14(b), because a lawyer may not be able to take action to protect an impaired client without revealing some confidential information.

Rule 1.14(d) creates a narrow right for a lawyer (typically a lawyer involved in public-interest work) to act for a "purported client," meaning a person who has had contact with the lawyer and who would have become a client but for the person's inability to enter into an express agreement of employment. The exception is extremely limited. The lawyer may not take action without the person's agreement unless: (i) an emergency has arisen in which the person will suffer irreparable damage, (ii) the lawyer believes in good faith that the person lacks the ability to make or express considered judgments, (iii) time is of the essence, and (iv) no other lawyer who has an established relationship with the person is available or willing to act. Even in such an emergency, a lawyer may take only those actions necessary to "maintain the status quo or to avoid irreversible harm." This very limited exception will benefit people who lack capacity to form a client-lawyer relationship without allowing lawyers to intrude into relationships that do not meet the Rule's rigorous standards.

Rule 1.14(e) recognizes the discretionary nature of the entire Rule by providing that a lawyer should not be subject to professional discipline for taking or failing to take any of the

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actions authorized by the Rule “if the lawyer has a reasonable basis for the lawyer’s action or inaction.”

Rule 1.14 deserves a place in the mandatory rules because it provides useful guidance to lawyers whose clients have diminished capacity, allows lawyers to intervene on behalf of such clients to protect against substantial harm that would otherwise occur, and protects lawyers who are asked to provide emergency assistance to a person who cannot form a client-lawyer relationship due to incapacity.

**RULE 1.15:
PRESERVING IDENTITY OF FUNDS AND PROPERTY OF OTHERS; FIDUCIARY
RESPONSIBILITY; COMMINGLING AND MISAPPROPRIATION OF CLIENT
FUNDS OR PROPERTY; MAINTENANCE OF BANK ACCOUNTS; RECORD
KEEPING; EXAMINATION OF RECORDS**

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained.

(2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," or "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

(3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.

(4) Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the

right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

- (1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;
- (2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;
- (3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and
- (4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

A lawyer shall maintain for seven years after the events that they record:

- (1) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;
- (2) a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;
- (3) copies of all retainer and compensation agreements with clients;
- (4) copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf;
- (5) copies of all bills rendered to clients;
- (6) copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;

(7) copies of all retainer and closing statements filed with the Office of Court Administration; and

(8) all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.

(9) Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

(10) For purposes of Rule 1.15(d), a lawyer may satisfy the requirements of maintaining “copies” by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

(e) Authorized Signatories.

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

(f) Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers’ Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(g) Designation of Successor Signatories.

(1) Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

(2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer’s estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney

disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

(3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in Rule 1.15(d).

(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

(j) Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

Comment

[1] A lawyer should hold the funds and property of others using the care required of a professional fiduciary. Securities and other property should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts, including an account established pursuant to the "Interest on Lawyer Accounts" law where appropriate. *See* State Finance Law § 97-v(4)(a); Judiciary Law § 497(2); 21 N.Y.C.R.R. § 7000.10. Separate trust accounts may be warranted or required when administering estate monies or acting in similar fiduciary capacities.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b)(3) provides that it is permissible when necessary to pay bank service

charges on that account. Accurate records must be kept regarding which portion of the funds belongs to the lawyer.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold undisputed funds to coerce a client into accepting the lawyer's contention. Furthermore, the disputed portion of the funds must be kept in or transferred into a trust account, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. Notice to the client of the right to arbitrate fee disputes is required in some circumstances. The undisputed portion of the funds is to be distributed promptly.

[4] When in the course of representation a lawyer is in possession of funds in which two or more persons (other than the lawyer) claim interests, the funds should be kept separate by the lawyer until the dispute is resolved, by agreement of the parties or court order or commencement by the lawyer of an interpleader action and deposit of the property into court. The lawyer should distribute promptly all portions of the funds as to which the interests are not in dispute.

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

REPORTERS' NOTES

Rule 1.15 provides detailed requirements regarding safekeeping of the funds and property of others held by lawyers. It prohibits commingling and misappropriation and sets out rules for banking and recordkeeping in connection with a law practice. The Rule is substantially the same as existing DR 9-102 [22 N.Y.C.R.R. § 1200.46], with some editorial clarifications.

**RULE 1.16:
DECLINING OR TERMINATING REPRESENTATION**

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

(1) the lawyer knows or reasonably should know that the representation will result in violation of these Rules or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

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

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the lawyer reasonably believes that the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that is illegal or prohibited under these Rules, or that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including failure to pay fees and disbursements, and the client has been given reasonable warning, in a retainer agreement or otherwise, that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer that was not reasonably foreseeable when the relationship began;

(7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult;

(8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;

(9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;

(10) the client knowingly and freely assents to termination of the employment;

- (11) withdrawal is permitted under Rule 1.13(c) or other law; or
- (12) other good cause for withdrawal exists.

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

(d) Upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

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

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation under paragraph (a)(1) if the client demands that the lawyer engage in conduct that is illegal or that violates these Rules or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

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

Discharge

[4] As provided in paragraph (a)(3), a client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

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

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

Optional Withdrawal

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

[7A] In accordance with paragraph (b)(4), a lawyer should use reasonable foresight in determining whether a proposed representation will involve client objectives or instructions that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement. A client's intended action does not create a fundamental disagreement simply because the lawyer disagrees with it. See Rule 1.2 regarding the allocation of responsibility between client and lawyer. The client has the right, for example, to accept or reject a settlement proposal; a client's decision on settlement involves a fundamental disagreement only when no reasonable person in the client's position, having regard for the hazards of litigation, would have declined the settlement. In addition, the client should be given notice of intent to withdraw and an opportunity to reconsider.

[8] Under paragraph (b)(5), a lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs (or other expenses or disbursements), or an agreement limiting the objectives of the representation.

[8A] Continuing to represent a client may impose an unreasonable burden unexpected by the client and lawyer at the outset of the representation. However, lawyers are ordinarily better suited than clients to foresee and provide for the burdens of representation. The burdens of uncertainty should therefore ordinarily fall on lawyers rather than clients unless they are attributable to client misconduct. That a representation will require more work or significantly larger advances of expenses than the lawyer contemplated when the fee was fixed is not grounds for withdrawal under paragraph (b)(6).

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, under paragraph (d) a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

REPORTERS' NOTES

Rule 1.16 articulates the circumstances under which a lawyer must decline a potential new engagement or withdraw from a representation, and articulates the circumstances under which a lawyer is permitted (but not required) to withdraw from a representation. The Rule also explains a lawyer's obligations in connection with withdrawal.

Rule 1.16(a)

Rule 1.16(a) is substantially identical to existing DR 2-110(B) [22 N.Y.C.R.R. § 1200.15(b)] (which governs mandatory withdrawal), except that the problem of taking litigation positions “merely” for purposes of harassment is covered in Rule 3.1 (which prohibits frivolous litigation) rather than here in the withdrawal rule.

Rule 1.16(b)

Rule 1.16(b) largely tracks DR 2-110(C) [22 N.Y.C.R.R. § 1200.15(c)] (which governs permissive withdrawal), but eliminates grounds for permissive withdrawal that overlap Rule 1.16(a)(1) (lawyer must withdraw if the lawyer “knows or reasonably should know that the representation will result in violation of these Rules or other law”). Rule 1.16(b) also simplifies the structure of DR 2-110(B) [22 N.Y.C.R.R. § 1200.15(b)] and expands or elaborates upon several new grounds for permissive withdrawal. Specifically:

Rule 1.16(b)(1), which is consistent with the existing introductory language of DR 2-110(C) [22 N.Y.C.R.R. § 1200.15(c)], makes clear that a lawyer may withdraw from representing a client when “withdrawal can be accomplished without material adverse effect on the interests of the client.” Stating this as an independent ground for withdrawal makes the Rule easier to understand.

Rule 1.16(b)(2) is essentially identical to DR 2-110(C)(1)(b) [22 N.Y.C.R.R. § 1200.15(c)(1)(b)].

Rule 1.16(b)(3) permits withdrawal when “the lawyer reasonably believes that the client has used the lawyer's services to perpetrate a crime or fraud.” This language tracks DR 2-110(C)(1)(g) [22 N.Y.C.R.R. § 1200.15(c)(1)(g)] but adds a standard (the lawyer “reasonably believes”) imported from DR 2-110(C)(1)(b) [22 N.Y.C.R.R. § 1200.15(c)(1)(b)]. The “reasonably believes” standard clarifies Rule 1.16(b)(3) and makes it consistent with Rule 1.16(b)(2).

Rule 1.16(b)(4) tracks DR 2-110(C)(1)(c) [22 N.Y.C.R.R. § 1200.15(c)(1)(c)] nearly verbatim by permitting withdrawal when the client “insists upon taking action that is illegal or prohibited under these Rules,” and adds that the lawyer may withdraw when the client insists on

taking action that the lawyer “considers repugnant or with which the lawyer has a fundamental disagreement.” These additions generally capture the grounds for permissive withdrawal in existing DR 2-110(C)(1)(e) [22 N.Y.C.R.R. § 1200.15(c)(1)(e)], which permits withdrawal when the client “[i]nsists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but is not prohibited under the Disciplinary Rules.” However, Rule 1.16(b)(4) imposes a higher and more specific burden on the lawyer seeking to withdraw, and extends the Rule to matters pending before a tribunal. The extension to matters pending before a tribunal is consistent with DR 2-110(C)(6) [22 N.Y.C.R.R. § 1200.15(c)(6)], which permits a lawyer to withdraw from a proceeding before a tribunal if the lawyer believes in good faith that the tribunal will find “other good cause for withdrawal.” A client’s insistence upon conduct that the lawyer considers “repugnant” or with which the lawyer has a “fundamental disagreement” fits that category. In any event, in a matter pending before a tribunal, the lawyer must typically seek the tribunal’s permission, so the tribunal can prevent the lawyer’s withdrawal if the lawyer’s reason is insufficient.

Rule 1.16(b)(5) permits a lawyer to withdraw if “the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services ... and the client has been given reasonable warning, in a retainer agreement or otherwise, that the lawyer will withdraw unless the obligation is fulfilled.” This Rule resembles DR 2-110(C)(1)(f) [22 N.Y.C.R.R. § 1200.15(c)(1)(f)], but achieves a more equitable balance between lawyers and clients regarding payment of fees and expenses. In the lawyer’s favor, the Rule eliminates the troublesome phrase “deliberately disregards an agreement,” which sometimes prohibited withdrawal when a client was simply unable to pay the lawyer’s fees. In the client’s favor, the Rule requires the lawyer to give “reasonable warning, in a retainer agreement or otherwise,” before withdrawing on this ground. Consequently, the Rule should encourage lawyers to accept meritorious matters from financially marginal clients and should encourage clients to pay valid legal fees if they want to ensure continued representation. If a lawyer needs to obtain permission from the tribunal to withdraw from pending litigation, see Rule 1.16(c), the tribunal may refuse to permit the lawyer’s withdrawal to prevent inequity or undue delay.

Rule 1.16(b)(6) permits withdrawal if the representation will result in “an unreasonable financial burden on the lawyer that was not reasonably foreseeable when the relationship began.” This ground will typically arise in complex litigation where the expenses necessary to prosecute or defend the matter were not apparent at the outset. Because a lawyer must request a tribunal’s permission to withdraw from pending litigation, the tribunal may prevent the lawyer’s withdrawal if the lawyer does not meet the dual burdens of proving that the financial burden is not only “unreasonable” but also was “not reasonably foreseeable” at the outset.

Rule 1.16(b)(7) permits withdrawal if the client “fails to cooperate in the representation or otherwise renders the representation unreasonably difficult.” This parallels DR 2-110(C)(1)(d) [22 N.Y.C.R.R. § 1200.15(c)(1)(d)] but specifies a failure to cooperate as one way in which a client may render a representation “unreasonably difficult,” because failure to cooperate is a common basis for seeking withdrawal under DR 2-110(C)(1)(d) [22 N.Y.C.R.R. § 1200.15(c)(1)(d)].

Rules 1.16(b)(8)-(10) are substantially identical to DR 2-110(C)(3)-(5) [22 N.Y.C.R.R. § 1200.15(c)(3)-(5)].

Rule 1.16(b)(11), which permits withdrawal when “permitted under Rule 1.13(c) or other law,” recognizes that other Rules also state grounds for permissive withdrawal. Rule 1.16(b) attempts to provide better guidance to lawyers by gathering all of these grounds into one Rule.

Rule 1.16(b)(12) permits withdrawal when “other good cause for withdrawal exists.” This goes beyond DR 2-110(C)(6) [22 N.Y.C.R.R. § 1200.15(c)(6)], which was limited to matters “pending before a tribunal.” The expansion to matters not pending before a tribunal is justified because lawyers can generally be expected to act in good faith, and lawyers will be deterred from unjustified withdrawals by fear that a client will sue for legal malpractice, breach of contract, or breach of fiduciary duty.

Rule 1.16(c)

Rule 1.16(c) requires a lawyer to “comply with applicable law requiring notice to or permission of a tribunal when terminating a representation” and requires a lawyer to “continue representation notwithstanding good cause for terminating the representation” if the tribunal orders the lawyer to continue. This is consistent with DR 2-110(A)(1) [22 N.Y.C.R.R. § 1200.15(a)(1)].

Rule 1.16(d)

Rule 1.16(d), requiring a lawyer to take certain actions to protect clients interests upon the termination of a representation, is substantially similar to DR 2-110(A)(2)-(3) [22 N.Y.C.R.R. § 1200.15(a)(2)-(3)] but adds, for clarification, that a withdrawing lawyer “may retain papers relating to the client to the extent permitted by other law.”

**RULE 1.17:
SALE OF LAW PRACTICE**

(a) A lawyer retiring from a private practice of law; a law firm, one or more members of which are retiring from the private practice of law with the firm; or the personal representative of a deceased, disabled or missing lawyer, may sell a law practice, including goodwill, to one or more lawyers or law firms, who may purchase the practice. The seller and the buyer may agree on reasonable restrictions on the seller's private practice of law, notwithstanding any other provision of these Rules. Retirement shall include the cessation of the private practice of law in the geographic area, that is, the county and city and any county or city contiguous thereto within this state, in which the practice to be sold has been conducted.

(b) Confidential information.

(1) With respect to each matter subject to the contemplated sale, the seller may provide prospective buyers with any information not protected as confidential information under Rule 1.6.

(2) Notwithstanding Rule 1.6, the seller may provide the prospective buyer with information as to individual clients:

(i) concerning the identity of the client, except as provided in paragraph (b)(6) ;

(ii) concerning the status and general nature of the matter;

(iii) available in public court files; and

(iv) concerning the financial terms of the client-lawyer relationship and the payment status of the client's account.

(3) Prior to making any disclosure of confidential information that may be permitted under paragraph (b)(2), the seller shall provide the prospective buyer with information regarding the matters involved in the proposed sale sufficient to enable the prospective buyer to determine whether any conflicts of interest exist. Where sufficient information cannot be disclosed without revealing client confidential information, the seller may make the disclosures necessary for the prospective buyer to determine whether any conflict of interest exists, subject to paragraph (b)(6). If the prospective buyer determines that conflicts of interest exist prior to reviewing the information, or determines during the course of review that a conflict of interest exists, the prospective buyer shall not review or continue to review the information unless the seller shall have obtained the consent of the client in accordance with Rule 1.6(a)(1).

(4) Prospective buyers shall maintain the confidentiality of and shall not use any client information received in connection with the proposed sale in the same manner and to the same extent as if the prospective buyers represented the client.

(5) Absent the consent of the client after full disclosure, a seller shall not provide a prospective buyer with information if doing so would cause a violation of the attorney-client privilege.

(6) If the seller has reason to believe that the identity of the client or the fact of the representation itself constitutes confidential information in the circumstances, the seller may not provide such information to a prospective buyer without first advising the client of the identity of the prospective buyer and obtaining the client's consent to the proposed disclosure.

(c) Written notice of the sale shall be given jointly by the seller and the buyer to each of the seller's clients and shall include information regarding:

(1) the client's right to retain other counsel or to take possession of the file;

(2) the fact that the client's consent to the transfer of the client's file or matter to the buyer will be presumed if the client does not take any action or otherwise object within 90 days of the sending of the notice, subject to any court rule or statute requiring express approval by the client or a court;

(3) the fact that agreements between the seller and the seller's clients as to fees will be honored by the buyer; and

(4) the identity and background of the buyer or buyers, including principal office address, bar admissions, number of years in practice in New York State, whether the buyer has ever been disciplined for professional misconduct or convicted of a crime, and whether the buyer currently intends to resell the practice.

(d) When the buyer's representation of a client of the seller would give rise to a waivable conflict of interest, the buyer shall not undertake such representation unless the necessary waiver or waivers have been obtained in writing.

(e) The fee charged a client by the buyer 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, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice, as may withdrawing partners of law firms.

Termination of Practice by Seller

[2] The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the buyers. The fact that a number of the seller's clients decide not to be represented by the buyers 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 example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant 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 resigns from a judiciary position. Although the requirements of this Rule may not be violated in these situations, contractual provisions in the agreement governing the sale of the practice may contain reasonable restrictions on a lawyer's resuming private practice. See Rule 5.6, Comment [1], regarding restrictions on right to practice.

[3] The private practice of law refers to a private law firm or lawyer, not to a public agency, legal services entity, or in-house counsel to a business. The requirement that the seller cease to engage in the private practice of law therefore 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.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within a geographic area, defined as the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted. Its provisions therefore accommodate the lawyer who sells the practice on the occasion of moving to another city and county that does not border on the city or county within New York State.

[5] [Omitted.]

Sale of Entire Practice

[6] The Rule requires that the seller's entire practice be sold. The prohibition against sale of less than an entire practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The buyers are required to undertake all client matters in the practice, subject to client consent. This requirement is not violated even if a buyer is unable to undertake a particular client matter because of a conflict of interest and the seller therefore remains as attorney of record for the matter in question.

Client Confidences, Consent and Notice

[7] Giving the buyer access to client-specific information relating to the representation and to the file requires client consent. Rule 1.17 provides that before such information can be disclosed by the seller to the buyer, the client must be given actual written notice of the contemplated sale, including the identity of the buyer, 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 under paragraph (c)(2).

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. The selling lawyer must make a good-faith effort to notify all of the lawyer's current clients. Where clients cannot be given actual notice and therefore cannot themselves consent to the purchase or direct any other disposition of their files, they are nevertheless protected by the fact that the buyer has the duty to maintain their confidences under paragraph (b)(4).

[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

Fee Arrangements Between Client and Buyer

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the buyer unless a modification of the fee agreement is reached under the strict standards of Rule 1.8(a).

Other Applicable Ethical Standards

[11] Lawyers participating in the sale or purchase of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. Examples include (i) the seller's obligation to exercise competence in identifying a buyer qualified to assume the practice and the buyer's obligation to undertake the representation competently under Rule 1.1, (ii) the obligation of the seller and the buyer to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to under Rule 1.7, and (iii) the obligation of the seller and the buyer to protect information relating to the representation under Rule 1.6 and Rule 1.9. See also Rule 1.0(g) for the definition of "informed consent."

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale. See Rule 1.16. If a tribunal refuses to give its permission for the substitution and the seller therefore must continue in the matter, the seller does not thereby violate the portion of this Rule requiring the seller to cease practice in the described geographic area.

Applicability of the Rule

[13] [Omitted.]

[14] This Rule does not apply to: (i) admission to or retirement from a law partnership or professional association, (ii) retirement plans and similar arrangements, (iii) a sale of tangible assets of a law practice, or (iv) the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice. This Rule governs the sale of an entire law practice upon retirement, which is defined in paragraph (a) as the cessation of the private practice of law in a given geographic area. Rule 5.4(a)(2) provides for the compensation of a lawyer who undertakes to complete one or more unfinished pieces of legal business of a deceased, disabled, or missing lawyer.

REPORTERS' NOTES

Rule 1.17 authorizes and governs the sale of an entire law practice by a retiring lawyer or by the personal representative of a deceased, disabled or missing lawyer. Rule 1.17 creates a limited exception to Rule 1.6 (the general rule on confidentiality), permitting the disclosure of some confidential information in the course of the sale. Rule 1.17 also imposes a duty of

confidentiality on prospective buyers. Like DR 2-111 [22 N.Y.C.R.R. § 1200.15-a], adopted in 1996, the Rule requires that notice of the proposed sale be given in a prescribed form to the seller's clients, and their consent to the sale is presumed if no objection is raised within 90 days. Where the transfer of the client to a buyer raises a waivable conflict of interest, the necessary consent to the conflict must be obtained in writing. With two exceptions, the Rule is substantively identical to existing DR 2-111 [22 N.Y.C.R.R. § 1200.15-a].

Rule 1.17(a) modifies the definition of "retirement." Existing DR 2-111(A) [22 N.Y.C.R.R. § 1200.15-a(a)] conditions the sale of a practice by a retiring lawyer upon the cessation of practice in the county and city in which the practice to be sold has been conducted, and in any county or city contiguous thereto. The last sentence of Rule 1.17(a) narrows this mandatory geographic retirement zone to contiguous counties or cities within New York State. This change will permit a New York lawyer who is also admitted in a nearby state, and whose practice is located near a state border, to sell the entire New York practice, retire from the practice of law in New York State, and still be permitted to continue to practice in the nearby state.

Rule 1.17(e) increases protection of existing clients against fee increases when a law practice is sold. Currently, DR 2-111(E) [22 N.Y.C.R.R. § 1200.15-a(e)] provides that the buyer shall not increase the fee by reason of the sale "unless permitted by a retainer agreement with the client or otherwise specifically agreed to by the client." Rule 1.17(e) entirely prohibits such a fee increase "by reason of the sale," without exception. This change will protect clients who have engaged a lawyer under a particular fee arrangement from an unexpected and possibly unfair fee increase due to the sale of a law practice.

**RULE 1.18:
DUTIES TO PROSPECTIVE CLIENTS**

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

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

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

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

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter in accordance with the requirements of Rule 1.10; and

(ii) written notice is promptly given to the prospective client.

Comment

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

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a “prospective client” within the meaning of paragraph (a). Similarly, a person who communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter is not entitled to the protection of this Rule. A lawyer may not encourage or induce a person to

communicate with a lawyer or lawyers for that improper purpose. See Rules 3.1(b)(2), 4.4, 8.4(a).

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

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for nonrepresentation 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 or Rule 1.9, then consent from all affected current or former clients must be obtained before accepting the representation. The representation must be declined if the lawyer will be unable to provide competent, diligent and adequate representation to the affected current and former clients and the prospective client.

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

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

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened, and written notice is promptly given to the prospective client. See Rule 1.10. Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, even though it may include amounts derived from the matter in which the lawyer is disqualified.

[8] Notice under paragraph (d)(2), including a general description of the subject matter about which the lawyer was consulted and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

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

REPORTERS' NOTES

Rule 1.18 sets forth a lawyer's duties to prospective clients, especially when the prospective client and the lawyer ultimately do not form a client-lawyer relationship. The Rule has no equivalent in the existing Disciplinary Rules, and therefore fills an important gap.

