VOLUME 3

MATERIALS PROVIDED TO MEMBERS OF THE COLORADO SUPREME COURT STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

FOR THE THIRD, FOURTH AND FIFTH MEETINGS

COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

AGENDA

June 11, 2004, 1:00 p.m.
Supreme Court Conference Room (5th Floor)

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1. Approval of minutes – See attached pages 1-13.

2. Administrative matters

   a. Confirmation of next meeting date.

   b. Changes in contact information.

3. Rule 5.5 Subcommittee Report – Nancy Cohen - See (a) attached pages 14-16, (b) materials distributed by e-mail prior to September 30, 2003 meeting, and (c) pages 19-48 of January 9, 2004 meeting materials.

4. Rule 1.4 Subcommittee Report – Eli Wald – See (a) attached pages 17-50, and (b) materials distributed by e-mail prior to September 30, 2003 meeting.

5. Proposed amendment to CRCP 265 – See attached pages 51-52.

6. Status report from Ethics 2000 Subcommittee – Michael Berger.

7. Other business

8. Adjournment (by 3:00 p.m.)

Chair
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FILE NOTE

The "submitted minutes" of the prior meeting that were provided to Committee members in advance of the current meeting have been omitted from this file.

See the files containing the *approved* minutes of the Supreme Court Standing Committee on the Rules of Professional Conduct, which are available on the Supreme Court's website.

Marcy Glenn

From: Nancy L. Cohen [nancy.cohen@arc.state.co.us]
Sent: Friday, May 28, 2004 12:00 PM
To: Marcy Glenn
Cc: Boston Stanton (E-mail); Bryan Vanmeveren (E-mail); Rich Casson (E-mail); William Lucero (E-mail)
Subject: Rule 5.5

Marcy

I heard back from two members about the proposed rule. I am sending it to you since I know you want to get the packet out. I am attaching the lastest version of the rule. Call me if you have any questions.

Nancy Cohen
Chief Deputy Regulation Counsel
Office of Attorney Regulation Counsel
600 17th. Street Suite 200- South
Denver, CO. 80202
303-866-6577

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(1) A lawyer shall not:

(a) Practice law in this jurisdiction without a license to practice law issued by the supreme court of the state of Colorado unless specifically authorized by C.R.C.P. 220, C.R.C.P. 221, C.R.C.P. 221.1, C.R.C.P. 222 or federal or tribal law;

(b) Practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction;

(c) Assist a person who is not authorized to practice law pursuant to subpart (a) of this rule in the performance of any activity that constitutes the unauthorized practice of law; or

(d) Allow the name of a disbarred lawyer or a suspended lawyer who must petition for reinstatement to remain in the firm name.

(2) A lawyer shall not employ, associate professionally with, allow or aid a person the lawyer knows or reasonably should know is a disbarred, suspended, or disabled inactive lawyer to perform the following on behalf of the lawyer's client:

(a) Receive, disburse or otherwise handle client funds;

(b) Render legal consultation or advice to the client;

(c) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(d) Appear as a representative of the client at a deposition or other discovery matter;

(e) Negotiate or transact any matter for or on behalf of the client with third parties; or

(f) Engage in activities that constitute the practice of law.

(3) Subject to the limitation set forth below in paragraph (4), a lawyer may employ, associate professionally with, allow or aid a disbarred, suspended, or disabled inactive lawyer to perform research, drafting or clerical activities, including but not limited to:

(a) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(b) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; and

(c) Accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active member who will appear as the representative of the client.

(4) A lawyer shall not allow a disbarred, suspended, or disabled lawyer to have any professional contact with clients of the lawyer or of the lawyer's firm unless the lawyer:

(a) Gives written notice to the client for whom the work will be performed that the disbarred, suspended or disabled lawyer may not practice law; and

(b) Provides such written notice to the client prior to the work.

(c) Retains written notification for no less than two years following completion of the work.

