

**NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT**

PROPOSED RULES OF PROFESSIONAL CONDUCT

**AS ADOPTED
BY THE HOUSE OF DELEGATES AT ITS NOVEMBER 4, 2006 MEETING**

**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 the State of New York which agrees to provide dishonored check reports in accordance with the provisions of Part 1300 of the joint rules of the Appellate Divisions. "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 he or she is a member, or in the name of the lawyer or firm of lawyers by whom he or she 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 which the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into which 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 the State of New York if such banking institution complies with such Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong which specifies 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 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 presently 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 which the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

A lawyer shall maintain for seven years after the events which 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 which 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 an attorney 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 Lawyer's 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 produced pursuant to this subdivision 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 lawyer-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 with 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 IOLA account 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 part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold 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 shall be promptly distributed.

[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 promptly distribute 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.

**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) of this Rule;

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

(iii) available in public court files; and

(iv) concerning the financial terms of the attorney-client 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) of this Rule, 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) of this Rule. 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 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 the state, whether the buyer has ever been disciplined for professional misconduct or convicted of a crime, and whether the buyer currently intends to re-sell 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. See Comment [1A] to Rule 5.6.

Termination of Practice by the 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 this situation, contractual provisions in the agreement governing the sale of the practice may contain reasonable restrictions on a lawyer's resuming private practice.

[3] The private practice of law refers to a private law firm or lawyer, not to a public agency, legal service 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 the State where the practice was previously conducted.

[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. The Rule 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.

[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 his or her 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) of this Rule.

[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. These include, for example, 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 (see Rule 1.1); 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 (see Rule 1.7 regarding conflicts and Rule 1.0(g) for the definition of informed consent); and the obligation of the seller and the buyer to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16). 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] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice. In particular, this Rule 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. 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 disappeared lawyer.

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 an extrajudicial statement 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 is 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 New York 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 also 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 which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of 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 which a prosecutor may make which comply with Rule 3.6(b) or 3.6(d).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. 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, even when such persons are not under the direct supervision of the prosecutor. 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 Comment [6A] to Rule 3.3.

[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. Rules 3.8(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(i), 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.

**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) (i) 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.

(ii) 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 assure 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 its consequences 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 that they know of or should have known of 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 the Rules of Professional Conduct. See Rule 5.2(a).

**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 the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise, a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. 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, the subordinate lawyer is advised to undertake research, to consult with a designated senior partner or special committee (see Comment [3] to Rule 5.1) 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.

**RULE 5.3:
RESPONSIBILITIES FOR NON-LAWYERS**

(a) A law firm shall assure that the work of non-lawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a non-lawyer shall adequately supervise the work of the non-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.

(b) A lawyer shall be responsible for conduct of a non-lawyer 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 non-lawyer is employed or is a lawyer who has supervisory authority over the non-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 its consequences could have been avoided or mitigated.

Comment

[1] This Rule requires a law firm to insure that work of non-lawyers is appropriately supervised. In addition, a lawyer with direct supervisory authority over the work of non-lawyers must adequately supervise those non-lawyers. Comments [2] and [3] to Rule 5.1, which concern supervision of lawyers, provide guidance by analogy for the methods and extent of supervising non-lawyers.

[2] With regard to non-lawyers, who are not themselves subject to these Rules, the purpose of the supervision is to give reasonable assurance that the conduct of all non-lawyers 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 employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A law firm must assure 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 should be responsible for their work product. The measures employed in supervising non-lawyers 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 non-lawyers in the firm will act in a way compatible with these Rules. A lawyer with direct supervisory authority over a non-lawyer has a parallel duty to provide appropriate supervision of the supervised non-lawyer.

[3] Paragraph (b) specifies the circumstances in which a lawyer is responsible for conduct of a non-lawyer that would be a violation of these Rules if engaged in by a lawyer. For guidance by analogy, see Comments [5], [6], [7], and [8] to Rule 5.1.

**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) of this Rule 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 insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

RULE 7.6:
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 when lawyers make or solicit such contributions 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 either circumstance, 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. Correspondingly, 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, whether or not 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 prohibits 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 and (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 (a) whether legal work awarded to the contributor or solicitor, if any, was awarded pursuant to a process that was insulated from political influence, (b) the amount of the contribution or the contributions resulting from a solicitation, (c) whether the contributor or any law firm with which the lawyer is associated has sought or plans to seek or does later seek government legal work from the official or candidate, (d) whether the contribution or solicitation was made because of an existing personal, family or non-client professional relationship with the government official or candidate, (e) 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 lawyer or any law firm with which the lawyer is associated did not perform or seek to perform legal work, (f) whether the contributor has made a contribution to the government official's or candidate's opponent(s) during the same campaign period and, if so, the amounts thereof and (g) 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.