Rule 1.18(a) defines a "prospective client" as a "person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter" This definition accords with common understandings of the term "prospective client."

Rule 1.18(b) covers the situation in which the prospective client and the lawyer ultimately do not form a client-lawyer relationship, either because the prospective client decides not to retain the lawyer (for example, the prospective client hires a different lawyer, or decides not to pursue the matter at all) or because the lawyer rejects the prospective client's matter. In either situation, Rule 1.18(b) applies the same duty of confidentiality to the lawyer regarding the former prospective client that Rule 1.9 applies to the lawyer regarding actual former clients. Accordingly, a person who consults with a lawyer about possible representation can depend on the same level of confidentiality regardless of whether the person hires the lawyer and regardless of whether the lawyer agrees to represent the person. This duty to former prospective clients has no direct counterpart in the Disciplinary Rules, but it is consistent with EC 4-1, which provides that "[b]oth the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed *or sought to employ* the lawyer" (emphasis supplied).

Rule 1.18(c) concerns representation materially adverse to a prospective client. The Rule generally treats prospective clients in the same manner as other former clients, but relaxes the traditional test somewhat by prohibiting a lawyer from opposing a former prospective client in a substantially related matter (or in the same matter) only if the lawyer "received information from the prospective client that could be significantly harmful to that person in the matter" The Rule is consistent with New York case law that inquires into the nature of a prospective client's discussions with a lawyer and accords slightly less protection to prospective clients who never retained a lawyer than to traditional clients who did retain the lawyer. *See, e.g., Seeley v. Seeley*, 129 A.D.2d 625, 626, 514 N.Y.S.2d 110, 111 (2d Dep't 1987) (disqualifying lawyer from opposing prospective client who had twice discussed with lawyer in detail "the facts and circumstances surrounding this action as well as other facts and sources of evidence, which directly bear on the case at bar"); *New York Univ. v. Simon*, 130 Misc. 2d 1019, 1022, 498 N.Y.S.2d 659, 662 (Civil Ct. N.Y. Co. 1985) (if court could remove party's chosen lawyer "solely upon proof that the other party had a preliminary discussion with that attorney, without evidence as to the nature of the matters disclosed," disqualification would be too easily obtainable).

Rule 1.18(c) is also an imputation rule. If a lawyer is disqualified under Rule 1.18(c), then the disqualification is generally imputed to all other lawyers associated with the firm.

Rule 1.18(d), however, articulates two exceptions to the general personal and imputed disqualification rules set out in Rule 1.18(c).

First, Rule 1.18(d)(1) permits either a lawyer or other lawyers in the lawyer's firm to oppose a former prospective client if both the "affected client" (meaning the lawyer's current client) and the prospective client have given "informed consent, confirmed in writing." This parallels the provisions governing a lawyer's representation of a client against any former client.

Second, Rule 1.18(d)(2) permits other lawyers in the firm to oppose the former prospective client if "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 two other conditions are met: "(i) the disqualified lawyer is timely screened from any participation in the matter," and "(ii) written notice is promptly given to the prospective client." The written notice provision gives the prospective client an opportunity to examine and evaluate the screening procedures, or to argue that the disqualified lawyer did not take "reasonable measures" to avoid exposure to more information than the lawyer needed to decide whether to accept the matter and thus cannot avoid imputation of the conflict even by instituting screening. These strict conditions balance the rights of prospective clients to confidentiality against the rights of other clients or potential clients to choose their own counsel and to avoid a disruptive disqualification if a prospective client has unforeseeably revealed disqualifying confidential information during preliminary discussions with a lawyer who avoided exposure to more confidential information than necessary.

RULE 2.1: ADVISOR

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

Comment

Scope of Advice

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

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

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibilities as advisor may include the responsibility to indicate that more may be involved than strictly legal considerations. For the allocation of responsibility in decision making between lawyer and client, see Rule 1.2.

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

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule

1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be advisable under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

REPORTERS' NOTES

Rule 2.1 reminds lawyers of the nature and scope of their responsibilities as advisors to their clients. The first sentence of the Rule mandates that a lawyer "exercise independent professional judgment" and "render candid advice." The second sentence provides that, in rendering advice, "a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation."

The mandate to "exercise independent professional judgment" is derived from Canon 5 of the New York Code, and the authorization to provide advice that goes beyond purely legal considerations parallels language in EC 7-8.

Rule 2.1 has no counterpart in the existing Disciplinary Rules. However, it deserves a place in the Rules to reinforce the bedrock values of candor and independent professional judgment.

**RULE 2.2:
[RESERVED]**

[The former Rule 2.2 was deleted by the ABA in 2002.]

REPORTERS' NOTES

The Rules do not contain any provision designated Rule 2.2, because the ABA deleted it from the Model Rules of Professional Conduct in 2002. However, to maintain consistency with other jurisdictions that based their rule-numbering systems on the ABA Model Rules prior to the deletion of Rule 2.2, the number is reserved.

**RULE 2.3:
EVALUATION FOR USE BY THIRD PERSONS**

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

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

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

Comment

Definition

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

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

Duties Owed to Third Person and Client

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, because such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken on behalf of the client. For example, if the lawyer is acting as advocate in defending

the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of the search may be limited by time constraints or the non-cooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If, after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted knowingly to make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1. A knowing omission of material information that must be disclosed to make material statements in the evaluation not false or misleading may violate this Rule.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a)(2). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the lawyer has consulted with the client and the client has been adequately informed concerning the conditions of the evaluation, the nature of the information to be disclosed and important possible effects on the client's interests. See Rules 1.0(g), 1.6(a).

Financial Auditors' Requests for Information

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

REPORTERS' NOTES

Rule 2.3 concerns evaluations that clients sometimes ask their lawyers to prepare for the use of third parties. New York does not currently address this topic in the Disciplinary Rules.

RULE 2.3

Rule 2.3(a) sets down a clear general rule: a lawyer may provide an evaluation of a client matter for the use of a third party if the lawyer reasonably believes that doing so “is compatible with other aspects of the lawyer’s relationship with the client.”

Rule 2.3(b), however, cautions that if “the lawyer knows or reasonably should know that the evaluation is likely to affect the client’s interests materially and adversely,” the lawyer is not permitted to provide the evaluation without the client’s “informed consent.” This paragraph protects the client-lawyer relationship against pressures from third parties on the lawyer or client.

Rule 2.3(c) protects confidential client information by stating expressly that information relating to the evaluation is protected by Rule 1.6 (the general rule governing confidentiality) unless disclosure is authorized in connection with a report of an evaluation. This paragraph makes clear that Rule 2.3 does not narrow or relax a lawyer’s duty of confidentiality and does not create any new exceptions to the duty of confidentiality.

The principal reason for addressing the subject of evaluations for third parties is to provide general guidance for lawyers in areas of law practice where evaluations for third parties are common. Rule 2.3 especially provides guidance to lawyers who are often asked to prepare opinion letters in support of contemplated transactions.

**RULE 2.4:
LAWYER SERVING AS THIRD-PARTY NEUTRAL**

(a) A lawyer serves as a “third-party neutral” when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them.

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

Comment

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

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

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

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

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

REPORTERS' NOTES

Rule 2.4 concerns the service of lawyers as third-party neutrals, such as arbitrators, mediators or other facilitators of alternative dispute resolution, and imposes certain disclosure obligations on lawyers serving as third-party neutrals.

Rule 2.4(a) defines the term "third-party neutral" as a lawyer who "assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them."

Rule 2.4(b) obligates a lawyer serving as a third-party neutral to inform unrepresented parties that the lawyer does not represent them, and requires the lawyer to explain the role of a third-party neutral when the lawyer "knows or reasonably should know that a party does not understand the lawyer's role in the matter." This provision will avoid confusion and ensure fairness in alternative dispute resolution proceedings.

Rule 2.4 has no analogue in the current Disciplinary Rules. The rationale for including a Rule governing lawyers serving as third-party neutrals is that alternative dispute resolution has become a substantial and increasingly important part of the civil justice system, and lawyers often serve as third-party neutrals. Rule 2.4 should promote the growth and fairness of alternative dispute resolution methods by providing guidance to lawyers who wish to serve as third-party neutrals.

**RULE 3.1:
MERITORIOUS CLAIMS AND CONTENTIONS**

(a) 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. A lawyer for the defendant in a criminal proceeding or for 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.

(b) A lawyer's conduct is "frivolous" for purposes of this Rule if the conduct:

(1) is completely without merit in law and fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) has no substantial purpose other than to delay or prolong the resolution of the litigation, in violation of Rule 3.2, or to harass or maliciously injure another in violation of Rule 4.4; or

(3) asserts material factual statements that are false, in violation of Rule 3.3 or Rule 4.1.

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 is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of a claim or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Lawyers are required, however, to inform themselves about the facts of their clients' cases and the applicable law, and determine that they can make good-faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the action has no substantial purpose other than to harass or maliciously injure a person, or 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 (which includes the establishment of new judge-made law).

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

REPORTERS' NOTES

Rule 3.1 prohibits frivolous conduct in litigation. It thus parallels parts of DR 7-102(A) [22 N.Y.C.R.R. § 1200.33(a)] and reinforces court rules on sanctions and the inherent power of courts to sanction frivolous conduct.

Rule 3.1(a), which is similar to DR 7-102(A) [22 N.Y.C.R.R. § 1200.33(a)], prohibits a lawyer from bringing or defending a proceeding or asserting or controverting an issue in a proceeding unless the lawyer has a basis in law and fact that is not “frivolous.” However, the Rule preserves the well-recognized right of a lawyer for a criminal defendant (or for the respondent in any proceeding that could result in incarceration) to “defend the proceeding [so] as to require that every element of the case be established.” That right, to hold the prosecuting authority to its burden of proof, is not expressly articulated in the existing Disciplinary Rules but is consistent with the fundamental tenets of our adversary system.

Rule 3.1(b) defines the term “frivolous” by borrowing heavily from the definition of “frivolous” in 22 N.Y.C.R.R. § 130-1.1(c), the main litigation sanctions provision in New York’s court rules. Rule 3.1(b)(1) expands that definition to include positions completely without merit not only in “law” but also in “fact.” The expansion complements section 130-1.1(c)(3) and Rule 3.1(b)(3), which prohibit a lawyer from asserting “material factual statements that are false”

The existing Disciplinary Rules do not define “frivolous.” The definition in Rule 3.1(b) should help lawyers to understand and abide by the limitations imposed by the Rule.

**RULE 3.2:
DELAY OF LITIGATION**

In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Such tactics are prohibited if their only substantial purpose is to frustrate an opposing party's attempt to obtain rightful redress or repose. It is not a justification that such tactics are often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay or needless expense. Seeking or realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

REPORTERS' NOTES

Rule 3.2 expresses a limitation on the duty to represent a client zealously within the bounds of the law. Specifically, it prohibits a lawyer who is representing a client from using means that have "no substantial purpose other than to delay or prolong the proceeding or to cause needless expense." The Rule resembles DR 7-102(A)(1) [22 N.Y.C.R.R. § 1200.33(a)(1)], which prohibits a lawyer from taking any action that would serve "merely to harass or maliciously injure another." Accordingly, Rule 3.2 prohibits parties from imposing delay and expense on their adversaries, the courts, and the public without a legitimate purpose.

**RULE 3.3:
CANDOR TOWARD THE TRIBUNAL**

(a) A lawyer shall not knowingly:

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

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

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

(b) A lawyer who represents a client in an adjudicative proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, if the lawyer knows that the client or any other person intends to engage, is engaging or has engaged in: (i) bribing, intimidating or unlawfully communicating with a witness, juror, court official or other participant in the proceeding, (ii) unlawfully destroying or concealing documents related to the proceeding, (iii) failing to disclose information to the tribunal when required by law to do so, or (iv) other criminal or fraudulent conduct related to the proceeding.

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

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

Comment

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

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however,

is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law and may not 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 by evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein because litigation documents ordinarily present assertions by the client or by someone on the client's behalf and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be based on the lawyer's own knowledge, as in an affidavit or declaration by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. See also Rule 8.4(b), Comments [2]-[3].

Legal Argument

[4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Paragraph (a)(2) requires an advocate to disclose directly adverse and controlling legal authority that is known to the lawyer and that has not been disclosed by the opposing party. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it.

Offering or Using False Evidence

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

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

[6A] The prohibition against offering and using false evidence ordinarily requires a prosecutor to correct any false evidence that has been offered by the government, inform the tribunal when the prosecutor reasonably believes that a prosecution witness has testified falsely,

and correct any material errors in a presentence report that are detrimental to a defendant. See Rules 3.8(g) and (h) regarding special duties of prosecutors.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If the criminal defendant insists on testifying and the lawyer knows that the testimony will be false, the lawyer may offer the testimony in a narrative form. The lawyer's ethical duty may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in criminal cases. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

[8] The prohibition against offering or using false evidence applies only 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(h) for the definition of "knowledge." Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering or using evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes to be false. Offering such proof may impair the integrity of an adjudicatory proceeding. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of a criminal defense client where the lawyer reasonably believes, but does not know, that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the criminal defendant's decision to testify.

Remedial Measures

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

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is for the lawyer to cooperate in deceiving the court,

thereby subverting the truth-finding process, which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. The client could therefore in effect coerce the lawyer into being a party to a fraud on the court.

Preserving Integrity of the Adjudicative Process

[12] Lawyers have a special obligation as officers of the court to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process. Accordingly, paragraph (b) requires a lawyer who represents a client in an adjudicative proceeding to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding. Such conduct includes, among other things, 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 related to the proceeding; and failing to disclose information to the tribunal when required by law to do so. For example, under some circumstances a person's omission of a material fact may constitute a crime or fraud on the tribunal.

[12A] A lawyer's duty to take reasonable remedial measures under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered or used the evidence in question. A lawyer's duty to take reasonable remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

Duration of Obligation

[13] Paragraph (c) establishes a practical time limit on the mandatory obligation to rectify false evidence or false statements of law and fact. The conclusion of the proceeding is a reasonably definite point for the termination of the mandatory 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, if any, has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the opposing position is expected to be presented by the adverse party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

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

REPORTERS' NOTES

Rule 3.3 requires a lawyer to be candid when representing a client before a tribunal. It addresses issues currently addressed in DR 7-102 [22 N.Y.C.R.R. § 1200.33] and DR 7-106 [22 N.Y.C.R.R. § 1200.37].

Rule 3.3(a)

Rule 3.3(a) contains three subparagraphs that prohibit a lawyer from "knowingly" doing any of the following:

(1) Making a false statement of fact or law to a tribunal or failing to correct a false statement of material fact or law previously made to the tribunal by the lawyer. DR 7-102(A)(5) [22 N.Y.C.R.R. § 1200.33(a)(5)] provides that a lawyer, in the representation of a client, shall not knowingly "[m]ake a false statement of law or fact," but no existing Disciplinary Rule requires a lawyer to correct a false statement that the lawyer previously made to the tribunal. Rule 3.3(a)(1) fills that gap, ensuring that a tribunal will not rely on false information.

(2) Failing to disclose directly adverse controlling authority not disclosed by opposing counsel. This provision in Rule 3.3(a)(2) is substantially identical to DR 7-106(B)(1) [22 N.Y.C.R.R. § 1200.37(b)(1)].

(3) Offering or using evidence that the lawyer knows to be false. This provision in Rule 3.3(a)(3) is similar to DR 7-102(A)(4) [22 N.Y.C.R.R. § 1200.33(a)(4)], which prohibits a lawyer from knowingly using "perjured testimony or false evidence." Because perjured testimony is always false, the Rule omits the separate reference to "perjured" testimony.

Rule 3.3(a)(3) further provides that 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." The mandate to disclose false testimony by a witness other than the client is consistent with DR 7-102(B)(2) [22 N.Y.C.R.R. § 1200.33(b)(2)], which provides that a lawyer who

receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal “shall reveal the fraud to the tribunal.”

The mandate to disclose false testimony by a client arguably goes beyond DR 7-102(B)(1) [22 N.Y.C.R.R. § 1200.33(b)(1)], which excuses a lawyer from revealing a client’s fraud on the tribunal if the information “is protected as a confidence or secret,” but the Rule is consistent with the letter and spirit of recent decisions of the New York Court of Appeals, including *People v. Andrades*, 4 N.Y.3d 355, 361 (2005) (referring to “counsel’s obligation to reveal fraud perpetrated by a client upon the court”), *People v. Berroa*, 99 N.Y.2d 134, 142 (2002) (noting that “counsel has a duty to disclose witness perjury to the Court”), and *People v. DePallo*, 96 N.Y.2d 437, 441 (2001) (holding that counsel complied with DR 7-102(B)(1) [22 N.Y.C.R.R. § 1200.33(b)(1)] by advising the court after his client testified that his client had testified falsely). In any event, a client who intends to lie has no expectation of confidentiality because, under Rule 1.6(b)(2) – as under DR 4-101(C)(3) [22 N.Y.C.R.R. § 1200.19(c)(3)] – a lawyer may reveal confidential information “to prevent the client from committing a crime,” and a client who has lied should have no right to greater protection. Even a criminal defendant has no constitutional right to testify falsely. See *Nix v. Whiteside*, 475 U.S. 157, 163 (1986) (“a criminal defendant’s privilege to testify in his own behalf does not include a right to commit perjury”). By making clear that a lawyer’s duty of candor to the court supersedes a lawyer’s duty of confidentiality to a client, Rule 3.3(a)(3) provides clear guidance to lawyers, protects the integrity of our system of justice, and gives lawyers greater ability to persuade clients not to commit perjury in the first place.

Rule 3.3(b)

Rule 3.3(b) requires a lawyer who represents a client in an adjudicative proceeding to take “reasonable remedial measures, including, if necessary, disclosure to the tribunal,” if the lawyer knows that any person – including a client – intends to engage, is engaging or has engaged in four categories of wrongdoing: (i) bribing, intimidating or unlawfully communicating with a witness, juror, court official or other participant in the proceeding, (ii) unlawfully destroying or concealing documents related to the proceeding, (iii) failing to disclose information to the tribunal when required by law to do so, or (iv) other criminal or fraudulent conduct related to the proceeding. This Rule goes substantially further than DR 7-102(B)(2) [22 N.Y.C.R.R. § 1200.33(b)(2)], which applies only when a person other than the client has “perpetrated a fraud upon a tribunal.” The broad duty to disclose serious wrongful conduct related to a proceeding should deter corruption in our system of justice or help courts to detect it when it does occur.

Rule 3.3(c)

Rule 3.3(c) provides that the mandatory disclosure duties imposed by paragraphs (a) and (b) “continue to the conclusion of the proceeding and apply even if compliance requires disclosure” of confidential information. This provision gives lawyers greater power to correct fraud on a tribunal than do two current rules: (i) DR 4-101 [22 N.Y.C.R.R. § 1200.19], which authorizes (but does not require) disclosure of a client’s intended future crime but not a client’s past crime, and (ii) DR 7-102(B) [22 N.Y.C.R.R. § 1200.33(b)], which requires a lawyer to disclose past fraud on the tribunal by a person “other than a client” but appears to exempt a

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lawyer from disclosing past fraud by a client if the information is protected as a confidence or secret. Rule 3.3(c) clears up any ambiguity with respect to clients, making it clear that a lawyer must disclose a client's criminal or fraudulent wrongdoing in connection with an adjudicative proceeding.

Rule 3.3(d)

Rule 3.3(d), which has no equivalent in the current Disciplinary Rules, provides that a lawyer in an ex parte proceeding must inform the tribunal of "all material facts known to the lawyer" – regardless of whether the facts are adverse – that will enable the tribunal to make an informed decision. This Rule will ensure fairness in temporary restraining order and other ex parte proceedings.

RULE 3.4:
FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

- (a) (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;
- (2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;
- (3) unlawfully obstruct another party's access to evidence that the lawyer reasonably believes to have potential evidentiary value; or
- (4) unlawfully alter, destroy or conceal a document or other material that the lawyer reasonably believes to have potential evidentiary value;
- (b) falsify evidence, create or use evidence the lawyer knows to be false, or counsel or assist a witness to testify falsely;
- (c) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. But a lawyer may advance, guarantee or acquiesce in the payment of:
 - (1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or
 - (2) a reasonable fee for the professional services of an expert witness and reasonable related expenses;
- (d) knowingly disobey an obligation under the rules or a ruling of a tribunal, except for an open refusal based on a good-faith assertion that no valid obligation exists;
- (e) in appearing before a tribunal on behalf of a client,
 - (1) allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;
 - (2) assert personal knowledge of facts in issue except when testifying as a witness; or
 - (3) 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;

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party, unless:

(1) the person is a relative or an employee, former employee or other agent of a client, or is contractually obligated or otherwise owes a legal duty to the client to refrain from disclosing certain information; and

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

(g) present, participate in presenting, or threaten to present criminal charges to obtain an advantage in a civil matter when doing so is prohibited by law.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructionist tactics in discovery procedure, and the like. The Rule applies to any conduct that falls within its general terms (for example, "obstruct another party's access to evidence") that is a crime, an intentional tort or prohibited by rules or a ruling of a tribunal. An example is "advis[ing] or caus[ing] a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein."

[2] Documents and other evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Paragraph (a) protects that right. Evidence that has been properly requested must be produced unless there is a good-faith basis for not doing so. Applicable state and federal law may make it an offense to destroy material for the purpose of impairing its availability in a pending or reasonably foreseeable proceeding, even though no specific request to reveal or produce evidence has been made. Paragraph (a) applies to evidentiary material generally, including computerized information.

[2A] Falsifying evidence, dealt with in paragraph (b), is also generally a criminal offense. Of additional relevance is Rule 3.3(a)(3), dealing with use of false evidence in a proceeding before a tribunal. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] Paragraph (c) applies generally to any inducement to a witness that is prohibited by law. It is not improper to pay a witness's reasonable expenses or to compensate an expert witness on terms permitted by law. However, any fee contingent upon the content of a witness' testimony or the outcome of the case is prohibited.

[3A] Paragraph (e) deals with improper statements relating to the merits of a case when representing a client before a tribunal: alluding to irrelevant matters, asserting personal knowledge of facts in issue, and asserting a personal opinion on issues to be decided by the trier of fact. See also Rule 4.4, prohibiting the use of any means that have no substantial purpose other than to embarrass or harm a third person. However, a lawyer may argue, upon analysis of the evidence, for any position or conclusion supported by the record. The term “admissible evidence” refers to evidence considered admissible in the particular context. For example, admission of evidence in an administrative adjudication or an arbitration proceeding may be governed by different standards than those applied in a jury trial.

[4] In general, a lawyer is prohibited from giving legal advice to an unrepresented person, other than the advice to secure counsel, when the interests of that person are or may have a reasonable possibility of being in conflict with the interests of the lawyer’s client. See Rule 4.3. Paragraph (f) permits a lawyer to advise relatives, or employees, former employees and agents of a client, and those who are contractually obligated or otherwise owe a legal duty to the client to refrain from disclosing certain information, to refrain from giving information to another party if the lawyer reasonably believes that the person’s interest will not be adversely affected by the lawyer’s advice. See also Rule 4.2.