(*Comment to* RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

The definition of the practice of law is established by law and varies from one jurisdiction to another. In order to protect the public, persons not admitted to practice law in Colorado cannot hold themselves out as lawyers in Colorado or as authorized to practice law in Colorado. Rule 5.5(1)(a) recognizes that Rules 220, 221, 221.1, and 222 of the Colorado Rules of Civil Procedure permit lawyers to practice law in accordance with their terms in Colorado without a license from the Colorado Supreme Court. Lawyers may also be permitted to practice law within the physical boundaries of the State, without such a license, where they do so pursuant to Federal or tribal law. Such practice does not constitute a violation of the general proscription of Rule 5.5(1)(a).

Paragraph (1)(c) 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. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in governmental agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

A lawyer may employ or contract with a disbarred, suspended or disabled lawyer to perform services that a law clerk, paralegal or other administrative staff may perform so long as the lawyer directly supervises the work.

The name of a disbarred lawyer or suspended lawyer (who must petition for reinstatement) must be removed from the firm name. A lawyer will be assisting in the unauthorized practice of law if the lawyer fails to remove such name.

Disbarred, suspended or disabled lawyers may have contact with clients of the licensed lawyer so long as the disbarred, suspended or disabled lawyer and the licensed lawyer provide written notice to the client that the lawyer cannot practice law. Written notice to the client shall include advisement of the disbarment, suspension or disability, including a provision that the person cannot give advice or engage in any other conduct considered the practice of law. Proof of service shall be maintained in the licensed lawyer's file for a minimum of two years.

Separate and apart from the suspended or disabled lawyer's obligation not to practice law, the licensed lawyer who employs or hires a suspended or disabled lawyer has an obligation to directly supervise that individual.

Colorado Rule of Professional Conduct 1.4 Subcommittee

To: Supreme Court Standing Committee

Date: June 3, 2004.

Re: Subcommittee Report to the Standing Committee

Ladies and Gentlemen:

The Colorado Rule of Professional Conduct 1.4 Subcommittee recommends to the Standing Committee that it does not endorse Proposed Rule 1.4(c).

Background

On September 30, 2003, the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct ("Standing Committee") appointed the Colorado Rule of Professional Conduct 1.4 Subcommittee ("Subcommittee") asking that the Subcommittee examines and comments on a change to Colo. RPC 1.4 proposed by Advisory Committee – Subcommittee on Malpractice Insurance.[1]

To date, ten jurisdictions have addressed the issue of reporting the maintenance of professional liability insurance. The highest courts in five jurisdictions, Delaware, Nebraska, North Carolina, Michigan and Virginia, require lawyers to disclose on their annual registration statements whether they maintain professional liability insurance. The highest courts in four other jurisdictions, Alaska, New Hampshire, Ohio and South Dakota, have amended their Rules of Professional Conduct to require lawyers to disclose directly to their clients whether they maintain professional liability insurance. In addition, the Oregon Supreme Court, while not having a disclosure rule *per se*, mandates professional liability insurance as a condition precedent to practicing law.[2]

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[1] *See*, September 25, 2003 Memorandum from the Advisory Committee – Subcommittee on Malpractice Insurance to the Standing Rules Committee ("Advisory Memo."), Appendix A.

[2] This summary paragraph appeared, as is, in the April 2004 Report of the American Bar Association Standing Committee on Client Protection ("ABA Report"), at *2, Appendix B.

1. Proposed Rule 1.4(c)

Proposed amendment to Colo. RPC 1.4 purported to impose mandatory disclosure of lack of malpractice insurance. It stated that "a lawyer shall inform a client, in writing, at the time of the client's engagement of the lawyer that the lawyer does not have malpractice insurance... and shall inform the client in writing at any time the lawyer's malpractice insurance drops below [specified] amounts or the lawyer's malpractice insurance is terminated..."

The comment to the Proposed Rule stated the amendment was necessary because the "absence of professional liability insurance is a material fact that may bear upon a client's decision to hire a lawyer."

2. Analysis of Proposed Rule 1.4(c)

(a) Absence of professional liability insurance – a material fact?