[5] The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), the lawyer’s threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done. But extortion is committed if the threat involves conduct of the third person unrelated to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute). Paragraph (g) provides for discipline only when the negotiation tactic is prohibited by other law.

REPORTERS’ NOTES

Rule 3.4 contains provisions designed to ensure fairness to opposing parties and their counsel. It addresses issues currently covered in DR 7-102 [22 N.Y.C.R.R. § 1200.33], DR 7-105 [22 N.Y.C.R.R. § 1200.36], DR 7-106 [22 N.Y.C.R.R. § 1200.37] and DR 7-109 [22 N.Y.C.R.R. § 1200.40].

Rules 3.4(a)(1) and (2) are substantially identical to DR 7-109(A) and (B) [22 N.Y.C.R.R. § 1200.40(a) and (b)]. Rules 3.4(a)(3) and (4) provide that a lawyer shall not “unlawfully obstruct another party’s access to evidence that the lawyer reasonably believes to have potential evidentiary value” or “unlawfully alter, destroy or conceal a document or other material that the lawyer reasonably believes to have potential evidentiary value.” These subparagraphs are generally similar to DR 7-102(A)(3) [22 N.Y.C.R.R. § 1200.33(a)(3)], which provides that a lawyer shall not “[c]onceal or knowingly fail to disclose that which the lawyer is required by law to reveal.” The qualifying term “unlawfully” in both Rules 3.4(a)(3) and (4) makes clear that the Rules go no further than existing law. They thus reflect existing prohibitions on spoliation of evidence but do not create any new prohibitions.

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Rule 3.4(b) provides that a lawyer shall not “falsify evidence, create or use evidence the lawyer knows to be false ...” These prohibitions generally carry forward the prohibition in DR 7-102(A)(6) [22 N.Y.C.R.R. § 1200.33(a)(6)], which provides that a lawyer shall not “[p]articipate in the creation ... of evidence when the lawyer knows or it is obvious that the evidence is false.” Rule 3.4(b) also provides that a lawyer shall not “counsel or assist a witness to testify falsely.” This prohibition is a more specific version of DR 7-102(A)(7) [22 N.Y.C.R.R. § 1200.33(a)(7)], which provides that a lawyer shall not “[c]ounsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent.”

Rule 3.4(c) provides that a lawyer shall not “offer an inducement to a witness that is prohibited by law,” language not found in the existing Disciplinary Rules. But Rule 3.4(c) also provides that a lawyer shall not “pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness’s testimony or the outcome of the case,” and articulates two exceptions (reasonable compensation and related expenses for loss of time on the part of a witness and for the services of an expert witness). That general principle and the two exceptions are based directly on DR 7-109(C) [22 N.Y.C.R.R. § 1200.40(c)].

Rule 3.4(d) is substantially similar to DR 7-106(A) [22 N.Y.C.R.R. § 1200.37(a)].

Rule 3.4(e) is substantially similar to prohibitions in DR 7-106(C)(1), (3) and (4) [22 N.Y.C.R.R. § 1200.37(c)(1), (3) and (4)].

Rule 3.4(f) provides that a lawyer shall not “request a person other than a client to refrain from voluntarily giving relevant information to another party” unless two conditions are met: (i) the person is a relative or an “employee, former employee or other agent of a client,” or is “contractually obligated or otherwise owes a legal duty to the client to refrain from disclosing certain information,” and (ii) “the lawyer reasonably believes that the person’s interest will not be adversely affected by refraining from giving such information.” Rule 3.4(f) has no equivalent in the existing Disciplinary Rules but deserves a place in the mandatory rules because it provides clear guidance on a question that lawyers for entities face on a daily basis. The Rule strikes an appropriate balance between the justice system’s search for the truth through the presentation of evidence and an organization’s right to control the disclosure of trade secrets or other proprietary information to the organization’s adversaries. The Rule permits a lawyer to make only a “request” – it does not permit a lawyer to demand that a relative or an employer’s agent withhold information – and even the request may be made only if it is consistent with the person’s interests.

Rule 3.4(g) provides that a lawyer shall not “present, participate in presenting, or threaten to present criminal charges to obtain an advantage in a civil matter when doing so is prohibited by law.” The Rule is based on DR 7-105 [22 N.Y.C.R.R. § 1200.36] but substitutes the phrase “when doing so is prohibited by law” for the word “solely.” The Rule thus replaces a subjective inquiry into “sole” motives with an objective inquiry into whether the conduct is “prohibited by law,” a change that should provide lawyers and courts with clearer guidance.

**RULE 3.5:
IMPARTIALITY OF JUDGES AND JURORS**

A lawyer shall not:

(a) seek to influence a judge, official or employee of a tribunal by means prohibited by law or give or lend anything of value to such a person when the recipient is prohibited from accepting the gift or loan;

(b) during an adversary proceeding, communicate as to the merits of the cause with the judicial officer or an employee who assists that judicial officer in such proceeding, or if no judicial officer is assigned to such a proceeding, to any judicial officer or employee who might assist the judicial officer who is assigned to the case, except:

(1) in the course of official proceedings in the cause;

(2) in writing, if the lawyer promptly delivers a copy of the writing to counsel for other parties and to a party who is not represented by a lawyer;

(3) orally, upon adequate notice to counsel for the other parties and to any party who is not represented by a lawyer; or

(4) as otherwise authorized by law or court order;

(c) seek to influence a juror or prospective juror by means prohibited by law;

(d) communicate ex parte with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order;

(e) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment;

(f) conduct a vexatious or harassing investigation of either a member of the venire or a juror or, by financial support or otherwise, cause another to do so; or

(g) engage in conduct intended to disrupt a tribunal.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. In addition, gifts and loans to judges and judicial employees, as well as contributions to candidates for judicial election, are regulated by the New York Code of Judicial Conduct, with

which an advocate should be familiar. *See* New York Code of Judicial Conduct, Canon 4(D)(5), 22 N.Y.C.R.R. § 100.4(D)(5) (prohibition of a judge’s receipt of a gift, loan, etc., and its exceptions) and Canon 5(A)(5), 22 N.Y.C.R.R. § 100.5(A)(5) (concerning lawyer contributions to the campaign committee of a candidate for judicial office). A lawyer is prohibited from aiding a violation of such provisions. Limitations on contributions in the Election Law may also be relevant.

[2] Unless authorized to do so by law or court order, a lawyer is prohibited from communicating *ex parte* with persons serving in a judicial capacity in an adjudicative proceeding, such as judges, masters or jurors, or to employees who assist them, such as law clerks. *See* New York Code of Judicial Conduct, Canon 3(B)(6), 22 N.Y.C.R.R. § 100.3(B)(6).

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. Paragraph (e) permits a lawyer to do so unless the communication is prohibited by law or a court order, but the lawyer must respect the desire of a juror not to talk with the lawyer. The lawyer 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 misbehavior is no justification for similar 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 under paragraph (f) to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. *See* Rule 1.0(u) for the definition of “tribunal.”

REPORTERS’ NOTES

Rule 3.5 prohibits lawyers from engaging various types of conduct that are highly prejudicial to the administration of justice. The Rule is especially concerned with improper influence over judges and improper interference with past, current, or prospective jurors. It relates to matters currently covered to some degree in DR 7-106 [22 N.Y.C.R.R. § 1200.37], DR 7-108 [22 N.Y.C.R.R. § 1200.39], DR 7-110 [22 N.Y.C.R.R. § 1200.41] and DR 9-101 [22 N.Y.C.R.R. § 1200.45].

Rule 3.5(a) provides that a lawyer shall not “seek to influence a judge, official or employee of a tribunal by means prohibited by law,” which has no direct counterpart in the existing Disciplinary Rules but is related to DR 9-101(C) [22 N.Y.C.R.R. § 1200.45(c)] (prohibiting a lawyer from stating or implying that the lawyer can improperly influence a “tribunal, legislative body, or public official”). Rule 3.5(a) also provides that a lawyer shall not “give or lend anything of value to such a person when the recipient is prohibited from accepting the gift or loan,” a prohibition based directly on DR 7-110(A) [22 N.Y.C.R.R. § 1200.41(a)].

Rule 3.5(b), governing *ex parte* communications, expands the prohibitions in DR 7-110(B) [22 N.Y.C.R.R. § 1200.41(b)] by prohibiting communications not only with a judicial

officer but also with “an employee who assists that judicial officer” in the proceeding in question.

Rule 3.5(c) provides that a lawyer shall not “seek to influence a juror or prospective juror by means prohibited by law.” This prohibition has no direct counterpart in the Disciplinary Rules but reflects the principles in DR 7-108 [22 N.Y.C.R.R. § 1200.39], which is designed to guard against improper interference with jurors.

Rule 3.5(d) is substantially similar to DR 7-108(A)-(C) [22 N.Y.C.R.R. § 1200.39(a)-(c)] but is more concise.

Rule 3.5(e) provides that a lawyer shall not “communicate with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress or harassment.” These prohibitions are consistent with the principles underlying DR 7-108 [22 N.Y.C.R.R. § 1200.39] but are broader and more specific, thus providing clearer guidance to lawyers and courts.

Rule 3.5(f) is substantially identical to DR 7-108(E) [22 N.Y.C.R.R. § 1200.39(e)].

Rule 3.5(g) prohibits a lawyer from engaging in “conduct intended to disrupt a tribunal.” The Rule is similar to DR 7-106(C)(6) [22 N.Y.C.R.R. § 1200.37(c)(6)], which prohibits a lawyer from engaging in “undignified or discourteous conduct which is degrading to a tribunal,” but the Rule is more pointed and eliminates the need to establish that conduct was “degrading” to the court, a change that should aid in enforcement.

**RULE 3.6:
TRIAL PUBLICITY**

(a) A lawyer who is participating in 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.

(b) Notwithstanding paragraph (a), a lawyer may state the following without elaboration:

(1) the claim, offense or defense and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case:

(i) the identity, age, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the identity of investigating and arresting officers or agencies and the length of the investigation; and

(iv) if the statement complies with paragraph (a), the fact, time and place of arrest, resistance, pursuit and use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission or statement.

(c) A statement ordinarily is likely to prejudice materially an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration, and the statement relates 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 incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless 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.

(d) 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.

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

Comment

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

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer making statements that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. It recognizes that the public value of informed commentary is great and that the likelihood of prejudice to a proceeding because of the commentary of a lawyer who is not involved in the proceeding is small. Thus, the Rule applies only to lawyers who are participating or have participated in the investigation or litigation of a matter and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice. Nevertheless, some statements in criminal cases are also required to meet the fundamental requirements of paragraph (a), for example, those identified in paragraph (b)(7)(iv). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement; statements on other matters may be permissible under paragraph (a).

[5] There are 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. Paragraph (c) specifies certain statements that ordinarily will have prejudicial effect.

[6] 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 hearings 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.

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

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

REPORTERS' NOTES

Rule 3.6 safeguards the civil and criminal adjudicative processes against prejudicial extrajudicial statements by lawyers but creates safe harbors and a narrow exception. It covers matters now governed by DR 7-107 [22 N.Y.C.R.R. § 1200.38].

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Rule 3.6(a) is substantially similar to the first sentence of DR 7-107(A) [22 N.Y.C.R.R. § 1200.38(a)] but replaces the phrase “reasonable person would expect to be disseminated” in DR 7-107(A) [22 N.Y.C.R.R. § 1200.38(a)] with the phrase “the lawyer knows or reasonably should know will be disseminated,” putting the focus on a reasonable lawyer rather than a reasonable person.

Rule 3.6(b) creates safe harbors for extrajudicial statements by permitting a lawyer to state certain categories of information “without elaboration,” despite Rule 3.6(a). The categories of information are substantially similar to the categories set out in DR 7-107(C) [22 N.Y.C.R.R. § 1200.38(c)].

Rule 3.6(c) is substantially identical to DR 7-107(B) [22 N.Y.C.R.R. § 1200.38(b)].

Rule 3.6(d) is substantially the same as the last two sentences of DR 7-107(A) [22 N.Y.C.R.R. § 1200.38(a)].

Rule 3.6(e) provides that no lawyer “associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).” This extension of the prohibitions of Rule 3.6(a) to associated lawyers is substantially similar to language in the first sentence of DR 7-107(A) [22 N.Y.C.R.R. § 1200.38(a)].

**RULE 3.7:
LAWYER AS WITNESS**

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

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case;
- (3) disqualification of the lawyer would work substantial hardship on the client;
- (4) the testimony will relate to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
- (5) the testimony is authorized by the tribunal with good cause.

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

Comment

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

Advocate-Witness Rule

[2] The tribunal may properly object when the trier of fact may be confused or misled by a lawyer's serving as both advocate and witness. The opposing party may properly object 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. The requirement that the testimony of the advocate-witness be on a significant issue of fact provides a materiality limitation.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1), (a)(2) and (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Testimony relating solely to a formality is uncontested when the lawyer reasonably believes that no substantial evidence will be offered in opposition to the testimony. 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 lawyer to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in

issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

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

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the non-testifying lawyer to act as advocate except in situations involving a conflict of interest. The testifying lawyer may continue to represent the client, with the client's informed consent, in pretrial activities such as legal research, fact gathering, preparation or argument of motions and briefs on issues of law, and may be consulted during the trial by the lawyer serving as advocate.

Conflict of Interest

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

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

informed consent under the conditions stated in Rule 1.7 or Rule 1.9. See Rule 1.0(g) for the definition of “informed consent.”

REPORTERS’ NOTES

Rule 3.7 governs lawyers who wish to act (or are acting) as both advocate and witness in the same proceeding. The rule generally covers the same ground as DR 5-102 [22 N.Y.C.R.R. § 1200.21] but greatly simplifies the language and structure.

Rule 3.7(a) prohibits a lawyer from acting as “advocate at a trial” in which the lawyer is likely to be a “necessary” witness on a “significant issue of fact” unless various exceptions apply. Four of these exceptions are substantially similar to exceptions found in DR 5-102(A) [22 N.Y.C.R.R. § 1200.21(a)] (except that the Rule deletes the word “solely” in three places and deletes the qualifying phrase “because of the distinctive value of the lawyer as counsel in the particular case” from the factor regarding “substantial hardship”). The Rule also adds an exception for testimony “authorized by the tribunal with good cause,” which reflects a court’s inherent power to supervise a trial.

Rule 3.7(b) provides that 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.” This imputation provision differs in method from DR 5-102(A) and (D) [22 N.Y.C.R.R. § 1200.21(a) and (d)], which disqualifies an entire firm if the testimony of a lawyer in the firm is or may be “prejudicial to the client.” The Rule instead measures the disqualification of other lawyers in the firm by the standards of the rules governing conflicts with existing or former clients. This makes Rule 3.7(b) consistent with other conflict situations covered by the Rules, but the result will often be the same as under DR 5-102(B) or (D) [22 N.Y.C.R.R. § 1200.21(b) and (d)].

**RULE 3.8:
SPECIAL RESPONSIBILITIES OF PROSECUTORS**

- (a) A prosecutor shall not:
- (1) institute or maintain a charge when the prosecutor knows or it is obvious that the charge is not supported by probable cause; or
 - (2) prosecute a charge at trial when the prosecutor knows or it is obvious that the charge cannot be supported by evidence sufficient to establish a prima facie showing of guilt.
- (b) A prosecutor shall not seek to prevent a person under investigation or the accused from exercising the right to counsel.
- (c) A prosecutor shall not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.
- (d) A prosecutor shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused, mitigate the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of the tribunal.
- (e) A prosecutor shall not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
- (1) the information sought is not protected from disclosure by any applicable privilege or the work-product doctrine;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information.
- (f) Except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, a prosecutor shall:
- (1) refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused; and
 - (2) make reasonable efforts to prevent persons under the supervisory authority of the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor comes to know of new and material evidence creating a reasonable likelihood that a convicted defendant did not commit the offense for which the defendant was convicted, the prosecutor shall:

(1) disclose that evidence to the convicted defendant and any appropriate court or authority; and

(2) undertake such further inquiry or investigation as may be necessary to determine whether the conviction was wrongful.

(h) When a prosecutor comes to know of clear and convincing evidence establishing that a conviction was wrongful, the prosecutor shall take appropriate steps to remedy the wrongful 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 and that guilt is decided upon the basis of sufficient evidence. Applicable state or federal law may require other measures by the prosecutor, and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4. A government lawyer in a criminal case is considered a “prosecutor” for purposes of this Rule.

[1A] Paragraph (b) is not intended to expand upon the obligations imposed on prosecutors by applicable law. It also does not prohibit a prosecutor from advising an accused or a person under investigation concerning the constitutional right to counsel.

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

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

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

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor’s extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and

should, avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium against the accused. A prosecutor in a criminal case shall make reasonable efforts to prevent persons under the prosecutor's supervisory authority, which may include investigators, law enforcement personnel, employees and other persons assisting or associated with the prosecutor, from making extrajudicial statements that the prosecutor would be prohibited from making under Rule 3.6 or this Rule. See Rule 5.3. Nothing in this Comment is intended to restrict the statements that a prosecutor may make that comply with Rule 3.6(b) or Rule 3.6(d).

[6] Like other lawyers, prosecutors are subject to Rule 5.1 and Rule 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 reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[6A] Reference to a "prosecutor" in this Rule includes the office of the prosecutor and all lawyers affiliated with the prosecutor's office who are responsible for the prosecution function. Like other lawyers, prosecutors are subject to Rule 3.3, which requires a lawyer to take reasonable remedial measures to correct material evidence that the lawyer has offered when the lawyer comes to know of its falsity. See Rule 3.3, Comment [6A].

[6B] The prosecutor's duty to seek justice has traditionally been understood not only to require the prosecutor to take precautions to avoid convicting innocent individuals, but also to require the prosecutor to take reasonable remedial measures when it appears likely that an innocent person was wrongly convicted. Paragraphs (g) and (h) express this traditional understanding. Accordingly, when a prosecutor comes to know of new and material evidence creating a reasonable likelihood that a person was wrongly convicted, paragraph (g) requires the prosecutor to examine the evidence and undertake such further inquiry or investigation as may be necessary to determine whether the conviction was wrongful. The scope of the inquiry will depend on the circumstances. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant. The nature of the inquiry or investigation must be such as to provide a "reasonable belief," as defined in Rule 1.0(n), that the conviction should or should not be set aside.

[6C] Additionally, paragraph (g) requires the prosecutor to disclose the new evidence to the defendant so that defense counsel may conduct any necessary investigation and make any appropriate motions directed at setting aside the verdict, and requires the prosecutor to disclose the new evidence to the court or other appropriate authority so that the court can determine whether to initiate its own inquiry. The evidence should be disclosed in a timely manner, depending on the particular circumstances. For example, disclosure of the evidence may be deferred where it could prejudice the prosecutor's investigation into the matter. If the convicted defendant is unrepresented and cannot afford to retain counsel, the prosecutor should request that the court appoint counsel for purposes of these post-conviction proceedings. The post-

conviction disclosure duty applies to new and material evidence of innocence, regardless of whether it could previously have been discovered by the defense.

[6D] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the injustice by taking appropriate steps to remedy the wrongful conviction. These steps may include, depending on the particular circumstances, disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor believes that the defendant was wrongfully convicted.

[6E] The duties in paragraphs (g) and (h) apply whether the new evidence comes to the attention of the prosecutor who obtained the defendant's conviction or to a different prosecutor. If the evidence comes to the attention of a prosecutor in a different prosecutor's office, the prosecutor should notify the office of the prosecutor who obtained the conviction.

REPORTERS' NOTES

Rule 3.8 addresses the ethical responsibilities of prosecutors. The Rule was developed in extensive consultation with state and federal prosecutors, criminal defense lawyers, and other interested parties from across New York State. It elaborates on matters now addressed in DR 7-103 [22 N.Y.C.R.R. § 1200.34].

Rule 3.8(a)(1) is substantially similar to DR 7-103(A) [22 N.Y.C.R.R. § 1200.34(a)] regarding a prosecutor's right to "institute" a charge, but expands the rule by applying the same standards to a prosecutor's right to "maintain" a charge that has already been instituted. Rule 3.8(a)(2), which has no counterpart in the existing Disciplinary Rules, provides that a prosecutor shall not "prosecute a charge at trial when the prosecutor knows or it is obvious that the charge cannot be supported by evidence sufficient to establish a prima facie showing of guilt." This Rule should ensure that a prosecutor does not take a case to trial when the prosecutor does not have sufficient evidence to survive a defense motion for a directed verdict.

Rule 3.8(b), which has no equivalent in the existing Disciplinary Rules, provides that a prosecutor "shall not seek to prevent a person under investigation or the accused from exercising the right to counsel." This Rule is designed to protect the constitutional right to counsel from improper interference. The Rule is believed to be consistent with the policies and practices of most prosecutors in New York State.

Rule 3.8(c), which has no equivalent in the existing Disciplinary Rules, provides that a prosecutor shall not "seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing." This Rule is also designed to protect important constitutional rights and is believed to be consistent with the policies and practices of most prosecutors in New York State.

Rule 3.8(d) is substantially similar to DR 7-103(B) [22 N.Y.C.R.R. § 1200.34(b)] but recognizes that a court has broad power to relieve a prosecutor of the Rule's disclosure obligations.

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Rule 3.8(e), which has no equivalent in the existing Disciplinary Rules, prohibits a prosecutor from serving a subpoena on a lawyer in a grand jury or other criminal proceeding to testify about a present or former client of the lawyer unless the information sought (i) is not privileged or protected by the work-product doctrine, (ii) is essential to an ongoing investigation or prosecution, and (iii) cannot feasibly be obtained in any other way. The Rule protects vital confidentiality interests for all clients by assuring them that their lawyer will not be subpoenaed to testify about them except in very narrow circumstances.

Rule 3.8(f) restricts a prosecutor's right to make extrajudicial statements that have a "substantial likelihood of heightening public condemnation of the accused," and requires a prosecutor to make "reasonable efforts" to prevent persons under the prosecutor's supervisory authority from making "extrajudicial statements that the prosecutor would be prohibited from making under Rule 3.6 or this Rule." The Rule essentially applies the concepts of DR 7-107(A) and DR 1-104(C) [22 N.Y.C.R.R. § 1200.5(c)] to prosecutors, but creates an exception permitting prosecutors to make "statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose."

Rule 3.8(g), which has no counterpart in the existing Disciplinary Rules, provides that when a prosecutor learns about "new and material evidence creating a reasonable likelihood that a convicted defendant did not commit the offense for which the defendant was convicted," the prosecutor shall (i) disclose the evidence to the defendant and an appropriate court or authority, and (ii) undertake further investigation "to determine whether the conviction was wrongful." This Rule will not only help to protect the rights of criminal defendants who may have been wrongfully convicted, but will protect the public by alerting authorities that the actual perpetrator of a crime may still be at large and may never have been charged with the crime. The Rule should also increase public confidence in the fairness of our criminal justice system. Based on consultations with prosecutors from throughout New York State, the Rule is believed to be consistent with prevailing policies and practices.

Rule 3.8(h), which has no equivalent in the existing Disciplinary Rules, provides that when a prosecutor "comes to know of clear and convincing evidence establishing that a conviction was wrongful, the prosecutor shall take appropriate steps to remedy the wrongful conviction." This Rule is a companion to Rule 3.8(g) and is supported by the same policy considerations.

**RULE 3.9:
ADVOCATE IN NONADJUDICATIVE PROCEEDINGS**

A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending nonadjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public. Representation in such matters is governed by Rules 4.1 through 4.4, and Rule 8.4.

Comment

[1] In representation before bodies such as legislatures, municipal councils and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument regarding the matters under consideration. The legislative body or administrative agency is entitled to know that the lawyer is appearing in a representative capacity. Ordinarily the client will consent to being identified, but if not, such as when the lawyer is appearing on behalf of an undisclosed principal, the governmental body at least knows that the lawyer is acting in a representative capacity as opposed to advancing the lawyer's personal opinion as a citizen. Representation in such matters is governed by Rules 4.1 through 4.4, and Rule 8.4.

[1A] Rule 3.9 does not apply to adjudicative proceedings before a tribunal. Court rules and other law require a lawyer, in making an appearance before a tribunal in a representative capacity, to identify the client or clients and provide other information required for communication with the tribunal or other parties.

[2] [Omitted.]

[3] [Omitted.]

REPORTERS' NOTES

Rule 3.9 governs the conduct of a lawyer who appears before a legislative body or administrative agency in a nonadjudicative matter or proceeding on behalf of a client. The New York Code does not currently address this topic.

Rule 3.9 provides that a lawyer who communicates with a legislative body or administrative agency "in a representative capacity" in connection with a "pending nonadjudicative matter" shall "disclose that the appearance is in a representative capacity," unless the lawyer is seeking from an agency "information from an agency that is available to the public." The Rule has no counterpart in the existing Disciplinary Rules. The closest analogue in the New York Code is EC 8-4, the first sentence of which provides: "Whenever a lawyer seeks legislative or administrative changes, the lawyer should identify the capacity in which he or she appears, whether on behalf of the lawyer, a client, or the public."

The purpose of Rule 3.9 is to alert legislators and administrative agencies when a lawyer is speaking not as an objective public citizen but rather as a paid advocate. However, the

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exception for a lawyer seeking public information from an agency means that the Rule will not impose disclosure obligations on lawyers seeking information available to the public at large.

Rule 3.9 also makes clear that a lawyer appearing in a representative capacity before a legislative body or administrative agency is governed by Rules 4.1 through 4.4, which generally prohibit false statements and other misconduct toward third parties, and by Rule 8.4, the general provision setting forth the varieties of professional misconduct.

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

In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.

Comment

Misrepresentation

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

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category; 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.

Illegal or Fraudulent Conduct by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client as to conduct that the lawyer knows is illegal or fraudulent. Ordinarily, a lawyer can avoid assisting a client's illegality or fraud by withdrawing from the representation. See Rule 1.16(a)(1). Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. See Rules 1.2(d), 1.6(b)(3).

REPORTERS' NOTES

Rule 4.1 prohibits dishonest statements when a lawyer communicates with third persons on a client's behalf. The Rule is substantially similar to DR 7-102(A)(5) [22 N.Y.C.R.R. § 1200.33(a)(5)], which provides that in the representation of a client a lawyer shall not "[k]nowingly make a false statement of law or fact." However, the Rule adds a materiality requirement to avoid sweeping minor and inconsequential misstatements into the disciplinary process. Also, Rule 4.1 applies only to false statements to third parties (including legislative bodies and administrative agencies), not to false statements made to tribunals; false statements to tribunals are governed by Rule 3.3(a)(1).

RULE 4.2:
COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) 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 court order.

(b) Notwithstanding the prohibitions of paragraph (a), a lawyer may:

(1) cause a client to communicate with a represented person unless the lawyer knows that the represented person is not legally competent; and

(2) counsel the client with respect to the client's communications with a represented person.

Comment

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

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

[3] Paragraph (a) applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person or an employee or agent of such a person concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party or between two organizations does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement (as defined by law) of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the state or federal rights of the accused. The fact that a

communication does not violate a state or federal right is insufficient to establish that the communication is permissible under this Rule. This Rule is not intended to effect any change in the scope of the anti-contact rule in criminal cases.

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

[7] In the case of a represented organization, paragraph (a) ordinarily prohibits communications with a constituent of the organization who: (i) supervises, directs or regularly consults with the organization's lawyer concerning the matter, (ii) has authority to obligate the organization with respect to the matter, or (iii) 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 unrepresented constituent. If an individual constituent of the organization is represented in the matter by the person's own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. 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 Rules 1.13, 4.4.

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

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

[10] A lawyer may not make a communication prohibited by paragraph (a) through the acts of another. See Rule 8.4(a).

Client-to-Client Communications

[11] Persons represented in a matter may communicate directly with each other and a lawyer may properly advise a client to communicate directly with a represented person without obtaining consent from the represented person's counsel. Agents for lawyers, such as investigators, are not considered clients within the meaning of this Rule even where the represented entity is an agency, department or other organization of the government, and therefore a lawyer may not cause such an agent to communicate with a represented person, unless the lawyer would be authorized by law or a court order to do so. A lawyer may also counsel a client with respect to communications with a represented person, including by drafting papers for the client to present to the represented person. In advising a client in connection with such communications, a lawyer may not advise the client to seek privileged information or other

information that the represented person is not personally authorized to disclose or is prohibited from disclosing, such as a trade secret or other information protected by law, or to encourage or invite the represented person to take actions without the advice of counsel.

[12] A lawyer who advises a client with respect to communications with a represented person should be mindful of the obligation to avoid abusive, harassing, or unfair conduct with regard to the represented person. The lawyer should advise the client against such conduct. A lawyer shall not advise a client to communicate with a represented person if the lawyer knows that the represented person is legally incompetent. See Rule 4.4.

REPORTERS' NOTES

Rule 4.2 regulates a lawyer's communications with persons who are represented by counsel, thus carrying on the long tradition of protecting the client-lawyer relationship against the risk of interference and overreaching by lawyers for parties with adverse interests. This topic is currently covered by DR 7-104 [22 N.Y.C.R.R. § 1200.35].

Rule 4.2(a) states the general rule that a lawyer representing a client "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." This language generally parallels the language in existing DR 7-104(A)(1) [22 N.Y.C.R.R. § 1200.35(a)(1)], but Rule 4.2(a) differs from DR 7-104(A)(1) [22 N.Y.C.R.R. § 1200.35(a)(1)] by using the term "person" rather than "party" and by supplementing the "authorized by law" exception with the additional phrase "or a court order."

The principal reason for substituting the term "person" for the term "party" is that the term "party" may suggest that the Rule applies only to named parties in litigation or other in formal proceedings. That is misleading. Many New York ethics authorities, and some courts, have interpreted the term "party" to include anyone known to be represented by counsel regarding the subject of the intended communication, whether the representation is in a transaction or in litigation, and whether litigation is pending or merely contemplated. Using the term "person" accords with these authorities and will reduce the danger that lawyers will misapprehend the scope of the Rule and engage in communications with represented persons that DR 7-104(A)(1) [22 N.Y.C.R.R. § 1200.35(a)(1)] has been consistently interpreted to prohibit.

Use of the term "represented person" is not intended to change the scope of the Rule in criminal matters, which are heavily governed by constitutional concerns that are the subject of a rich body of case law. However, Rule 4.2(a) expands on the existing "authorized by law" exception by adding the phrase "or court order." This expansion recognizes that courts have the inherent power to regulate the lawyers who appear before them and may therefore authorize communications that would otherwise violate the Rule.

Rule 4.2(b), which is roughly equivalent to existing DR 7-104(B) [22 N.Y.C.R.R. § 1200.35(b)], permits a lawyer to initiate direct client-to-client communications unless the lawyer knows that the represented person is not legally competent, and permits a lawyer to counsel a client about the client's communications with a represented person. This provision

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differs from DR 7-104(B) [22 N.Y.C.R.R. § 1200.35(b)] by omitting the existing requirement that a lawyer provide “reasonable advance notice” to the represented person’s lawyer when counseling a client to communicate directly with that person. This change reflects the belief that direct client-to-client communications are often helpful in resolving disputes, and that the “reasonable advance notice” requirement currently in DR 7-104(B) [22 N.Y.C.R.R. § 1200.35(b)] creates an unnecessary obstacle that might impede such communications. Nothing in Rule 4.2 (or in any other Rule) prevents a lawyer from advising a client not to respond to direct communications by another represented person.

The substance of DR 7-104(A)(2) [22 N.Y.C.R.R. § 1200.35(a)(2)], which governs communications with an unrepresented party, has been relocated to Rule 4.3.

**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.

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, explain that the client has interests opposed to those of the unrepresented person. As to misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(a), Comment [2A]. Relatedly, Rule 3.4(f) prohibits a lawyer from asking a person other than a client to refrain from voluntarily giving relevant information to the other party, unless that person is a relative, an employee or other agent of a client, or a person under a contractual obligation or legal duty to the client to refrain from disclosing certain information, and the lawyer believes that the person's interests will not be adversely affected by complying with request.

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

REPORTERS' NOTES

Rule 4.3 regulates dealings between lawyers and persons who are not represented by counsel. The Rule covers issues now addressed in DR 7-104(A)(2) [22 N.Y.C.R.R. § 1200.35(a)(2)], which generally prohibits a lawyer from giving advice to an unrepresented party "other than the advice to secure counsel."

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The Rule contains three commands. First, a lawyer dealing on behalf of a client with a person who is not represented by counsel is forbidden from stating or implying that the lawyer is “disinterested.” Second, when the lawyer knows (or reasonably should know) that the unrepresented person misunderstands the lawyer’s role in the matter (for example, believing that the lawyer is a neutral investigator, or that the lawyer is looking out for the best interests of the unrepresented person), the lawyer must correct the unrepresented person’s misunderstanding. Third, the lawyer must not offer “legal advice” to an unrepresented person, “other than the advice to secure counsel,” if the lawyer knows or reasonably should know that the unrepresented person’s interests “are or have a reasonable possibility of being in conflict with” the interests of the lawyer’s client. Rule 4.3 thus encompasses DR 7-104(B) [22 N.Y.C.R.R. § 1200.35(b)] but provides more detailed guidance to lawyers and greater protection to unrepresented persons.

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

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

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

Comment

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

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent, produced, or otherwise inadvertently made available by opposing parties or their lawyers. One way to resolve this situation is for lawyers to enter into agreements containing explicit provisions as to how the parties will deal with inadvertently sent documents. In the absence of such an agreement, however, if a lawyer knows or reasonably should know that such a document was sent inadvertently, this Rule requires only that the lawyer promptly notify the sender in order to permit that person to take protective measures. Although this Rule does not require that the lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence-preclusion. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes email and other electronically stored information subject to being read or put into readable form.

[3] Refraining from reading or continuing to read a document once a lawyer realizes that it was inadvertently sent to the wrong address and returning the document to the sender honors the policy of these Rules to protect the principles of client confidentiality. Because there are circumstances where a lawyer's ethical obligations should not bar use of the information obtained from an inadvertently sent document, however, this Rule does not subject a lawyer to professional discipline for reading and using that information. Nevertheless, substantive law or procedural rules may require a lawyer to refrain from reading an inadvertently sent document, or to return the document to the sender, or both. Accordingly, in deciding whether to retain or use an inadvertently received document, some lawyers may take into account whether the attorney-client privilege would attach. But if applicable law or rules do not address the situation,

decisions to refrain from reading such documents or to return them, or both, are matters of professional judgment reserved to the lawyer. See Rules 1.2, 1.4.

REPORTERS' NOTES

Rule 4.4 places limits on advocacy, thus ensuring greater civility in the justice system. It has no direct analogue in the current Disciplinary Rules.

Rule 4.4(a) has two clauses. The first clause generally prohibits conduct that has “no substantial purpose” other than to embarrass or harm a third person. This roughly parallels DR 7-102(A) [22 N.Y.C.R.R. § 1200.33(a)], which provides that a lawyer must not engage in certain types of conduct when the lawyer “knows” or it is “obvious” that the conduct would serve “merely to harass or maliciously injure another.” The second clause of Rule 4.4(a) prohibits a lawyer from using “methods of obtaining evidence that violate the legal rights” of a third person. This prohibition is not directly included in the existing Disciplinary Rules.

Rule 4.4(b) addresses the increasingly common problem of misaddressed or erroneously transmitted communications, including the inadvertent production of materials in discovery. The Rule requires that a lawyer who receives a document inadvertently sent or otherwise inadvertently disclosed by an adversary must “promptly notify the sender.” This formulation places a modest burden on the innocent receiving lawyer, but enables the sender, upon receipt of notice, to take whatever steps the sender considers advisable. The current Disciplinary Rules do not contain any comparable rule, but the provision is needed to guard against breaches of confidentiality and other harms to clients that inevitably arise, even among careful and conscientious lawyers, with the proliferation of email, faxes and other electronic means of communication.

Rule 4.4(b) is deliberately simple in form and simple to implement, leaving to courts and ethics committees the complex, case-by-case task of determining when lawyers should be able to read, retain, or use the information contained in inadvertently sent documents. A more detailed rule on inadvertently transmitted documents would likely be difficult to apply and enforce, and could not possibly anticipate all of the situations that will arise as technology evolves.

RULE 4.5:
COMMUNICATION AFTER INCIDENTS INVOLVING PERSONAL INJURY OR
WRONGFUL DEATH

(a) In the event of an incident involving potential claims for personal injury or wrongful death, no unsolicited communication shall be made to an individual injured in the incident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law firm, seeking to represent the injured individual or legal representative thereof in potential litigation or in a proceeding arising out of the incident before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(b) Paragraph (a) applies as well to lawyers or law firms or any associate, agent, employee or other representative of a lawyer or law firm who represent actual or potential defendants or entities that may defend or indemnify those defendants.

Comment

[1] Where paragraph (a) imposes a 30-day (or 15-day) restriction on solicitations directed to potential claimants relating to a specific incident involving potential claims for personal injury or wrongful death, the 30-day (or 15-day) restriction also applies to any communication with potential claimants by lawyers or law firms who represent actual or potential defendants or entities that may defend or indemnify those defendants. Although defense counsel is not soliciting employment from potential claimants for personal injury or wrongful death, it is improper under paragraph (b) for defense counsel to contact such claimants during the period of time when potential plaintiffs' lawyers are barred from doing so. However, if potential claimants are represented by counsel, it is proper for defense counsel to communicate with potential plaintiffs' counsel even during the 30-day (or 15-day) period. See also Rule 7.3(e). Paragraph (b) does not bar defense lawyers from communicating with potential defendants even within the 30-day (or 15-day) period, provided the communication does not violate any other Rule.

REPORTERS' NOTES

Rule 4.5 is substantially identical to DR 7-111 [22 N.Y.C.R.R. § 1200.41-a], adopted in 2007.

**RULE 5.1:
RESPONSIBILITIES OF LAW FIRMS, PARTNERS, MANAGERS AND
SUPERVISORY LAWYERS**

(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

(b) (1) A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules.

(2) A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.

(c) A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate. A lawyer with direct supervisory authority over another lawyer shall adequately supervise the work of the other lawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

(d) A lawyer shall be responsible for a violation of these Rules by another lawyer if:

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

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

Comment

[1] Paragraph (a) applies to law firms; paragraph (b) applies to lawyers with management responsibility in a law firm or a lawyer with direct supervisory authority over another lawyer.

[2] Paragraph (b) requires lawyers with management authority within a firm or those having direct supervisory authority over other lawyers to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the

firm will conform to these Rules. Such policies and procedures include those designed (i) to detect and resolve conflicts of interest (see Rule 1.10(f)), (ii) to identify dates by which actions must be taken in pending matters, (iii) to account for client funds and property, and (iv) to ensure that inexperienced lawyers are appropriately supervised.

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

[4] Paragraph (d) expresses a general principle of personal responsibility for acts of other lawyers in the law firm. See also Rule 8.4(a).

[5] Paragraph (d) imposes such responsibility on a lawyer who orders, directs or ratifies wrongful conduct and on lawyers who are partners or who have comparable managerial authority in a law firm who know or reasonably should know of the conduct. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Partners and lawyers with comparable authority, as well as those who supervise other lawyers, are indirectly responsible for improper conduct of which they know or should have known in the exercise of reasonable managerial or supervisory authority. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent misconduct or to prevent or mitigate avoidable consequences of misconduct if the supervisor knows that the misconduct occurred.

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

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

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

REPORTERS' NOTES

Rule 5.1 deals with the responsibilities of law firms, partners, managers and supervisory lawyers. Rule 5.1 is almost identical to existing DR 1-104 [22 N.Y.C.R.R. § 1200.5], added to the Code in 1999, but whereas DR 1-104 covers supervision of both lawyers and nonlawyers, Rule 5.1 deals only with the supervision of lawyers. Supervision of nonlawyers is instead addressed in a separate provision, Rule 5.3.

Rule 5.1(a), making a law firm as an entity responsible to ensure that all lawyers in the firm comply with the ethics rules, is nearly identical to DR 1-104(A) [22 N.Y.C.R.R. § 1200.5(a)].

Rule 5.1(b), governing lawyers with “management responsibility” in a law firm and lawyers with “direct supervisory authority” over other lawyers, is substantively identical to DR 1-104(B) [22 N.Y.C.R.R. § 1200.5(b)] but has been divided into two paragraphs for clarity.

Rule 5.1(c), governing the supervisory duties of a law firm as an entity, is similar to DR 1-104(C) [22 N.Y.C.R.R. § 1200.5(c)]. However, whereas DR 1-104(C) [22 N.Y.C.R.R. § 1200.5(c)] provides that a law firm “shall adequately supervise” the lawyers in the firm, “as appropriate,” Rule 5.1(c) provides that a law firm “shall ensure that the work of partners and associates is adequately supervised, as appropriate.” This subtle change recognizes that the law firm entity itself, which is not a human being, cannot directly supervise subordinates, but can (through its managers) take the steps necessary to ensure that adequate supervision is being provided. In addition, Rule 5.1(c) strengthens DR 1-104(C) [22 N.Y.C.R.R. § 1200.5(c)] by imposing the same duty on lawyers who have direct supervisory authority over other lawyers. This change reinforces the duty of supervision by requiring supervision both at the systemic level (the level of the law firm as entity) and at the one-on-one level at which the daily tasks of practice are actually performed.

Rule 5.1(d) sets forth the circumstances in which supervisory lawyers, partners and managerial lawyers will have vicarious disciplinary responsibility for acts of subordinate lawyers. It is nearly identical to DR 1-104(D) [22 N.Y.C.R.R. § 1200.5(d)] but makes three small changes: (i) it is limited to lawyers (because vicarious responsibility for the misdeeds of nonlawyers has been moved to Rule 5.3), (ii) it adds a reference to lawyers who possess “comparable managerial responsibility” to partners, and (iii) it divides DR 1-104(D)(2) [22 N.Y.C.R.R. § 1200.5(d)(2)] into subparagraphs for greater clarity.

The portion of DR 1-104 [22 N.Y.C.R.R. § 1200.5] stating that lawyers are responsible for their own individual conduct has been moved to Rule 5.2, which discusses the responsibilities of subordinate lawyers.

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

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

(b) A subordinate lawyer does not violate these Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

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

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise, a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear, and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. To evaluate the supervisor's conclusion that the question is arguable and the supervisor's resolution of it is reasonable in light of applicable law, it is advisable that the subordinate lawyer undertake research, consult with a designated senior partner or special committee, if any (see Rule 5.1, Comment [3]), or use other appropriate means. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

REPORTERS' NOTES

Rule 5.2 sets out the responsibilities of a subordinate lawyer when taking direction from a supervisory lawyer.

Rule 5.2(a), which is substantively identical to DR 1-104(E) [22 N.Y.C.R.R. § 1200.5(e)], makes clear that a subordinate lawyer is bound by the ethics rules "notwithstanding that the lawyer acted at the direction of another person."

Rule 5.2(b), which is substantively identical to DR 1-104(F) [22 N.Y.C.R.R. § 1200.5(f)], provides that a subordinate lawyer does not violate the ethics rules if the lawyer "acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."

RULE 5.3:
LAWYER'S RESPONSIBILITY FOR CONDUCT OF NONLAWYERS

(a) A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

(b) A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if:

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

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

Comment

[1] This Rule requires a law firm to ensure that work of nonlawyers is appropriately supervised. In addition, a lawyer with direct supervisory authority over the work of nonlawyers must adequately supervise those nonlawyers. Comments [2] and [3] to Rule 5.1, which concern supervision of lawyers, provide guidance by analogy for the methods and extent of supervising nonlawyers.

[2] With regard to nonlawyers, who are not themselves subject to these Rules, the purpose of the supervision is to give reasonable assurance that the conduct of all nonlawyers employed by or retained by or associated with the law firm is compatible with the professional obligations of the lawyers and firm. Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals. Such assistants, whether they are employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A law firm must ensure that such assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and

RULE 5.3

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. A law firm should make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with these Rules. A lawyer with direct supervisory authority over a nonlawyer has a parallel duty to provide appropriate supervision of the supervised nonlawyer.

[3] Paragraph (b) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of these Rules if engaged in by a lawyer. For guidance by analogy, see Rule 5.1, Comments [5]-[8].

REPORTERS' NOTES

Rule 5.3 deals with the duty of law firms and supervising lawyers to ensure adequate supervision of nonlawyers who work for the firm. Rule 5.3 is almost identical to the portions of existing DR 1-104 [22 N.Y.C.R.R. § 1200.5] that deal with nonlawyers. The differences between Rule 5.3 and DR 1-104 [22 N.Y.C.R.R. § 1200.5] are the same as the differences between DR 1-104 [22 N.Y.C.R.R. § 1200.5] and Rule 5.1, and the justifications for these differences are also the same.

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

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm or another lawyer associated in the firm may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased, disabled or missing lawyer may pay to the estate or representative of the deceased, disabled or missing lawyer that portion of the total compensation that fairly represents the services rendered by the deceased, disabled or missing lawyer;

(3) a lawyer or law firm may compensate a nonlawyer employee or include a nonlawyer employee in a retirement plan based in whole or in part on a profit-sharing arrangement;

(4) except where prohibited by court rule or other law, a lawyer may share court-awarded legal fees with a non-profit public-interest organization that employed, retained or recommended employment of the lawyer in a matter within the purview of the organization's public-interest mission.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) Unless authorized by law, a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under Rule 1.6.

(d) A lawyer shall not practice with or in the form of an entity authorized to practice law for profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone

other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[1A] Paragraph (a)(2) governs the compensation of a lawyer who undertakes to complete one or more unfinished pieces of legal business of a deceased, disabled or missing lawyer. For purposes of this Rule, a "disabled" lawyer includes one who is disabled due to alcohol or substance abuse. Rule 1.17 governs the sale of an entire law practice upon retirement, which is defined as the cessation of the private practice of law in a given geographic area.