Proponents of the Proposed Rule believe that the absence of professional liability insurance constitutes a material fact that should be disclosed so clients can make informed decisions whether to retain un-insured attorneys. There is, however, no credible evidence evaluating if and how information regarding the availability or absence of liability insurance influences the decisions of clients to retain attorneys.

A related argument in support of the Proposed Rule is that some clients assume mistakenly that most attorneys are insured. A disclosure requirement would thus correct erroneous client expectations regarding the availability of liability insurance. There is some empirical evidence in support of this argument. While clients may assume that most Colorado attorneys carry professional liability insurance, a survey conducted in 2003 found that only 60% of responding attorneys had malpractice insurance.[3] On the other hand, even assuming that some clients do expect most attorneys to be covered, there is no hard evidence showing that most lawyers are un-insured.[4] The survey conducted in Colorado in conjunction with the 2003 attorney registration form was arguably inconclusive. While finding that 40% of responding attorneys did not have professional liability, only 7,720 lawyers responded to the survey. Possibly, un-insured attorneys were over-

[3] Advisory Memo., Appendix A.

[4] *See, e.g.*, February 11, 2004 Memorandum from the Lawyers' Professional Committee to the Colorado Bar Association Board of Governors ("Lawyers' Professional Com. Memo."), Appendix C ("[T]he committee is not aware of any empirical evidence to suggest that disclosure of malpractice insurance is needed...).

represented in the survey. Thus, there is no hard evidence supporting the need for disclosure regarding the absence of liability insurance.

(b) The extent of disclosure

Opponents of the Proposed Rule assert that disclosure regarding the absence of professional liability insurance without effective means of public education about the unique characteristics of professional liability insurance, for example, the differences between "claims-made" and occurrence-based policies, deductibles, and other significant policy provisions that may affect actual coverage in a particular matter may mislead clients.[5] Because of the nature of "claims-made" coverage, by the time aggrieved clients discover the professional negligence and damage occurred, the coverage they were told about when they first retained the lawyer may be long gone.[6] Moreover, as Fischer points out, "[d]isclosure rules only advise potential clients that a lawyer has purchased an insurance policy. They say nothing about having insurance coverage, or sufficient coverage based upon the number, nature and size of claims, and the type of alleged malfeasance."[7] Thus, by imposing mandatory disclosure regarding the absence of professional liability insurance, Proposed Rule 1.4(c) may implicitly create a too simplistic and thus mistaken presumption among clients: "if my attorney does not disclose the absence of professional liability insurance it means that insurance is available to me if something goes wrong."

While "the relatively unique nature of lawyers' professional liability insurance makes for unique opportunities for miscommunications between parties,"[8] proponents of the Proposed Rule assert that the complexity of the matter cannot serve as a reason not to inform clients about a relevant material fact. Attorneys may inform clients of the limits on the usefulness of their disclosure, *e.g.*, that most policies are "claims-made" policies and that policies generally do not cover dishonesty or other intentional acts. Lawyers may also explain to clients that given the nature of "claims-made" coverage, it is possible that the insurance policy a lawyer has in place at the time of disclosure may have lapsed at the time a claim for legal malpractice is made and that additional disclosure is only required by the Proposed Rule as long as the representation is ongoing and not after it has been terminated. In addition, lawyers may discuss with clients whether they possess "tail" coverage to protect themselves from this situation. Finally, attorneys may discuss with clients the meaning of policy limits.

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[5] *Id. See also*, Glenn Fischer, *It's What They Don't Know That Can Hurt Them*, 8(1) LAWYER'S PROFESSIONAL LIABILITY ADVISORY 1 (2004).
[6] *Id.*
[7] *Id.* at *2.
[8] *Id.*

(c) The costs of Proposed Rule 1.4(c)

Opponents of Proposed Rule 1.4(c) argue that by creating an indirect incentive for un-covered lawyers to purchase professional liability insurance the Rule may lead to increased premiums for all lawyers and thus to higher costs of legal services.[9] Notably, the argument re the increased cost of legal services depends on the number of un-covered attorneys and the areas of law in which they practice, information on which hard evidence is not currently available. On the other hand, arguably attorneys who are currently un-covered may continue to practice without obtaining coverage and charge reduced fees compared to fees charged by covered attorneys. And yet, since no credible evidence is available, it is also possible that un-insured attorneys do not charge lower fees.