[1B] Paragraph (a)(3) permits limited fee sharing with a nonlawyer employee, where the employee's compensation or retirement plan is based in whole or in part on a profit-sharing arrangement. Such sharing of profits with a nonlawyer employee must be based on the total profitability of the law firm or a department within a law firm and may not be based on the fee resulting from a single case.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f), providing that a lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent.

REPORTERS' NOTES

Rule 5.4 provides detailed rules to ensure that the professional independence of a lawyer is not compromised by any relationship with a nonlawyer or by a third party fee-payer. In most respects, Rule 5.4 is substantially identical to existing Disciplinary Rules.

Rule 5.4(a), which restricts fee sharing with nonlawyers, is substantially similar to DR 3-102 [22 N.Y.C.R.R. § 1200.17], but the provision permitting a lawyer to share compensation with the estate of a deceased lawyer has been expanded to permit a lawyer to share legal fees with the legal representative not only of a "deceased" lawyer but also of a "disabled or missing" lawyer. This expansion fills an important gap in the current Disciplinary Rules, which make no provision for lawyers who are disabled or who cannot be located. Also, the amount that may be shared is described as the "portion" that represents the services rendered by the deceased, disabled, or missing lawyer, rather than the "proportion," which implies mathematical precision. Because it may be difficult to establish the exact proportion of work performed by the deceased, disabled or missing lawyer on any given matter, this change will facilitate the calculation of fees and the completion of legal work in these situations.

Rule 5.4(a)(4), which has no equivalent in the existing Disciplinary Rules, permits a lawyer to share court-awarded fees from a particular matter with a non-profit public-interest organization that procured the lawyer's employment in the matter. This is a change from existing DR 3-102 [22 N.Y.C.R.R. § 1200.17], which would prohibit such sharing. The reason for the change is to make it easier for lawyers to provide financial support to public-interest groups that sponsor or engage in litigation to advance the public interest. The change recognizes the importance of public-interest work and should increase financial support for groups that

perform such work. Because the Rule is limited to court-awarded fees, and because fee sharing is permitted only with non-profit public-interest organizations, the potential for abuse is low. Furthermore, Rule 5.4(a)(4) does not permit such sharing where “prohibited by court rule or other law.” Currently, section 491 of the Judiciary Law appears to prohibit such fee sharing, so the Rule probably would have no effect without an amendment of that statute. The NYSBA supports such an amendment to Judiciary Law § 491 and believes that an ethics rule should be in place in the event the Legislature enacts such an amendment. The NYSBA also believes that judicial approval of fee sharing with public-interest groups would remove a potential impediment to legislative action amending section 491.

Rule 5.4(b), which prohibits a lawyer from forming a partnership with a nonlawyer if any of the partnership’s activities consist of the practice of law, is identical to DR 3-103 [22 N.Y.C.R.R. § 1200.18].

Rule 5.4(d), which prohibits lawyers from practicing in business entities in which a nonlawyer is an owner or controlling person, is substantially similar to DR 5-107(C) [22 N.Y.C.R.R. § 1200.26(c)], but Rule 5.4(d) has been expanded to include any other “entity authorized to practice law for profit.” This change will ensure that the Rule is broad enough to cover new types of entities that may arise in the future.

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

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in New York State shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in New York State for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in New York State.

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

(1) are undertaken in association with a lawyer who is admitted to practice in New York State and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in New York State that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of New York State.

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’s assisting another person.

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

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

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

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this state under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this state without being admitted to practice generally here.

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

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or

commonwealth of the United States, and in any foreign jurisdiction. The word “admitted” in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who, while technically admitted, is not authorized to practice, because, for example, the lawyer is on inactive status.

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

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

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

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

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

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this state that arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted but are not within

paragraphs (c)(2) and (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

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

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this state for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this state must become admitted to practice law generally in this state.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational 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 employees. The paragraph applies to in-house corporate lawyers, government 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.

[17] If an employed lawyer establishes an office or other systematic presence in this state for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client-protection funds and mandatory continuing legal education.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

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

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

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this state by lawyers who are admitted to practice in other jurisdictions. Lawyer communications to prospective clients in this state are governed by Rules 7.1 through 7.5.

REPORTERS' NOTES

Rule 5.5 prohibits lawyers from engaging in or assisting nonlawyers in the unauthorized practice of law, but permits lawyers from other jurisdictions to practice law in New York on a temporary basis under certain specified conditions. ABA Model Rule 5.5, in verbatim or slightly modified form, is in effect in 35 states, including Connecticut, Massachusetts, New Jersey and Pennsylvania (as of January 2008). The proposal contained in this report is patterned on the Pennsylvania rule.

Rule 5.5(a) provides that 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. These dual prohibitions are substantively identical to existing DR 3-101 [22 N.Y.C.R.R. § 1200.16].

Rules 5.5(b), (c), and (d), which address the multijurisdictional practice of law, have no analogue in the existing Disciplinary Rules.

Rule 5.5(b) states a general prohibition: a lawyer who is not admitted to practice in New York shall neither (i) “establish an office or other systematic and continuous presence in New York State for the practice of law” (except as authorized by these Rules or other law), or (ii) “hold out to the public or otherwise represent that the lawyer is admitted to practice law in New York State.” This general prohibition reflects the traditional doctrine and custom that lawyers not admitted to practice in New York may neither systematically practice law here nor convey the impression that they are admitted here.

Rule 5.5(c), which governs all types of lawyers, departs from the general prohibition on law practice in New York by out-of-state lawyers. Specifically, Rule 5.5(c) regularizes existing practice and permits a lawyer admitted in another United States or foreign jurisdiction, who is not disbarred or suspended from practice in any jurisdiction, to provide legal services on a temporary basis in New York in four narrow circumstances. None of the enumerated circumstances include legal work that, under the Judiciary Law, must be performed by lawyers admitted in New York, such as real estate conveyances, wills and trusts, and litigation (unless the out-of-state lawyer is admitted *pro hac vice*), *see* Judiciary Law § 484.

Rule 5.5(d) has two subparagraphs that address two special categories of law practice. Rule 5.5(d)(1) permits in-house lawyers to provide legal services to their “employer or its organizational affiliates” as long as the services do not require *pro hac vice* admission. (As noted above, Rule 5.5 makes no change in existing court rules regarding *pro hac vice* admission.) The Rule 5.5(d)(1) exception recognizes that companies employing in-house counsel are

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typically sophisticated users of legal services and are unlikely to be harmed simply because a lawyer employed at the company's New York offices is not admitted to practice here. The exception also recognizes that an in-house lawyer presents no threat to the public as long as the lawyer is rendering services only to the employer and not to the general public. Rule 5.5(d)(2) permits lawyers to provide legal services that they are "authorized to provide by federal law or other law of New York State." This exception effects no change in current practice, because New York has either chosen to permit these services under state law or is compelled to permit these services under federal law.

Rule 5.5 provides significant benefits to the state. New York is the nation's premier commercial and legal center. Permitting a lawyer admitted in another U.S. jurisdiction who has not established an office or other systematic and continuous presence in New York to provide temporary legal services in New York that carry no risk of adverse effect upon the interests of clients, the public or the courts is likely to enhance the position of New York as a legal center and to improve the ability of clients to have their legal needs addressed more effectively and efficiently. With respect to in-house lawyers, who are not limited to temporary practice but are limited to providing services to their employers, Rule 5.5 offers companies the flexibility to locate in-house lawyers in New York whenever they are needed here, thus increasing corporate efficiency.

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

A lawyer shall not participate in offering or making:

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

Comment

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

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

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

REPORTERS' NOTES

Rule 5.6 states the prohibition on agreements that restrict the lawyer's right to practice, with an exception for retirement benefits. Rule 5.6 is substantively identical to existing DR 2-108 [22 N.Y.C.R.R. § 1200.13].

**RULE 5.7:
RESPONSIBILITIES REGARDING NONLEGAL SERVICES**

(a) With respect to lawyers or law firms providing nonlegal services to clients or other persons:

(1) a lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the provision of both legal and nonlegal services;

(2) a lawyer or law firm that provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship;

(3) a lawyer or law firm that is an owner, controlling party or agent of or that is otherwise affiliated with an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship;

(4) for purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has previously advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is de minimis.

(b) Notwithstanding the provisions of paragraph (a), a lawyer or law firm that is an owner, controlling party or agent or is otherwise affiliated with an entity that the lawyer or law firm knows is providing nonlegal services to a person shall not permit any nonlawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person or to cause the lawyer or law firm to compromise its duty under Rule 1.6(a) with respect to the confidential information of a client receiving legal services.

(c) A lawyer or law firm shall not, whether directly or through an affiliated entity, provide both legal and nonlegal services to a client in the same matter or in substantially related matters unless (i) the lawyer or law firm complies with Rule 1.8(a) regarding the provision of the nonlegal services, (ii) the lawyer or law firm reasonably believes it can provide competent and diligent representation to the client, and (iii) the client gives informed consent, confirmed in writing.

(d) For purposes of this Rule, “nonlegal services” means those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer.

Comment

[1] For many years, lawyers have provided nonlegal services to their clients. By participating in the delivery of these services, lawyers can serve a broad range of economic and other interests of clients. Whenever a lawyer directly provides nonlegal services, the lawyer must avoid confusion on the part of the client as to the nature of the lawyer's role, so that the person for whom the nonlegal services are performed understands that the services may not carry with them the legal and ethical protections that ordinarily accompany a client-lawyer relationship. The recipient of the nonlegal services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of nonlegal services when that may not be the case. The risk of confusion is especially acute when the lawyer renders both legal and nonlegal services with respect to the same matter. Under some circumstances, the legal and nonlegal services may be so closely entwined that they cannot be distinguished from each other. In this situation, the recipient is likely to be confused as to whether and when the relationship is protected as a client-lawyer relationship. Therefore, where the legal and nonlegal services are not distinct, paragraph (a)(1) requires that the lawyer providing nonlegal services adhere to all of the requirements of these Rules with respect to the nonlegal services. Paragraph (a)(1) applies to the provision of nonlegal services by a law firm if the person for whom the nonlegal services are being performed is also receiving legal services from the firm that are not distinct from the nonlegal services.

[2] Even when the lawyer believes that the provision of nonlegal services is distinct from any legal services being provided, there is still a risk that the recipient of the nonlegal services might reasonably believe that the recipient is receiving the protection of a client-lawyer relationship. Therefore, paragraph (a)(2) requires that the lawyer providing the nonlegal services adhere to these Rules, unless the person understands that the nonlegal services are not the subject of a client-lawyer relationship. Nonlegal services also may be provided through an entity with which a lawyer is affiliated, for example, as owner, controlling party or agent. In this situation, there is still a risk that the recipient of the nonlegal services might reasonably believe that the recipient is receiving the protection of a client-lawyer relationship. Therefore, paragraph (a)(3) requires that the lawyer involved with the entity providing nonlegal services adhere to all of these Rules with respect to the nonlegal services, unless the person understands that the nonlegal services are not the subject of a client-lawyer relationship.

[3] These Rules will be presumed to apply to a lawyer who directly provides or is otherwise involved in the provision of nonlegal services unless the lawyer complies with paragraph (a)(4) by communicating in writing to the person receiving the nonlegal services that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services. Such a communication should be made before entering into an agreement for the provision of nonlegal services in a manner sufficient to ensure that the person understands the significance of the communication. In certain circumstances, however, additional steps may be required to ensure that the person understands the distinction. For example, while the written disclaimer set forth in paragraph (a)(4) will be adequate for a sophisticated user of legal and nonlegal services, a more detailed explanation may be required for someone unaccustomed to making distinctions between legal services and nonlegal services. Where appropriate and especially where legal services are provided in the same transaction as

nonlegal services, the lawyer should counsel the client about the possible effect of the proposed provision of services on the availability of the attorney-client privilege. The lawyer or law firm will not be required to comply with these requirements if its interest in the entity providing the nonlegal services is so small as to be de minimis.

[4] Although a lawyer may be exempt from the application of these Rules with respect to nonlegal services on the face of paragraph (a), the scope of the exemption is not absolute. A lawyer who provides or who is involved in the provision of nonlegal services may be excused from compliance with only those Rules that are dependent upon the existence of a representation or client-lawyer relationship. Other Rules, such as those prohibiting lawyers from misusing the confidences or secrets of a former client (see Rule 1.9), requiring lawyers to report certain lawyer misconduct (see Rule 8.3), and prohibiting lawyers from engaging in illegal, dishonest, fraudulent or deceptive conduct (see Rule 8.4), apply to a lawyer irrespective of the existence of a representation, and thus govern a lawyer not covered by paragraph (a). A lawyer or law firm rendering legal services is always subject to these Rules.

Provision of Legal and Nonlegal Services in the Same Transaction

[5] Paragraph (c) recognizes that in some situations it may be beneficial to a client to purchase both legal and nonlegal services from a lawyer, law firm or affiliated entity in the same matter or in two or more substantially related matters. Examples include: (i) a law firm that represents corporations and also provides public lobbying, public relations, investment banking and business relocation services, (ii) a law firm that represents clients in environmental matters and also provides engineering consulting services to those clients, and (iii) a law firm that represents clients in litigation and also provides consulting services relating to electronic document discovery. In these situations, the lawyer may have a financial interest in the nonlegal services that would constitute a conflict of interest under Rule 1.7(a)(2), which governs conflicts between a client and a lawyer's personal interests.

[5A] Under Rule 1.7(a)(2), a concurrent conflict of interest exists when a reasonable lawyer would perceive a significant risk that the representation will be materially limited or that the lawyer's independent professional judgment on behalf of a client will be adversely affected by the lawyer's responsibilities to another client, a former client or a third person or by the lawyer's own financial, business, property or personal interests. When a lawyer or law firm provides both legal and nonlegal services in the same matter (or in substantially related matters), a conflict with the lawyer's own interests will nearly always arise. For example, if the legal representation involves exercising judgment about whether to recommend nonlegal services and which provider to recommend, or if it involves overseeing the provision of the nonlegal services, then a conflict with the lawyer's own interests under Rule 1.7(a)(2) is likely to arise. However, a client may consent to such a conflict if the lawyer complies both with Rule 1.7(b) regarding the conflict affecting the legal representation of the client and with Rule 1.8(a) regarding the business transaction with the client.

[5B] Thus, the client may consent if: (i) the lawyer complies with Rule 1.8(a) with respect to the transaction in which the lawyer agrees to provide the nonlegal services, including obtaining the client's informed consent in a writing signed by the client, (ii) the lawyer reasonably believes that the lawyer can provide competent and diligent legal representation

despite the conflict within the meaning of Rule 1.7(b), and (iii) the client gives informed consent pursuant to Rule 1.7(b), confirmed in writing. In certain cases, it will not be possible to provide both legal and nonlegal services because the lawyer could not reasonably believe that he or she can represent the client competently and diligently while providing both legal and nonlegal services in the same or substantially related matters. Whether providing dual services gives rise to an impermissible conflict must be determined on a case-by-case basis, taking into account all of the facts and circumstances, including factors such as: (i) the experience and sophistication of the client in obtaining legal and nonlegal services of the kind being provided in the matter, (ii) the relative size of the anticipated fees for the legal and nonlegal services, (iii) the closeness of the relationship between the legal and nonlegal services, and (iv) the degree of discretion the lawyer has in providing the legal and nonlegal services.

[6] In the context of paragraph (c), Rule 1.8(a) first requires that: (i) the nonlegal services be provided on terms that are fair and reasonable to the client, (ii) full disclosure of the terms on which the nonlegal services will be provided be made in writing to the client in a manner understandable by the client, (iii) the client is advised to seek the advice of independent counsel about the provision of the nonlegal services by the lawyer, and (iv) the client gives informed consent, as set forth in Rule 1.8(a)(3), in a writing signed by the client, to the terms of the transaction in which the nonlegal services are provided and to the lawyer's inherent conflict of interest.

[7] In addition, in the context of paragraph (c), Rule 1.8(a) requires a full disclosure of the nature and extent of the lawyer's financial interest or stake in the provision of the nonlegal services. By its terms, Rule 1.8(a) requires that the nonlegal services be provided on terms that are fair and reasonable to the client. (Where the nonlegal services are provided on terms generally available to the public in the marketplace, that requirement is ordinarily met.) Consequently, as a further safeguard against conflicts that may arise when the same lawyer provides both legal and nonlegal services in the same or substantially related matters, a lawyer may do so only if the lawyer not only complies with Rule 1.8(a) with respect to the nonlegal services, but also obtains the client's informed consent, pursuant to Rule 1.7(b), confirmed in writing, after fully disclosing the advantages and risks of obtaining legal and nonlegal services from the same or affiliated providers in a single matter (or in substantially related matters), including the lawyer's conflict of interest arising from the lawyer's financial interest in the provision of the nonlegal services.

[8] [Omitted.]

[9] [Omitted.]

[10] [Omitted.]

[11] [Omitted.]

REPORTERS' NOTES

Rule 5.7 regulates lawyers who provide nonlegal services to clients or others. The Rule is identical to existing DR 1-106 [22 N.Y.C.R.R. § 1200.5-b], adopted in 2001, except for the addition of a new paragraph (c).

Rule 5.7(c) prohibits lawyers from providing both legal and nonlegal services to a client in the same matter (or in two substantially related matters), unless the lawyer complies with the general rules regarding conflict of interest waivers in Rule 1.7 with respect to the legal services, and also complies with the stringent provisions of Rule 1.8(a) (governing business transactions between lawyers and clients) regarding the *nonlegal* services. This change, which in itself constitutes a rejection by the NYSBA House of Delegates of contrary interpretations of the DR 1-106 [22 N.Y.C.R.R. § 1200.5-b] by the Committee on Professional Ethics (*see, e.g.*, N.Y. State Formal Ops. 752, 753 and 755), benefits clients whose interests are best served by receiving both legal and nonlegal services in the same matter (or in closely related matters). A series of safeguards set forth in this Rule and incorporated by reference from Rule 1.8(a) will serve to protect such clients from possible abuses. These safeguards include the following: (i) the lawyer must reasonably believe that the lawyer can provide competent and diligent legal representation to the client, (ii) the lawyer must encourage the client to seek (and give the client the opportunity to seek) the advice of independent counsel regarding whether to obtain legal and nonlegal services from the same lawyer or law firm, (iii) the lawyer must obtain the client's informed consent, in a writing signed by the client, to the terms of the transaction and the lawyer's role in the transaction, and (iv) the transaction must be fair and reasonable to the client.

RULE 5.8:
CONTRACTUAL RELATIONSHIPS WITH NONLEGAL PROFESSIONALS

(a) A lawyer or law firm may enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services, notwithstanding the provisions of Rule 1.7(a), provided that:

(1) the profession of the nonlegal professional or nonlegal professional service firm is included in a list jointly established and maintained by the Appellate Divisions pursuant to 22 N.Y.C.R.R. § 1205.3;

(2) the lawyer or law firm neither grants to the nonlegal professional or nonlegal professional service firm, nor permits such person or firm to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in or managerial or supervisory right, power or position in connection with the practice of law by the lawyer or law firm, nor shares legal fees with a nonlawyer or receives or gives any monetary or other tangible benefit for giving or receiving a referral, as provided in Rule 7.2(a); and

(3) the lawyer or law firm:

(i) discloses the fact that the contractual relationship exists to any client of the lawyer or law firm before the client is referred to the nonlegal professional service firm, or to any client of the nonlegal professional service firm before that client receives legal services from the lawyer or law firm;

(ii) provides the client with a copy of the “Statement of Client’s Rights In Cooperative Business Arrangements” pursuant to 22 N.Y.C.R.R. § 1205.4; and

(iii) receives from the client informed written consent.

(b) For purposes of paragraph (a):

(1) each profession on the list maintained pursuant to a joint rule of the Appellate Divisions shall have been designated sua sponte or approved by the Appellate Divisions upon application of a member of a nonlegal profession or nonlegal professional service firm, upon a determination that the profession is composed of individuals who, with respect to their profession:

(i) have been awarded a bachelor’s degree or its equivalent from an accredited college or university, or have attained an equivalent combination of educational credit from such a college or university and work experience;

(ii) are licensed to practice the profession by an agency of New York State or of the United States; and

(iii) are required, under penalty of suspension or revocation of license, to adhere to a code of ethical conduct that is reasonably comparable to that of the legal profession.

(2) The term “ownership or investment interest” means any such interest in any form of debt or equity and shall include any interest commonly considered to be an interest accruing to or enjoyed by an owner or investor.

(c) Notwithstanding Rule 5.4(a), a lawyer or law firm may allocate costs and expenses with a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship permitted by paragraph (a), provided the allocation reasonably reflects the costs and expenses incurred or expected to be incurred by each.

Comment

Contractual Relationships Between Lawyers and Nonlegal Professionals

[1] The legal profession has an essential tradition of complete independence and uncompromised loyalty to those it serves. Recognizing this tradition, clients of lawyers practicing in New York State are guaranteed independent professional judgment and undivided loyalty, uncompromised by conflicts of interest. Indeed, these guarantees of independence and loyalty represent the very foundation of the profession and allow and foster its continued role as a protector of the system of law. Therefore, a lawyer must remain completely responsible for the lawyer’s own independent professional judgment, maintain client confidences, preserve funds of clients and third parties in the lawyer’s control and otherwise comply with the legal and ethical principles governing lawyers in New York State. Multidisciplinary practice between lawyers and nonlawyers is incompatible with the core values of the legal profession and, therefore, a strict division between services provided by lawyers and those provided by nonlawyers is essential to protect those values. Nevertheless, this Rule permits lawyers to enter into interprofessional contractual relationships for the systematic and continuing provision of legal and nonlegal professional services, provided the nonlegal professional or nonlegal professional service firm with which the lawyer or law firm is affiliated does not own, control, supervise or manage, directly or indirectly, in whole or in part, the lawyer’s or law firm’s practice of law. The nonlegal professional or nonlegal professional service firm may not play a role in, for example, (i) deciding whether to accept or terminate an engagement to provide legal services in a particular matter or to a particular client, (ii) determining the manner in which lawyers are hired or trained, (iii) assigning lawyers to handle particular matters or to provide legal services to particular clients, (iv) deciding whether to undertake pro bono and other public-interest legal work, (v) making financial and budgetary decisions relating to the legal practice, and (vi) determining the compensation and advancement of lawyers and of persons assisting lawyers on legal matters.

[2] The contractual relationship permitted by this Rule may include the sharing of premises, general overhead or administrative costs and services on an arm’s length basis. Such financial arrangements, in the context of an agreement between lawyers and other professionals to provide legal and other professional services on a systematic and continuing basis, are permitted subject to the requirements of paragraph (a) and Rule 7.2(a). Similarly, lawyers

participating in such arrangements remain subject to general ethical principles in addition to those set forth in this Rule including, at a minimum, Rule 1.7, Rule 1.8(f), Rule 1.9, Rule 5.7(b) and Rule 7.5(a). Thus, the lawyer or law firm may not, for example, include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional, enter into formal partnerships with nonlawyers, or practice in an organization authorized to practice law for a profit in which nonlawyers own any interest. Moreover, a lawyer or law firm may not enter into an agreement or arrangement for the use of a name in respect of which a nonlegal professional or nonlegal professional service firm has or exercises a proprietary interest if, under or pursuant to the agreement or arrangement, that nonlegal professional or firm acts or is entitled to act in a manner inconsistent with paragraph (a)(2) or Comment [1]. More generally, the existence of a contractual relationship permitted by this Rule does not by itself create a conflict of interest in violation of Rule 1.8(a). Whenever a law firm represents a client in a matter in which the nonlegal professional service firm's client is also involved, the law firm's interest in maintaining an advantageous relationship with a nonlegal professional service firm might, in certain circumstances, adversely affect the independent professional judgment of the law firm.

[3] Each lawyer and law firm having a contractual relationship under paragraph (a) has an ethical duty to observe these Rules with respect to the lawyer's or law firm's own conduct in the context of that relationship. For example, the lawyer or law firm cannot permit the obligation to maintain client confidences, as required by Rule 1.6, to be compromised by the contractual relationship or by its implementation by or on behalf of nonlawyers involved in the relationship. In addition, the prohibition in Rule 8.4(a) against circumventing a Rule through actions of another applies generally to the lawyer or law firm in the contractual relationship.

[4] The contractual relationship permitted by paragraph (a) may provide for the reciprocal referral of clients by and between the lawyer or law firm and the nonlegal professional or nonlegal professional service firm. When in the context of such a contractual relationship a lawyer or law firm refers a client to the nonlegal professional or nonlegal professional service firm, the lawyer or law firm shall observe the ethical standards of the legal profession in verifying the competence of the nonlegal professional or nonlegal professional services firm to handle the relevant affairs and interests of the client. Referrals should only be made when requested by the client or deemed to be reasonably necessary to serve the client. Thus, even if otherwise permitted by paragraph (a), a contractual relationship may not require referrals on an exclusive basis. See Rule 7.2(a).

[5] To ensure that only appropriate professional services are involved, a contractual relationship for the provision of services is permitted under paragraph (a) only if the nonlegal party thereto is a professional or professional service firm meeting appropriate standards regarding ethics, education, training and licensing. The Appellate Divisions maintain a public list of eligible professions at 22 N.Y.C.R.R. § 1205.5. A member of the nonlegal profession or a professional service firm may apply for the inclusion of particular professions on the list or professions may be added to the list by the Appellate Divisions sua sponte. A lawyer or law firm not wishing to affiliate with a nonlawyer on a systematic and continuing basis, but only to engage a nonlawyer on an ad hoc basis to assist in a specific matter, is not governed by this Rule when so dealing with the nonlawyer. Thus, a lawyer advising a client in connection with a discharge of chemical wastes may engage the services of and consult with an environmental

engineer on that matter without the need to comply with this Rule. Likewise, the requirements of this Rule need not be met when a lawyer retains an expert witness in a particular litigation.

[6] Depending upon the extent and nature of the relationship between the lawyer or law firm, on the one hand, and the nonlegal professional or nonlegal professional service firm, on the other hand, it may be appropriate to treat the parties to a contractual relationship permitted by paragraph (a) as a single law firm for purposes of these Rules, as would be the case if the nonlegal professional or nonlegal professional service firm were in an “of counsel” relationship with the lawyer or law firm. If the parties to the relationship are treated as a single law firm, the principal effects would be that conflicts of interest are imputed as between them pursuant to Rule 1.10(a) and that the law firm would be required to maintain systems for determining whether such conflicts exist pursuant to Rule 1.10(f). To the extent that the rules of ethics of the nonlegal profession conflict with these Rules, the rules of the legal profession will still govern the conduct of the lawyers and the law firm participants in the relationship. A lawyer or law firm may also be subject to legal obligations arising from a relationship with nonlawyer professionals, who are themselves subject to regulation.

REPORTERS’ NOTES

Rule 5.8 governs the conditions under which a lawyer may enter into a contractual relationship with one or more specified nonlegal professionals for the purpose of offering legal and nonlegal professional services on a systematic and continuing basis. The Rule exempts such arrangements from the conflict of interest rules that would otherwise apply, and (i) places specific limitations on the nature of the contractual relationship, (ii) establishes criteria for the qualifications of professions that may be approved by the Appellate Divisions for such arrangements, and (iii) requires specific disclosures to clients.

Rule 5.8 is substantively identical to existing DR 1-107 [22 N.Y.C.R.R. § 1200.5-c], as adopted in 2001, with two exceptions. First, the introductory language in the first two paragraphs of DR 1-107(A) [22 N.Y.C.R.R. § 1200.5-c(a)] has been moved to a Comment to the Rule. This language, which explains the reasons for placing limitations on multidisciplinary practice, does not state any requirements or prohibitions, and thus is better suited to a Comment than to a Rule.

Second, the specific provision in DR 1-107(C) [22 N.Y.C.R.R. § 1200.5-c(c)] permitting non-exclusive reciprocal referral agreements between a lawyer and a nonlegal professional has been expanded and clarified in Rule 7.2, Comment [4].

**RULE 6.1:
VOLUNTARY PRO BONO SERVICE**

A lawyer has a professional obligation to render public-interest and pro bono legal service.

(a) Each lawyer should aspire to provide at least 20 hours of pro bono service annually by providing legal services at no fee and without expectation of fee to:

(1) persons of limited financial means;

(2) not-for-profit, governmental or public-service organizations, where the legal services are designed primarily to address the legal and other basic needs of persons of limited financial means; or

(3) organizations specifically designed to increase the availability of legal services to persons of limited financial means.

(b) Each lawyer also should provide financial support for such organizations to assist in providing legal services to persons of limited financial means.

(c) In addition to meeting the aspirational goals set forth above, a lawyer should render public-interest and pro bono legal service:

(1) where the payment of standard legal fees would significantly deplete the recipient's economic resources or would be otherwise inappropriate, by providing legal services at no fee or substantially reduced fees to individuals, organizations seeking to secure or protect civil rights, civil liberties or public rights or to not-for-profit, government or public-service organizations in matters in furtherance of their organization purposes;

(2) by providing legal services at a substantially reduced fee to a person of limited financial means;

(3) by participating without compensation in activities for improving the law, the legal system or the legal profession; or

(4) by providing legal services without compensation or at substantially reduced compensation in aid or support of the judicial system (including services as an arbitrator, mediator or neutral in court-annexed alternative dispute resolution).

(d) The professional obligation set forth in this Rule is not intended to be enforced through the disciplinary process, and the failure to fulfill the aspirational goals of this Rule should be without legal consequence.

Comment

[1] Pro bono legal service for the public good is an integral part of a lawyer's professional responsibility. In particular, providing pro bono legal service for the poor is an important part of this responsibility. As our society has become one in which rights and responsibilities are increasingly defined in legal terms, access to legal services has become of critical importance. This is true for all people, rich, poor or of moderate means. However, because the legal problems of the poor often involve areas of basic need, their inability to obtain legal services can have dire consequences. The vast unmet legal needs of the poor in New York have been recognized in several studies undertaken over the past two decades. As an officer of the court, each lawyer – regardless of professional prominence or professional work load – has a professional obligation to provide or to assist in providing pro bono legal services to the poor. This professional obligation applies to all lawyers, including members of the judiciary and government lawyers.

[2] To meet this professional obligation, paragraph (a) urges all lawyers to provide a minimum of 20 hours of pro bono legal service annually without fee or expectation of fee, either directly to persons of limited financial means or to organizations that serve the legal or other basic needs of persons of limited financial means. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of the lawyer's career, the lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2A] Paragraph (b) provides that, in addition to providing the services described in paragraph (a), lawyers should provide financial support to organizations that provide legal services to persons of limited financial means. This obligation is separate from and not a substitute for the provision of legal services described in paragraph (a). To assist the funding of civil legal services for low income people, when selecting a bank for deposit of funds into an "IOLA" account pursuant to Judiciary Law § 497, a lawyer should take into consideration the interest rate offered by the bank on such funds.

[2B] Paragraphs (a) and (b) recognize the critical need for legal services that exists among persons of limited means. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rulemaking and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraph (a) and persons served by organizations to which lawyers should contribute financially under paragraph (b) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless cannot afford counsel. Legal services can be rendered to individuals or to

organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means.

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

[5] While a lawyer may fulfill the annual responsibility to perform pro bono service exclusively through activities described in paragraphs (a) and (b), all lawyers are urged to render public-interest and pro bono service in addition to assistance to the poor. This responsibility can be met in a variety of ways as set forth in paragraph (c). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono service outlined in paragraph (a). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by making financial contributions to organizations that help meet the legal and other basic needs of the poor, as described in paragraph (b) or by performing some of the services outlined in paragraph (c).

[6] Paragraph (c)(1) includes the provision 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, anti-discrimination claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (c)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Acceptance of court appointments and participation in bar association programs that provide legal services in which the fee is substantially below a lawyer's usual rate are encouraged under this provision.

[8] Paragraphs (c)(3) and (c)(4) recognize the value of lawyers' engaging in activities that improve the law, the legal system or the legal profession. Examples of the many activities that fall within this paragraph include: (i) serving on bar association committees, (ii) serving on boards of pro bono or legal services programs, (iii) taking part in Law Day activities, (iv) acting as a continuing legal education instructor, a mediator or an arbitrator, and (v) engaging in legislative lobbying to improve the law, the legal system or the profession.

[9] [Omitted.]

[10] [Omitted.]

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

[12] [Omitted.]

REPORTERS' NOTES

Rule 6.1 sets forth a lawyer's professional obligation to render public-interest and pro bono legal service. It is derived from EC 2-25 of the New York Code of Professional Responsibility, as amended by the NYSBA House of Delegates on April 2, 2005. This obligation consists of three responsibilities: (i) to provide a minimum of 20 hours of free legal services to poor people or to organizations that meet the legal or other basic needs of poor people, (ii) to contribute money to organizations that assist in providing legal services to poor people, and (iii) when these two responsibilities have been fulfilled, to provide pro bono services from the expanded menu of opportunities set forth in the Rule at either no fee or at a substantial discount. Although the obligation in Rule 6.1 is expressed in aspirational terms and is not enforceable through the disciplinary process (as is the case under current EC 2-25), it is included in the Rules to increase the awareness of lawyers of the importance of rendering public-interest and pro bono legal service and to articulate priorities that have been expressed by the bar and by the courts.

**RULE 6.2:
ACCEPTING APPOINTMENTS BY COURTS**

A lawyer shall not seek to avoid appointment by a court to represent a person, except for good cause.

Comment

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

Appointed Counsel

[2] For good cause, a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if undertaking the representation would result in a violation of these Rules or other law. For example, good cause exists if the lawyer could not handle the matter competently, see Rule 1.1. Similarly, good cause exists if undertaking the representation would result in an improper conflict of interest (i) because of the lawyer's representation of a current client (see Rule 1.7), (ii) because of the lawyer's representation of a former client (see Rule 1.9), (iii) because of imputation of a conflict of interest to the lawyer (see Rule 1.10), or (iv) because of the lawyer's personal interests, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship, or the lawyer's ability to represent the client (see Rule 1.7). Absent such a material limitation on the representation or other violation of these Rules or other law, good cause does not exist solely because of the repugnance of the subject matter of the proceeding, community attitude, the identity or position of the potential client, the belief of a lawyer that a defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of a civil case.

[2A] Good cause to decline an appointment may also include circumstances where acceptance would create a personal hardship on the lawyer or be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

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

REPORTERS' NOTES

Rule 6.2 provides that a lawyer may not seek to avoid appointment by a tribunal to represent a person, except for "good cause."

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The existing Disciplinary Rules do not currently address this issue, but it is addressed in two Ethical Considerations. Specifically, EC 2-38 states that a lawyer should not seek to be excused from undertaking a court-appointed representation “except for compelling reasons,” and EC 2-30 discusses the circumstances in which it is appropriate for a lawyer to decline an engagement generally. To facilitate court appointments of lawyers, these concepts deserve a place in the mandatory rules.

**RULE 6.3:
MEMBERSHIP IN A LEGAL SERVICES ORGANIZATION**

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

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

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

[1A] This Rule applies to legal services organizations organized and operating on a not-for-profit basis.

[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.

REPORTERS' NOTES

Rule 6.3 authorizes lawyers to serve as officers or members of a not-for-profit legal services organization without exposing the lawyers to conflicts of interest that might otherwise disqualify them or their law firms from representing clients in the normal course of practice. Rule 6.3 is substantially similar to DR 5-110 [22 N.Y.C.R.R. § 1200.29], with minor changes in language and cross-references.

RULE 6.4:
LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

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

Comment

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. For example, a lawyer concentrating 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. A lawyer's identification with the organization's aims and purposes, under some circumstances, may give rise to a personal-interest conflict with client interests implicating the lawyer's obligations under other Rules, particularly Rule 1.7. A lawyer is also professionally obligated to protect the integrity of the law reform program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially affected.

REPORTERS' NOTES

Rule 6.4 authorizes a lawyer to serve as a member, officer or director of a law reform organization, notwithstanding the effect the reform may have on the interests of the lawyer's clients. This issue is not directly addressed in the current New York Code.

Rule 6.4 makes clear that serving on the board of a law reform organization is not equivalent to representing that organization, and therefore does not expose a lawyer who serves on such a board to disqualification motions in the course of the lawyer's regular practice. However, the Rule requires that when the lawyer knows that the interests of a client may be "materially affected" by a decision in which the lawyer participates, the lawyer must disclose that fact but need not identify the client.

The existing Disciplinary Rules do not address participation by lawyers in law reform organizations. Instead, the substance of Rule 6.4 currently appears in EC 8-4. Rule 6.4 serves the important social policy goal of encouraging lawyers to participate in activities that improve the law, the legal system and the legal profession.

RULE 6.5:
PARTICIPATION IN LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association or other not-for-profit legal services organization, 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) shall comply with Rule 1.7 and Rule 1.9(a), concerning restrictions on representations where there are or may be conflicts of interest, only if the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest;

(2) shall comply with Rule 1.10 only if the lawyer has actual knowledge at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or Rule 1.9(a) with respect to the matter; and

(3) notwithstanding paragraphs (a)(1) and (a)(2), a lawyer may provide limited legal services sufficient to make an appropriate referral of the client to another program, provided the otherwise disqualified lawyer discloses the fact of the conflict when making the referral.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

(c) For purposes of this Rule, “short-term limited legal services” means providing legal advice or representation free of charge as part of a program described in paragraph (a) with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance.

(d) The lawyer providing short-term limited legal services must secure the client’s informed consent to the limited scope of the representation, and such representation shall be subject to Rule 1.6.

(e) This Rule shall not apply where the court before which the representation is pending determines that a conflict of interest exists or, if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation.

Comment

[1] Legal services organizations, courts, government agencies, bar associations and various non-profit organizations have established programs through which lawyers provide free short-term limited legal services, such as advice or the completion of legal forms, to assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer’s representation of the client will continue beyond the limited consultation. Such programs are

normally operated under circumstances in which it is not feasible for a lawyer to utilize the conflict-checking system required by Rule 1.10(f) before providing the short-term limited legal services contemplated by this Rule. See also Rules 1.7, 1.9, 1.10.

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

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

[3A] Where a lawyer knows that the representation of a program client presents a conflict of interest, this Rule does not prohibit the lawyer from providing limited legal services sufficient to make an appropriate referral of the client to another program. In this situation, a lawyer should explore ways to assist the person to obtain alternative legal assistance that do not expose the lawyer to confidential or sensitive information; for example, the lawyer could provide general information about other programs that may provide such assistance. In the event that the otherwise disqualified lawyer reasonably concludes that it is necessary for the lawyer to provide limited legal services to the person, the lawyer should first disclose to that person the fact of the conflict. In any event, a lawyer in this situation should take special care to avoid exposure to more information than is required to make an appropriate referral to another program.

[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 only when the lawyer knows that the lawyer's firm is disqualified by Rule 1.7 or Rule 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

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

REPORTERS' NOTES

Rule 6.5 provides that a lawyer participating in certain short-term limited legal services programs is subject to the conflict of interest Rules only where the lawyer knows of the

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underlying conflict or imputed conflict. The Rule is substantially similar to DR 5-101-A [22 N.Y.C.R.R. § 1200.20-a], which was adopted in December 2007.

As the Appellate Division has recognized by adopting DR 5-101-A [22 N.Y.C.R.R. § 1200.20-a], a relaxation of ordinary conflict of interest rules is appropriate for lawyers participating in certain short-term limited legal services programs because (i) requiring a conflict check each time such legal advice is given is impractical and burdensome, and (ii) the limited short-term nature of the legal services rendered in such programs reduces the risk that conflicts will arise between the program-client and other matters handled by the lawyer or the lawyer's firm.

**RULE 7.1:
ADVERTISING AND OTHER COMMUNICATIONS
CONCERNING A LAWYER'S SERVICES**

(a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that:

- (1) contains statements or claims that are false, deceptive or misleading; or
- (2) violates a Rule.

(b) Subject to the provisions of paragraph (a), an advertisement may include information as to:

(1) legal and nonlegal education; degrees and other scholastic distinctions; dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by these Rules; public offices and teaching positions held; publications of law-related matters authored by the lawyer; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency; and bona fide professional ratings;

(2) names of clients regularly represented, provided that the clients have given prior written consent;

(3) bank references; credit arrangements accepted; prepaid or group legal services programs in which the lawyer or law firm participates; nonlegal services provided by the lawyer or law firm or by an entity owned and controlled by the lawyer or law firm; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by Rule 5.8, and the nature and extent of services available through those contractual relationships; and

(4) legal fees for initial consultation; contingent fee rates in civil matters, when accompanied by a statement disclosing the information required by paragraph (p); range of fees for legal and nonlegal services, provided that there is available to the public free of charge a written statement clearly describing the scope of each advertised service, hourly rates, and fixed fees for specified legal and nonlegal services.

(c) An advertisement shall not:

(1) include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter that is still pending;

(2) include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefor;

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(3) include the portrayal of a judge, the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case;

(4) use actors to portray the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same;

(5) rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence;

(6) be made to resemble legal documents; or

(7) utilize a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter.

(d) An advertisement that complies with paragraph (e) may contain the following:

(1) statements that are reasonably likely to create an expectation about results the lawyer can achieve;

(2) statements that compare the lawyer's services with the services of other lawyers;

(3) testimonials or endorsements of clients, where not prohibited by paragraph (c)(1), and of former clients; or

(4) statements describing or characterizing the quality of the lawyer's or law firm's services.

(e) It is permissible to provide the information set forth in paragraph (d) provided:

(1) its dissemination does not violate paragraph (a);

(2) it can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated; and

(3) it is accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome."

(f) Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to Rule 7.3(a)(1), shall be labeled "Attorney Advertising" on the first page, or on the home page in the case of a web site. If the communication is in the form of a self-mailing brochure or postcard, the words "Attorney Advertising" shall appear therein. In the case of email, the subject line shall contain the notation "ATTORNEY ADVERTISING."

(g) A lawyer or law firm shall not utilize:

(1) a pop-up or pop-under advertisement in connection with computer-accessed communications, other than on the lawyer's or law firm's own web site or other Internet presence; or

(2) meta-tags or other hidden computer codes that, if displayed, would violate a Rule.

(h) All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) Any words or statements required by this Rule to appear in an advertisement must be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud.

(j) A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service. Such legal services shall include all those services that are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.

(k) All advertisements shall be pre-approved by the lawyer or law firm, and a copy shall be retained for a period of not less than three years following its initial dissemination. Any advertisement contained in a computer-accessed communication shall be retained by the lawyer for a period of not less than one year. A copy of the contents of any web site covered by this Rule shall be preserved upon the initial publication of the web site, any major web site redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days.

(l) If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm shall not charge more than the fee advertised for such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm shall not charge more than the fixed fee for such stated legal services as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services performed or to be performed were not legal services referred to or implied in the advertisement or in the fee schedule and, further, that a different fee arrangement shall apply to the transaction.

(m) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under this Rule in a publication that is published more frequently than once per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under this Rule in a publication that is published once per month or less frequently, the lawyer shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under this Rule in a publication that has no

fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication, but in no event less than 90 days.

(n) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under this Rule, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(o) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item.

(p) All advertisements that contain information about the fees charged by the lawyer or law firm, including those indicating that in the absence of a recovery no fee will be charged, shall comply with the provisions of Judiciary Law § 488(3).

Comment

Advertising

[1] The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of competent legal counsel. Hence, important functions of the legal profession are to educate people to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

[2] The public's need to know about legal services can be fulfilled in part through advertising. People of limited means who have not made extensive use of legal services in many instances rely on advertising to find appropriate counsel. While a lawyer's reputation may attract some clients, lawyers may also make the public aware of their services by advertising to obtain work.

[3] Advertising by lawyers serves two principal purposes: first, it educates potential clients regarding their need for legal advice and assists them in obtaining a lawyer appropriate for those needs. Second, it enables lawyers to attract clients. To carry out these two purposes and because of the critical importance of legal services, it is of the utmost importance that lawyer advertising not be false, deceptive or misleading. Truthful statements that are misleading 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 misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services, or about the results a lawyer can achieve, for which there is no reasonable factual foundation. For example, a lawyer might truthfully state, "I have never lost a case," but that statement would be misleading if the lawyer settled virtually all cases that the lawyer handled. A communication to anyone that states or implies that the lawyer has the ability to influence improperly a court, court officer, governmental agency or government official is improper under Rule 8.4(e).

[4] To be effective, advertising must attract the attention of viewers, readers or recipients and convey its content in ways that will be understandable and helpful to them.

Lawyers may therefore use advertising techniques intended to attract attention, such as music, sound effects, graphics and the like, so long as those techniques do not render the advertisement false, deceptive or misleading. Lawyer advertising may use actors or fictionalized events or scenes for this purpose, provided appropriate disclosure of their use is made. Some images or techniques, however, are highly likely to be misleading. So, for instance, legal advertising should not be made to resemble legal documents.

[5] The “Attorney Advertising” label serves to dispel any confusion or concern that might be created when nonlawyers receive letters or emails from lawyers. The label is not necessary for advertising in newspapers or on television, or similar communications that are self-evidently advertisements, such as billboards or press releases transmitted to news outlets, and as to which there is no risk of such confusion or concern. An advertisement in a newspaper may nevertheless require the label if it is a paid article about a law firm adjacent to other articles written by the newspaper, where there is a reasonable risk that readers will confuse the two. The ultimate purpose of the label is to inform readers where they might otherwise be confused.

[6] Not all communications made by lawyers about the lawyer or the law firm’s services are advertising. Advertising by lawyers consists of communications made in any form about the lawyer or the law firm’s services, the primary purpose of which is retention of the lawyer or law firm for pecuniary gain as a result of the communication. However, non-commercial communications motivated by a not-for-profit organization’s interest in political expression and association are generally not considered advertising. Of course, all communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a material false statement of fact or law. By definition, communications to existing clients are excluded from the Rules governing advertising. A client who is a current client in any matter is an existing client for all purposes of these Rules. (Whether a client is a current client for purposes of conflicts of interest and other issues may depend on other considerations. Generally, the term “current client” for purposes of the advertising exemption should be interpreted more broadly than it is for determining whether a client is a “current client” for purposes of a conflict of interest analysis.)

[7] Communications to former clients that are germane to the earlier representation are not considered to be advertising. Likewise, communications to other lawyers, including those made in bar association publications and other publications targeted primarily at lawyers, are excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or law firm. Topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are generally not considered advertising. However, a newsletter, client alert, or blog that provides information or news primarily about the lawyer or law firm (for example, the lawyer or law firm’s cases, personnel, clients or achievements) generally would be considered advertising. Communications, such as proposed retainer agreements or ordinary correspondence with a prospective client who has expressed interest in, and requested information about, a lawyer’s services, are not advertising. Accordingly, the special restrictions on advertising and solicitation would not apply to a lawyer’s response to a prospective client who has asked the lawyer to outline the lawyer’s qualifications to undertake a proposed retention or the terms of a potential retention.

[8] The circulation or distribution to prospective clients by a lawyer of an article or report published about the lawyer by a third party is advertising if the lawyer's primary purpose is to obtain retentions. In circulating or distributing such materials the lawyer should include information or disclaimers as necessary to dispel any misconceptions to which the article may give rise. For example, if a lawyer circulates an article discussing the lawyer's successes that is reasonably likely to create an expectation about the results the lawyer will achieve in future cases, a disclaimer is required by paragraph (e)(3). If the article contains misinformation about the lawyer's qualifications, any circulation of the article by the lawyer should make any necessary corrections or qualifications. This may be necessary even when the article included misinformation through no fault of the lawyer or because the article is out of date, so that material information that was true at the time is no longer true. Some communications by a law firm that may constitute marketing or branding are not necessarily advertisements. For example, pencils, legal pads, greeting cards, coffee mugs, T-shirts or the like with the law firm name, logo, and contact information printed on them do not constitute "advertisements" within the definition of this Rule if their primary purpose is general awareness and branding, rather than the retention of the law firm for a particular matter.

Recognition of Legal Problems

[9] The legal professional should help the public to recognize legal problems because such problems may not be self-revealing and might not be timely noticed. Therefore, lawyers should encourage and participate in educational and public-relations programs concerning the legal system, with particular reference to legal problems that frequently arise. A lawyer's participation in an educational program is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients. Such a program might be considered to be advertising if, in addition to its educational component, participants or recipients are expressly encouraged to hire the lawyer or law firm. A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, because slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for nonlawyers should caution them not to attempt to solve individual problems on the basis of the information contained therein.

[10] As members of their communities, lawyers may choose to sponsor or contribute to cultural, sporting, charitable or other events organized by not-for-profit organizations. If information about the lawyer or law firm disseminated in connection with such an event is limited to the identification of the lawyer or law firm, the lawyer's or law firm's contact information, a brief description of areas of practice, and the fact of sponsorship or contribution, the communication is not considered advertising.

Statements Creating Expectations, Characterizations of Quality, and Comparisons

[11] Lawyer advertising may include statements that are reasonably likely to create an expectation about results the lawyer can achieve, statements that compare the lawyer's services with the services of other lawyers, or statements describing or characterizing the quality of the lawyer's or law firm's services, only if they can be factually supported by the lawyer or law firm

as of the date on which the advertisement is published or disseminated and are accompanied by the following disclaimer: “Prior results do not guarantee a similar outcome.” Accordingly, if true and accompanied by the disclaimer, a lawyer or law firm could advertise “Our firm won 10 jury verdicts over \$1,000,000 in the last five years,” “We have more Patent Lawyers than any other firm in X County,” or “I have been practicing in the area of divorce law for more than 10 years.” Even true factual statements may be misleading if presented out of the context of additional information needed to properly understand and evaluate the statements. For example, a truthful statement by a lawyer that the lawyer’s average jury verdict for a given year was \$100,000 may be misleading if that average was based on a large number of very small verdicts and one \$10,000,000 verdict. Likewise, advertising that truthfully recites judgment amounts would be misleading if the lawyer failed to disclose that the judgments described were overturned on appeal or were obtained by default.

[12] Descriptions of characteristics of the lawyer or law firm that are not comparative and do not involve results obtained are permissible even though they cannot be factually supported. Such statements are understood to be general descriptions and not claims about quality, and would not be likely to mislead potential clients. Accordingly, a law firm could advertise that it is “Hard-Working,” “Dedicated,” or “Compassionate” without the necessity to provide factual support for such subjective claims. On the other hand, descriptions of characteristics of the law firm that compare its services with those of other law firms and that are not susceptible of being factually supported could be misleading to potential clients. Accordingly, a lawyer may not advertise that the lawyer is the “Best,” “Most Experienced,” or “Hardest Working.” Similarly, some claims that involve results obtained are not susceptible of being factually supported and could be misleading to potential clients. Accordingly, a law firm may not advertise that it will obtain “Big \$\$\$,” “Most Money,” or “We Win Big.”

Bona Fide Professional Ratings

[13] An advertisement may include information regarding bona fide professional ratings by referring to the rating service and how it has rated the lawyer, provided that the advertisement contains the “past results” disclaimer as required under paragraphs (d) and (e). However, a rating is not “bona fide” unless it is unbiased and nondiscriminatory. Thus, it must evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service’s economic interests (such as payment to the rating service by the rated lawyer) and not subject to improper influence by lawyers who are being evaluated. Further, the rating service must fairly consider all lawyers within the pool of those who are purported to be covered. For example, a rating service that purports to evaluate all lawyers practicing in a particular geographic area or in a particular area of practice or of a particular age must apply its criteria to all lawyers within that geographic area, practice area, or age group.

Meta-Tags

[14] Meta-tags are hidden computer software codes that direct certain Internet search engines to the web site of a lawyer or law firm. For example, if a lawyer places the meta-tag “NY personal injury specialist” on the lawyer’s web site, then a person who enters the search term “personal injury specialist” into a search engine will be directed to that lawyer’s web page. That particular meta-tag is prohibited because Rule 7.4(a) generally prohibits the use of the word

“specialist.” However, a lawyer may use an advertisement employing meta-tags or other hidden computer codes that, if displayed, would not violate a Rule.

Advertisements Referring to Fees and Advances

[15] All advertisements that contain information about the fees or expenses charged by the lawyer or law firm, including advertisements indicating that in the absence of a recovery no fee will be charged, must comply with the provisions of section 488(3) of the Judiciary Law. However, a lawyer or law firm that offers any of the fee and expense arrangements permitted by section 488(3) must not, either directly or in any advertisement, state or imply that the lawyer’s or law firm’s ability to advance or pay costs and expenses of litigation is unique or extraordinary when that is not the case. For example, if an advertisement promises that the lawyer or law firm will advance the costs and expenses of litigation contingent on the outcome of the matter, or promises that the lawyer or law firm will pay the costs and expenses of litigation for indigent clients, then the advertisement must not say that such arrangements are “unique in the area,” “unlike other firms,” available “only at our firm,” “extraordinary,” or words to that effect, unless that is actually the case. However, if the lawyer or law firm can objectively demonstrate that this arrangement is unique or extraordinary, then the lawyer or law firm may make such a claim in the advertisement.

Retention of Copies; Filing of Copies; Designation of Principal Office

[16] Where these Rules require that a lawyer retain a copy of an advertisement or file a copy of a solicitation or other information, that obligation may be satisfied by any of the following: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

[17] A law firm that has no office it considers its principal office may comply with paragraph (h) by listing one or more offices where a substantial amount of the law firm’s work is performed.

REPORTERS’ NOTES

Rule 7.1 governs advertising by lawyers. It is identical to DR 2-101 [22 N.Y.C.R.R. § 1200.6], as amended effective February 1, 2007.

**RULE 7.2:
PAYMENT FOR REFERRALS**

(a) A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that a lawyer may:

(1) refer clients to a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuing basis as permitted by Rule 5.8 provided, however, that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees;

(2) pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by Rule 1.5(e);

(3) pay the reasonable costs of advertisements or communications permitted by these Rules; and

(4) pay for a law practice in accordance with Rule 1.17.

(b) A lawyer, or the lawyer's partner, associate or any other affiliated lawyer, may be recommended, employed or paid by, or may cooperate with, one of the following offices or organizations that promotes the use of the lawyer's services or those of a partner or associate or any other affiliated lawyer, or request one of the following offices or organizations to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other affiliated lawyer as a private practitioner, if there is no interference with the exercise of independent professional judgment on behalf of the client:

(1) a legal aid office or public defender office:

(i) operated or sponsored by a duly accredited law school;

(ii) operated or sponsored by a bona fide, non-profit community organization;

(iii) operated or sponsored by a governmental agency; or

(iv) operated, sponsored, or approved by a bar association;

(2) a military legal assistance office;

(3) a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule;

(4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries, provided the following conditions are satisfied:

(i) neither the lawyer, nor the lawyer's partner, nor associate, nor any other affiliated lawyer nor any nonlawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer;

(ii) such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization;

(iii) the member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter;

(iv) the legal services plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved by the organization for the particular matter involved would be unethical, improper or inadequate under the circumstances of the matter involved; and the plan provides an appropriate procedure for seeking such relief;

(v) the lawyer does not know or have reason to know that such organization is in violation of applicable laws, rules of court or other legal requirements that govern its legal services operations; and

(vi) such organization has filed with the appropriate disciplinary authority, to the extent required by such authority, at least annually a report with respect to its legal services plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its legal services activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

Comment

Paying Others to Recommend a Lawyer

[1] Lawyers are not permitted to pay others for channeling professional work. Paragraph (a)(3), however, allows a lawyer to pay for advertising and communications permitted by these Rules, including the costs of print directory listings, online directory listings, newspaper ads, television and radio airtime, domain name registrations, sponsorship fees, banner ads and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, marketing personnel and web site designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[2] A lawyer may pay the usual charges of a qualified legal assistance organization. A lawyer so participating should make certain that the relationship with a qualified legal assistance organization in no way interferes with independent professional representation of the

interests of the individual client. A lawyer should avoid situations in which officials of the organization who are not lawyers attempt to direct lawyers concerning the manner in which legal services are performed for individual members and should also avoid situations in which considerations of economy are given undue weight in determining the lawyers employed by an organization or the legal services to be performed for the member or beneficiary, rather than competence and quality of service.

[3] A lawyer who accepts assignments or referrals from a qualified legal assistance organization must act reasonably to ensure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. The lawyer must ensure that the organization's communications with prospective clients are in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a qualified legal assistance organization would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic or real-time interactive electronic contacts that would violate Rule 7.3.

[4] A lawyer also may agree to refer clients to another lawyer or a nonlawyer in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1, 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer must not pay anything solely for the referral, but the lawyer does not violate paragraph (a) by agreeing to refer clients to the other lawyer or nonlawyer so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. A lawyer may enter into such an arrangement only if it is nonexclusive on both sides, so that both the lawyer and the nonlawyer are free to refer clients to others if that is in the best interest of those clients. Conflicts of interest created by such arrangements are governed by Rule 1.7. A lawyer's interest in receiving a steady stream of referrals from a particular source must not undermine the lawyer's independent professional judgment on behalf of clients. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprising multiple entities.

REPORTERS' NOTES

Rule 7.2 states the general prohibition that a lawyer may not pay for referrals of clients, and sets out several limited exceptions, including paying fees or dues of a qualified legal assistance organization or sharing fees with another lawyer pursuant to Rule 5.8 (the equivalent of DR 1-107) [22 N.Y.C.R.R. § 1200.5-c]. Rule 7.2 is identical to DR 2-103(D) [22 N.Y.C.R.R. § 1200.08(d)] and DR 2-103(F) [22 N.Y.C.R.R. § 1200.08(f)], as amended effective February 1, 2007.

**RULE 7.3:
DIRECT CONTACT WITH PROSPECTIVE CLIENTS**

(a) A lawyer shall not engage in solicitation:

(1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication, unless the recipient is a close friend, relative, former client or current client; or

(2) by any form of communication if:

(i) the communication or contact violates Rule 4.5, Rule 7.1(a), or paragraph (e);

(ii) the recipient has made known to the lawyer a desire not to be solicited by the lawyer;

(iii) the solicitation involves coercion, duress or harassment;

(iv) the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer; or

(v) the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.

(b) For purposes of this Rule, “solicitation” means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

(c) A solicitation directed to a recipient in New York State shall be subject to the following provisions:

(1) A copy of the solicitation shall at the time of its dissemination be filed with the attorney disciplinary committee of the judicial district or judicial department wherein the lawyer or law firm maintains its principal office. Where no such office is maintained, the filing shall be made in the judicial department where the solicitation is targeted. A filing shall consist of:

(i) a copy of the solicitation;

(ii) a transcript of the audio portion of any radio or television solicitation; and

(iii) if the solicitation is in a language other than English, an accurate English-language translation.

(2) Such solicitation shall contain no reference to the fact of filing.

(3) If a solicitation is directed to a predetermined recipient, a list containing the names and addresses of all recipients shall be retained by the lawyer or law firm for a period of not less than three years following the last date of its dissemination.

(4) Solicitations filed pursuant to this subdivision shall be open to public inspection.

(5) The provisions of this paragraph shall not apply to:

(i) a solicitation directed or disseminated to a close friend, relative, or former or current client;

(ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at a prospective client affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or

(iii) professional cards or other announcements the distribution of which is authorized by Rule 7.5(a).

(d) A written solicitation shall not be sent by a method that requires the recipient to travel to a location other than that at which the recipient ordinarily receives business or personal mail or that requires a signature on the part of the recipient.

(e) No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(f) Any solicitation made in writing or by computer-accessed communication and directed to a predetermined recipient, if prompted by a specific occurrence involving or affecting a recipient, shall disclose how the lawyer obtained the identity of the recipient and learned of the recipient's potential legal need.

(g) If a retainer agreement is provided with any solicitation, the top of each page shall be marked "SAMPLE" in red ink in a type size equal to the largest type size used in the agreement, and the words "DO NOT SIGN" shall appear on the client signature line.

(h) Any solicitation covered by this section shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) The provisions of this Rule shall apply to a lawyer or members of a law firm not admitted to practice in New York State who solicit retention by residents of New York State.

Comment**Solicitation**

[1] In addition to seeking clients through general advertising (either by public communications in the media or by private communications to potential clients who are neither current clients nor other lawyers), many lawyers attempt to attract clients through a specialized category of advertising called “solicitation.” Not all advertisements are solicitations within the meaning of this Rule. All solicitations, however, are advertisements with certain additional characteristics. By definition, a communication that is not an advertisement is not a solicitation. Solicitations are subject to all of the Rules governing advertising and are also subject to additional Rules, including filing a copy of the solicitation with the appropriate attorney disciplinary authority (including a transcript of the audio portion of any radio or television solicitation and, if the solicitation is in a language other than English, an accurate English language translation). These and other additional requirements will facilitate oversight by disciplinary authorities.

[2] A “solicitation” means any advertisement: (i) that is initiated by a lawyer or law firm (as opposed to a communication made in response to an inquiry initiated by a potential client), (ii) with a primary purpose of persuading recipients to retain the lawyer or law firm (as opposed to providing educational information about the law, see Rule 7.1, Comment [7]), (iii) that has as a significant motive for the lawyer to make money (as opposed to a public-interest lawyer offering pro bono services), and (iv) that is directed to or targeted at a specific recipient or group of recipients, or their family members or legal representatives. Any advertisement that meets all four of these criteria is a solicitation, and is governed not only by the Rules that govern all advertisements but also by special Rules governing solicitation.

Directed or Targeted

[3] An advertisement may be considered to be directed to or targeted at a specific recipient or recipients in two different ways. First, an advertisement is considered “directed to or targeted at” a specific recipient or recipients if it is made by in-person or telephone contact or by real-time or interactive computer-accessed communication or if it is addressed so that it will be delivered to the specific recipient or recipients or their families or agents (as with letters, emails, express packages). Advertisements made by in-person or telephone contact or by real-time or interactive computer-accessed communication are prohibited unless the recipient is a close friend, relative, former client or current client. Advertisements addressed so that they will be delivered to the specific recipient or recipients or their families or agents (as with letters, emails, express packages) are subject to various additional rules governing solicitation (including filing and public inspection) because otherwise they would not be readily subject to disciplinary oversight and review. Second, an advertisement in public media such as newspapers, television, billboards, web sites or the like is a solicitation if it makes reference to a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement explicitly refers. The term “specific incident” is explained in Comment [5].

[4] Unless it falls within Comment [3], an advertisement in public media such as newspapers, television, billboards, web sites or the like is presumed not to be directed to or targeted at a specific recipient or recipients. For example, an advertisement in a public medium is not directed to or targeted at “a specific recipient or group of recipients” simply because it is intended to attract potential clients with needs in a specified area of law. Thus, a lawyer could advertise in the local newspaper that the lawyer is available to assist homeowners in reducing property tax assessments. Likewise, an advertisement by a patent lawyer is not directed or targeted within the meaning of the definition solely because the magazine is geared toward inventors. Similarly, a lawyer could advertise on television or in a newspaper or web site to the general public that the lawyer practices in the area of personal injury or Workers’ Compensation law. The fact that some recipients of such advertisements might actually be in need of specific legal services at the time of the communication does not transform such advertisements into solicitations.

Solicitations Relating To a Specific Incident Involving Potential Claims for Personal Injury or Wrongful Death

[5] Solicitations relating to a specific incident involving potential claims for personal injury or wrongful death are subject to a further restriction, in that they may not be disseminated until 30 days (or in some cases 15 days) after the date of the incident. This restriction applies even where the recipient is a close friend, relative, or former client, but not where the recipient is an current client. A “specific incident” is a particular identifiable event (or a sequence of related events occurring at approximately the same time and place) that causes harm to one or more people. Specific incidents include such events as traffic accidents, plane or train crashes, explosions, building collapses, and the like.

[6] A solicitation that is intended to attract potential claims for personal injury or wrongful death arising from a common cause but at disparate times and places, does not relate to a specific incident and is not subject to the special 30-day (or 15-day) rule, even though it is addressed so that it will be delivered to specific recipients or their families or agents (as with letters, emails, express packages), or is made in a public medium such as newspapers, television, billboards, web sites or the like and makes reference to a specific person or group of people, see Comments [3]-[4]. For example, solicitations intended to be of interest only to potential claimants injured over a period of years by a defective medical device or medication do not relate to a specific incident and are not subject to the special 30-day (or 15-day) rule.

[7] An advertisement in the public media that makes no express reference to a specific incident does not become a solicitation subject to the 30-day (or 15-day) rule solely because a specific incident has occurred within the last 30 (or 15) days. Thus, a law firm that advertises on television or in newspapers that it can “help injured people explore their legal rights” is not violating the 30-day (or 15-day) rule by running or continuing to run its advertisements even though a mass disaster injured many people within hours or days before the advertisement appeared. Unless an advertisement in the public media explicitly refers to a specific incident, it is not a solicitation subject to the 30-day (or 15-day) blackout period. However, if a lawyer causes an advertisement to be delivered (whether by mail, email, express service, courier, or any other form of direct delivery) to a specific recipient (i) with knowledge that the addressee is either a person killed or injured in a specific incident or that person’s family

member or agent, and (ii) with the intent to communicate with that person because of that knowledge, then the advertisement is a solicitation subject to the 30-day (or 15-day) rule even if it makes no reference to a specific incident and even if it is part of a mass mailing.

Extraterritorial Application of Solicitation Rules

[8] All of the special solicitation rules, including the special 30-day (or 15-day) rule, apply to solicitations directed to recipients in New York State, whether made by a lawyer admitted in New York State or a lawyer admitted in any another jurisdiction. Solicitations by a lawyer admitted in New York State directed to or targeted at a recipient or recipients outside of New York State are not subject to the filing and related requirements set out in Rule 7.3(c). Whether such solicitations are subject to the special 30-day (or 15-day) rule depends on the application of Rule 8.5.

In-Person, Telephone and Real-Time or Interactive Computer-Accessed Communication

[9] Paragraph (a) generally prohibits in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients. For example, in-person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration. These same risks are present in telephone contact or by real-time or interactive computer-accessed communication and are regulated in the same manner. The prohibitions on in-person or telephone contact and by real-time or interactive computer-accessed communication do not apply if the recipient is a close friend, relative, former or current client. Communications with these individuals do not pose the same dangers as solicitations to others. However, when the special 30-day (or 15-day) rule applies, it does so even where the recipient is a close friend, relative, or former client. Ordinary email and web sites are not considered to be real-time or interactive communication. Similarly, automated pop-up advertisements on a web site that are not a live response are not considered to be real-time or interactive communication. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication.

REPORTERS' NOTES

Rule 7.3 governs solicitation by lawyers. Rule 7.3 is identical to the relevant portions of DR 2-103 [22 N.Y.C.R.R. § 1200.08], as amended effective February 1, 2007.

**RULE 7.4:
IDENTIFICATION OF PRACTICE AND SPECIALTY**

(a) A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or the law firm practices or specializes or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c).

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

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

(1) the lawyer has been certified as a specialist by an organization that has been approved or accredited by the American Bar Association or the New York State Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

Comment

[1] Paragraph (a) permits a lawyer to indicate areas of practice in which the lawyer practices, or that his or her practice is limited to those areas.

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

[3] Paragraph (c) permits a lawyer to state that the lawyer specializes or is certified as a specialist in a field of law if such certification is granted by an organization approved or accredited by the American Bar Association or the New York State Bar Association. In order 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.

REPORTERS’ NOTES

Rule 7.4 prohibits lawyers from claiming to be “specialists” in a particular area of law, with limited exceptions. The Rule is substantially similar to DR 2-105 [22 N.Y.C.R.R. § 1200.10], but makes two changes.

First, adding to the exception in DR 2-105 [22 N.Y.C.R.R. § 1200.10] regarding the designation “Patent Attorney,” Rule 7.4 permits a lawyer engaged in an admiralty practice to use the designation “Admiralty” or “Proctor in Admiralty.” This addition recognizes the ancient origins of this traditional title.

Second, Rule 7.4 changes the organizations that may approve or accredit lawyers as being certified as specialists in a particular field of law. DR 2-105 [22 N.Y.C.R.R. § 1200.10] recognizes the ABA as a certifier and also permits certification by unspecified out-of-state authorities that have authority over specialization in other jurisdictions. Rule 7.4 does not recognize those out-of-state authorities as proper certifiers. Under Rule 7.4, only the ABA and the NYSBA may accredit an organization for purposes of certifying specialists. This limitation avoids the possibility that New York lawyers may claim to be certified by organizations supervised by distant and unknown authorities.

Existing DR 2-105 [22 N.Y.C.R.R. § 1200.10] requires a lawyer who is certified as a specialist and wishes to state that fact to accompany the statement by a long disclaimer. Rule 7.4 eliminates the disclaimer, instead requiring only that the name of the certifying organization be clearly identified. The current disclaimer has the effect of undermining any benefit that might arise from specialty certification, and the disclosure requirement in Rule 7.4 combined with the elimination of approval for out-of-state certifying organizations (other than the ABA, which has long experience and high standards in specialization certification) should be sufficient to guard against abuse and deception.

**RULE 7.5:
FIRM NAMES AND LETTERHEADS**

(a) A lawyer or law firm may use Internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule and are in accordance with Rule 7.1, including the following:

(1) a professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.1(b) or Rule 7.4. A professional card of a law firm may also give the names of members and associates;

(2) a professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state the nature of the legal practice if permitted under Rule 7.4;

(3) a sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice if permitted under Rule 7.4; and

(4) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under Rule 7.1(b) or Rule 7.4. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated "Of Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(b) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation shall contain "PC" or such symbols permitted by law, the name of a limited liability company or partnership shall contain "LLC," "LLP" or such symbols permitted by law and, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Such terms as "legal clinic," "legal aid," "legal service office," "legal assistance office," "defender office" and the like may be used only by qualified legal assistance organizations, except that the term "legal clinic" may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein. A lawyer or law firm may not include the name of a nonlawyer in its firm name, nor may a lawyer or law firm

that has a contractual relationship with a nonlegal professional or nonlegal professional service firm pursuant to Rule 5.8 to provide legal and other professional services on a systematic and continuing basis include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional affiliated therewith. A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit the lawyer's name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

(c) Lawyers shall not hold themselves out as having a law partnership unless they are in fact partners.

(d) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(e) A lawyer or law firm may utilize a domain name for an Internet web site that does not include the name of the lawyer or law firm, provided:

(1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm;

(2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name;

(3) the domain name does not imply an ability to obtain results in a matter;
and

(4) the domain name does not otherwise violate these Rules.

(f) A lawyer or law firm may utilize a telephone number that contains a domain name, nickname, moniker or motto that does not otherwise violate these Rules.

Comment

Professional Status

[1] In order to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status. Lawyers should not hold themselves out as being partners or associates of a law firm if that is not the fact, and thus lawyers should not hold themselves out as being a partners or associates if they only share offices.

Trade Names and Domain Names

[2] A lawyer may not practice under a trade name. Many law firms have created Internet web sites to provide information about their firms. A web site is reached through an Internet address, commonly called a “domain name.” As long as a law firm’s name complies with other Rules, it is always proper for a law firm to use its own name or its initials or some abbreviation or variation of its own name as its domain name. For example, the law firm of Able and Baker may use the domain name www.ableandbaker.com, or www.ab.com, or www.able.com, or www.ablelaw.com. However, to make domain names easier for clients and potential clients to remember and to locate, some law firms may prefer to use terms other than the law firm’s name. If Able and Baker practices real estate law, for instance, it may prefer a descriptive domain name such as www.realestatelaw.com or www.ablerealestatelaw.com or a colloquial domain name such as www.dirtlawyers.com. Accordingly, a law firm may utilize a domain name for an Internet web site that does not include the name of the law firm, provided the domain name meets four conditions: First, all pages of the web site created by the law firm must clearly and conspicuously include the actual name of the law firm. Second, the law firm must in no way attempt to engage in the practice of law using the domain name. This restriction is parallel to the general prohibition against the use of trade names. For example, if Able and Baker uses the domain name www.realestatelaw.com, the firm may not advertise that people buying or selling homes should “contact www.realestatelaw.com” unless the firm also clearly and conspicuously includes the name of the law firm in the advertisement. Third, the domain name must not imply an ability to obtain results in a matter. For example, a personal injury firm could not use the domain name www.win-your-case.com or www.settle-for-more.com because such names imply that the law firm can obtain favorable results in every matter regardless of the particular facts and circumstances. Fourth, the domain name must not otherwise violate a Rule. If a domain name meets the three criteria listed here but violates another Rule, then the domain name is improper under this Rule as well. For example, if Able and Baker are each solo practitioners who are not partners, they may not jointly establish a web site with the domain name www.ableandbaker.com because the lawyers would be holding themselves out as having a partnership when they are in fact not partners.

Telephone Numbers

[3] Many lawyers and law firms use telephone numbers that spell words, because such telephone numbers are generally easier to remember than strings of numbers. As with domain names, lawyers and law firms may always properly use their own names, initials, or combinations of names, initials, numbers, and legal words as telephone numbers. For example, the law firm of Red & Blue may properly use phone numbers such as RED-BLUE, 4-RED-LAW, or RB-LEGAL.

[4] Some lawyers and firms may instead (or in addition) wish to use telephone numbers that contain a domain name, nickname, moniker, or motto. A lawyer or law firm may use such telephone numbers as long as they do not violate any Rules, including those governing domain names. For example, a personal injury law firm may use the numbers 1-800-ACCIDENT, 1-800-HURT-BAD, or 1-800-INJURY-LAW, but may not use the numbers 1-800-WINNERS, 1-800-2WIN-BIG, or 1-800-GET-CASH. (Phone numbers with more letters than

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the number of digits in a phone number are acceptable as long as the words do not violate a Rule.) See Rule 7.1, Comment [12].

REPORTERS' NOTES

Rule 7.5 governs law firm names and letterheads. It prohibits the practice of law under a trade name, prohibits lawyers from holding themselves out as having a partnership unless they are in fact partners, and governs partnerships between or among lawyers who are licensed in different jurisdictions. Rule 7.5 is identical to DR 2-102 [22 N.Y.C.R.R. § 1200.7], as amended effective February 1, 2007.

**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 candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, or in return for having obtained such engagement or appointment, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In any of these circumstances, the integrity of the profession is undermined.

[1A] In addition, campaign contributions by lawyers to government officials or candidates for public office who are or may be in a position to influence the award of a legal engagement may threaten government integrity by subjecting the recipient to a conflict of interest. Similarly, when a lawyer makes a significant contribution to a public official or an election campaign for a candidate for public office and is later engaged by the official to perform legal services for the official's agency, it may appear that the official has been improperly influenced in selecting the lawyer, regardless of whether this is so. This appearance of influence reflects poorly on the integrity of the legal profession and government as a whole.

[1B] For these reasons, just as these Rules prohibit a lawyer from compensating or giving anything of value to a person or organization to recommend or obtain employment by a client, the Rules prohibit a lawyer from making or soliciting a political contribution to any candidate for government office, government official, political campaign committee or political party, if a reasonable person would conclude that the contribution is being made or solicited for the purpose of obtaining or being considered eligible to obtain a government legal engagement. This would be true even in the absence of an understanding between the lawyer and any government official or candidate that special consideration will be given in return for the political contribution or solicitation.

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

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

[4] For the purpose of this Rule, the term “lawyer or law firm” includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] In determining whether a reasonable person would conclude that a contribution to a candidate for government office, government official, political campaign committee or political party is or has been made for the purpose of obtaining or being considered eligible to obtain a government legal engagement or in return for having been awarded such engagement, the factors to be considered include: (i) whether legal work awarded to the contributor or solicitor, if any, was awarded pursuant to a process that was insulated from political influence, (ii) the amount of the contribution or the contributions resulting from a solicitation, (iii) whether the contributor or any law firm with which the lawyer is associated has sought or plans to seek or later does seek government legal work from the official or candidate, (iv) whether the contribution or solicitation was made because of an existing personal, family or non-client professional relationship with the government official or candidate, (v) whether prior to the contribution or solicitation in question, the contributor or solicitor had made comparable contributions or had engaged in comparable solicitations on behalf of governmental officials or candidates for public office for which the contributor or any law firm with which the contributor is associated did not perform or seek to perform legal work, (vi) whether the contributor has made a contribution to the government official’s or candidate’s opponent or opponents during the same campaign period and if so, the amounts thereof, and (vii) whether the contributor is eligible to vote in the jurisdiction of the government official or candidate, and if not, whether other factors indicate that the contribution or solicitation was nonetheless made to further a genuinely held political, social or economic belief or interest rather than to obtain a legal engagement.

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

REPORTERS’ NOTES

Rule 7.6 prohibits a lawyer from accepting government legal work or an appointment from a judge in return for making or soliciting political contributions, a practice often referred to as “pay to play.” The current Disciplinary Rules do not specifically impose the same prohibition, but pay-to-play conduct most likely would constitute the giving of something of value in exchange for employment or a recommendation of employment in violation of DR 2-103(D) [22 N.Y.C.R.R. § 1200.08(d)] (which was designated DR 2-103(B) [22 N.Y.C.R.R. § 1200.08(b)] prior to February 1, 2007).

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The subject is also addressed in EC 2-37 and EC 2-38, which were expressly cited with approval in a March 6, 2000 statement by the New York Unified Court System. The prohibited pay-to-play conduct is pernicious and goes directly to the heart of the justice system. A pointed and specific prohibitory rule is appropriate, rather than trying to shoehorn such conduct into more general rules or aspirational statements.

**RULE 8.1:
TRUTHFULNESS IN BAR ADMISSION MATTERS**

(a) An applicant for admission to the bar or a lawyer in connection with a bar admission application shall not knowingly:

(1) make a false statement of material fact; or

(2) fail to disclose a material fact requested in connection with a lawful demand for information from an admissions authority.

(b) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

Comment

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Thus, 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 as well as that of another.

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

[3] A lawyer representing an applicant for admission to the bar is governed by the Rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

REPORTERS' NOTES

Rule 8.1 requires an applicant for admission to the bar to be honest and to cooperate with bar admission authorities, but also protects certain narrow categories of information against disclosure. It addresses issues now covered by DR 1-101 [22 N.Y.C.R.R. § 1200.2].

Rule 8.1(a) parallels DR 1-101(A) [22 N.Y.C.R.R. § 1200.2(a)] by prohibiting a bar applicant from making a "false statement of material fact" on the application. Rule 8.1(a) also prohibits a lawyer from making a false statement of material fact in connection with a bar application, thus extending the rule against false statements to lawyers who are representing or assisting a person in applying for admission to the bar, including those submitting supporting affidavits or other information to bar admission authorities.

Rule 8.1(a)(2) provides that an applicant shall not "fail to disclose a material fact requested in connection with a lawful demand for information from an admissions authority." This requirement parallels the requirement in DR 1-101(A) [22 N.Y.C.R.R. § 1200.2(a)] that a

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lawyer is subject to discipline if the lawyer “has deliberately failed to disclose a material fact requested in connection with” the lawyer’s application for admission to the bar.

Rule 8.3(c) adds that the Rule “does not require disclosure of information otherwise protected by Rule 1.6” (the basic confidentiality rule), thus making clear that the Rule does not mandate disclosures of confidential information by a lawyer who is representing or counseling a bar admission applicant. Rule 8.3(c) also provides that the Rule does not require disclosure of “information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.” These two exceptions borrow language from the exceptions in DR 1-103(A) [22 N.Y.C.R.R. § 1200.4(a)] that cover the same two categories of information. These exceptions are necessary to avoid discouraging bar applicants who desire to retain counsel or to participate in a lawyer assistance program.

**RULE 8.2:
JUDICIAL OFFICERS AND CANDIDATES**

(a) A lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office.

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

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. False statements of fact by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer may engage in constitutionally protected speech, but is bound by valid limitations on speech and 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.

REPORTERS' NOTES

Rule 8.2 governs lawyers who wish to comment about the qualifications, conduct, or integrity of judges or candidates for judicial office, and governs the conduct of candidates for judicial office. It addresses issues now covered by DR 8-102 [22 N.Y.C.R.R. § 1200.43] and DR 8-103 [22 N.Y.C.R.R. § 1200.44].

Rule 8.2(a) is substantially similar to DR 8-102(A) and (B) [22 N.Y.C.R.R. § 1200.43(a) and (b)] but expands those rules by prohibiting false statements not only regarding “qualifications” but also regarding “conduct or integrity,” which are equally important to a judge’s reputation and self-respect.

Rule 8.2(b) is substantially similar to DR 8-103(A) [22 N.Y.C.R.R. § 1200.44(a)] but requires a candidate for judicial office to comply with “the applicable provisions of the Code of Judicial Conduct,” rather than specifying the precise sections. The proposed formulation will avoid the need to amend Rule 8.2 if the Code of Judicial Conduct is amended or renumbered.

**RULE 8.3:
REPORTING PROFESSIONAL MISCONDUCT**

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(c) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.

(d) This Rule does not require disclosure of:

- (1) information otherwise protected by Rule 1.6;
- (2) information gained by a lawyer serving as an arbitrator, mediator or other third-party neutral in a confidential proceeding; or
- (3) information gained by a lawyer or judge while participating in a bona fide lawyer 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 result in violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions, but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is therefore required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to a tribunal or other authority empowered

to investigate or act upon the violation. Similar considerations apply to the reporting of judicial misconduct.

[3A] Paragraph (c) requires a lawyer in certain situations to respond to a lawful demand for information concerning another lawyer or a judge. This Rule is subject to the provisions of the Fifth Amendment to the United States Constitution and corresponding provisions of state law. 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.

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

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in a bona fide assistance program for lawyers or judges. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) encourages lawyers and judges to seek assistance and treatment through such a program. Without such an exception, lawyers and judges may hesitate to seek assistance and treatment from these programs, and this may result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

REPORTERS' NOTES

Rule 8.3 governs a lawyer's duty to report professional misconduct by judges and lawyers, and articulates exceptions to that duty. It parallels DR 1-103 [22 N.Y.C.R.R. § 1200.4].

Rule 8.3(a) is substantially similar to DR 1-103(A) [22 N.Y.C.R.R. § 1200.4(a)], except that the exceptions for confidential information and information gained in a lawyer assistance program have been moved to paragraph (d).

Rule 8.3(b) creates a new reporting requirement when a lawyer "knows that a judge has committed a violation of the applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office" This is a change from DR 1-103(B) [22 N.Y.C.R.R. § 1200.4(b)], which requires a lawyer to reveal such knowledge only "upon proper request of a tribunal or other authority" To preserve public confidence in the judiciary, judges who violate the Code of Judicial Conduct should be called to account. Lawyers are often in the best position to know what the Code of Judicial Conduct requires and to recognize violations of that Code. Therefore, requiring lawyers to report violations by judges on the same terms under which lawyers are required to report violations by lawyers will deter violations of the Code of Judicial Conduct and increase the likelihood that violations will be reported when they do occur.

Rule 8.3(c) is nearly identical to DR 1-103(B) [22 N.Y.C.R.R. § 1200.4(b)], except that the exception for confidential information has been moved to paragraph (d).

Rule 8.3(d) states the exceptions to the duties articulated in paragraphs (a) through (c). The exceptions in paragraphs (d)(1) and (d)(3) are essentially the same as the exceptions in DR 1-103(A) [22 N.Y.C.R.R. § 1200.4(a)], except that the word "knowledge" has been replaced by

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the word “information.” The exception in paragraph (d)(2), which exempts “information gained by a lawyer serving as an arbitrator, mediator or other third-party neutral in a confidential proceeding,” is a new exception and is designed to protect the reasonable expectations of parties who participate in confidential proceedings with third-party neutrals. The exception resembles the confidentiality provision in the Fee Dispute Resolution Program, 22 N.Y.C.R.R. § 137.12(b) (“All mediation proceedings and all settlement discussions and offers of settlement are confidential and may not be disclosed in any subsequent arbitration.”).

**RULE 8.4:
MISCONDUCT**

A lawyer or law firm shall not:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability:
 - (1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or
 - (2) to achieve results using means that violate these Rules or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.

Comment

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

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for illegal conduct that indicates lack of those characteristics relevant to law practice. Violations involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice are illustrative of illegal conduct that

reflects adversely on fitness to practice law. Other types of illegal conduct may or may not fall into that category, depending upon the particular circumstances. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding. The assertion of the lawyer's constitutional rights consistent with Rule 8.1, Comment [2] does not constitute failure to cooperate. The conduct must be seriously inconsistent with a lawyer's responsibility as an officer of the court.

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

[4A] A lawyer harms the integrity of the law and the legal profession when the lawyer states or implies an ability to influence improperly any officer or agency of the executive, legislative or judicial branches of government.

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

[5A] Unlawful discrimination in the practice of law on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation is governed by paragraph (g).

REPORTERS' NOTES

Rule 8.4 describes various categories of professional misconduct. Like DR 1-102 [22 N.Y.C.R.R. § 1200.3], it applies not only to a "lawyer" but also to a "law firm."

Rule 8.4(a) combines language from DR 1-102(A)(1) and (2) [22 N.Y.C.R.R. § 1200.3(a)(1) and (2)]. The first clause is substantially similar to DR 1-102(A)(1) [22 N.Y.C.R.R. § 1200.3(a)(1)]. The second clause states that it is misconduct for a lawyer to "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," which parallels but goes beyond DR 1-102(A)(2) [22 N.Y.C.R.R. § 1200.3(a)(2)] (a lawyer shall not "[c]ircumvent a Disciplinary Rule through actions of another"). The Rule thus preserves the principle of DR 1-102(A)(2) [22 N.Y.C.R.R. § 1200.3(a)(2)] but sweeps in more varieties of circumvention.

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Rules 8.4(b), (c) and (d) are identical to DR 1-102(A)(3), (4) and (5) [22 N.Y.C.R.R. § 1200.3(a)(3), (4) and (5)].

Rule 8.4(e) has two numbered clauses. The first clause makes it professional misconduct for a lawyer to state or imply an ability “to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official,” which is substantially identical to DR 9-101(C) [22 N.Y.C.R.R. § 1200.45(c)]. The second clause makes it professional misconduct for a lawyer to state or imply an ability “to achieve results using means that violate these Rules or other law.” The second clause has no counterpart in the existing Disciplinary Rules. It will give disciplinary authorities an independent ground to discipline lawyers who boast or suggest that they can get away with violating the law or the ethics rules.

Rule 8.4(f), which makes it professional misconduct for a lawyer to “knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law,” has no direct counterpart in the existing Disciplinary Rules. It is intended to increase public confidence in our system of justice and to deter violations of the Code of Judicial Conduct.

Rule 8.4(g) is identical to DR 1-102(A)(6) [22 N.Y.C.R.R. § 1200.3(a)(6)].

**RULE 8.5:
DISCIPLINARY AUTHORITY AND CHOICE OF LAW**

(a) Disciplinary Authority.

A lawyer admitted to practice in New York State is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer not admitted in New York State is also subject to the disciplinary authority of this state if the lawyer provides or offers to provide any legal services in this state. A lawyer may be subject to the disciplinary authority of both New York State and another jurisdiction for the same conduct.

(b) Choice of Law.

In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

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

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

Comment

Disciplinary Authority

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

Choice of Law

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

practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

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

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice-of-law rules, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

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

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

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

REPORTERS' NOTES

Rule 8.5 deals with the authority of the New York courts to discipline both New York and out-of-state lawyers and provides a choice-of-law rule for such discipline. Rule 8.5 addresses issues now covered by DR 1-105 [22 N.Y.C.R.R. § 1200.5-a].

Like DR 1-105(A) [22 N.Y.C.R.R. § 1200.5-a(a)], Rule 8.5(a) provides that a lawyer admitted to practice in New York State is subject to the disciplinary authority of the state "regardless of where the lawyer's conduct occurs." Rule 8.5(a) also adds explicit authority for New York to discipline a lawyer not admitted in New York if the lawyer "provides or offers to

provide legal services in this state.” Under Rule 5.5, out-of-state lawyers will be permitted to provide legal services in New York under limited circumstances. Rule 7.3(i) (governing solicitation) specifically applies that Rule to out-of-state lawyers who solicit retention by residents of New York. Given the changing nature of law practice and the increased opportunities for non-New York lawyers to interact with New York clients, New York should explicitly assert disciplinary authority over out-of-state lawyers who provide or offer to provide legal services in New York State.

Rule 8.5(b), which parallels existing DR 1-105(B) [22 N.Y.C.R.R. § 1200.5-a(b)], specifies choice-of-law rules so that lawyers will know which jurisdiction’s rules apply to their conduct in various situations, regardless of whether that conduct is in connection with a proceeding in court.

Rule 8.5(b)(1) parallels DR 1-105(B)(1) [22 N.Y.C.R.R. § 1200.5-a(b)(1)] but shortens it to provide simply that “for conduct in connection with a matter pending before a tribunal,” the rules to be applied shall be those of “the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise.” The breadth of the term “tribunal,” as defined in Rule 1.0(u), means that Rule 8.5(b)(1) will provide guidance to lawyers engaged in binding arbitrations, administrative proceedings and other proceedings before tribunals that are not courts of record, to which the current rule is limited. Similarly, by eliminating the reference in DR 1-105(B)(1) [22 N.Y.C.R.R. § 1200.5-a(b)(1)] to bar admission, and by applying the tribunal’s rules whenever conduct is “in connection with” a matter pending before it, Rule 8.5(b)(1) will avoid the potentially difficult situation in which different lawyers working together on a case may be governed by different and perhaps conflicting rules depending on whether they are admitted to practice before the tribunal. Rule 8.5(b)(1) provides clarity to all lawyers performing work in connection with a matter pending before a tribunal, putting them on notice that they will all be governed by the rules of the jurisdiction in which the tribunal sits.

Rule 8.5(b)(2), which applies to any conduct not covered by subparagraph (b)(1), abandons the two-part structure and “principally practices” test of DR 1-105(B)(2) [22 N.Y.C.R.R. § 1200.5-a(b)(2)]. Under DR 1-105(B)(2)(a) [22 N.Y.C.R.R. § 1200.5-a(b)(2)(a)], a lawyer admitted only in New York is governed only by the New York Disciplinary Rules, but a lawyer admitted in New York and one or more other jurisdictions is governed by the rules of the admitting jurisdiction in which the lawyer “principally practices” (a test sometimes requiring a factual inquiry) unless the lawyer’s conduct has its “predominant effect” in a different jurisdiction (a test almost always requiring a complex factual inquiry). Rule 8.5(b)(2) ordinarily shifts the locus of the choice of law to the jurisdiction in which the “conduct occurred,” a relatively straightforward inquiry. Rule 8.5(b)(2) preserves the exception in DR 1-105(B)(2)(a) [22 N.Y.C.R.R. § 1200.5-a(b)(2)(a)] for “predominant effect,” but lessens the burden of factual inquiry on the part of lawyers and courts by providing that 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” (emphasis supplied).

Given the increasing number of New York lawyers either admitted to practice in other jurisdictions or permitted to provide limited legal services by the many other jurisdictions that have adopted a version of Model Rule 5.5, a choice-of-law analysis based on the simple question

of where the lawyer's conduct occurred is logical and easy to apply. Moreover, because lawyers may sometimes have difficulty discerning where the "predominant effect" of their conduct will be felt, the new safe harbor provision affords fairness. The formulation allows lawyers to make a reasonable determination of which rules of professional conduct apply to them in a particular matter.