Furthermore, as the number of un-covered attorneys in Colorado is unclear, it is not known how a disclosure requirement would affect the number of lawyers in a particular field, or their hourly rates. Some attorneys, with no history of malpractice or discipline, are unable to obtain any malpractice insurance at any price. Because disclosure of lack of coverage likely connotes incompetence or past misconduct, an unfair aspersion is cast on these attorneys, who may ultimately decide not to continue to practice, or not to practice in a particular field. This, in turn, may not be beneficial to clients.

The Proposed Rule would place a reporting burden on an indeterminable number of un-insured attorneys in the state.[10] Proponents note that the costs can be minimized, for example, New Hampshire which amended its Rules of Professional Conduct to require lawyers to disclose directly to clients whether they maintain professional liability insurance also adopted a standard form Notice to Clients and a standard form Client Acknowledgment.[11]

Opponents further assert that Proposed Rule 1.4(c) may involve a cost in terms of establishing and maintaining client trust. A mandatory disclosure about the absence of professional liability insurance at the outset of the attorney-client relationship may compromise trust and loyalty, two fundamental characteristics of the relationship. Proponents contend that disclosure may increase client confidence in the attorney's trustworthiness and honesty. The arguments on both sides are hard to evaluate empirically.

Finally, opponents of the Rule assert that it may impose a high burden on new-comers to the profession who may find it more costly to obtain liability insurance or on attorneys practicing in high risk fields where coverage is very costly to obtain. Thus the Proposed Rule may constitute a

[9] Evidence from Alaska following implementation of a client disclosure rule supports this contention. Whether it would occur in Colorado is not known.
[10] *See, e.g.*, Lawyers' Professional Com. Memo., Appendix C, at *2.
[11] New Hampshire RPC 1.17.

barrier to entry into the profession and may drive out lawyers from certain practice areas. Proponents counter that there is no credible evidence from jurisdictions which adopted the Proposed Rule to support these contentions.

(d) Self-regulation

Rule opponents argue that Proposed Rule 1.4(c), by imposing a mandatory disclosure requirement regarding the absence of professional liability insurance may create an indirect incentive for un-covered lawyers to purchase such coverage fearing loss of competition to covered attorneys. If mandatory liability insurance is the ultimate goal of Rule 1.4(c) the measure should be regulated directly rather than implicitly via disclosure requirements. Furthermore, Proposed Rule 1.4(c) arguably shifts the locus of attorney regulation from self-regulation to market-regulation by positioning insurance companies as powerful regulators of attorney conduct.

Proponents assert that there is no credible evidence to support the argument. Even assuming the Proposed Rule does creates an indirect incentive for un-covered attorneys to seek coverage, it is not clear that insurance companies will gain undue influence over the regulation of lawyers and the outcome may depend on the specifics of the insurance market in the jurisdiction.

(e) Conclusion

The lack of sufficient evidence makes is difficult to assess to policy considerations explored above. Proponents of Proposed Rule 1.4(c) argue that it serves the goal of informing clients about a relevant material fact regarding the representation and allowing clients a more meaningful participation in the attorney-client relationship. Opponents contend that the Proposed Rule attempts to offer a simplistic solution to an array of complex issues, imposes significant costs on members of the bar and clients and leaves unresolved many concerns. Ultimately, the Proposed Rule's costs outweigh its benefits. A majority of Subcommittee members believes that the Proposed Rule should not be endorsed by the Standing Committee.

A

MEMORANDUM

TO: Standing Rules Committee

FROM: Advisory Committee – Subcommittee on Malpractice Insurance

RE: Amendment to Colo. RPC 1.4

DATE: September 25, 2003

The Advisory Committee met on September 18, 2003, to discuss a potential amendment to Colo. RPC 1.4 regarding the disclosure of lack of malpractice insurance. The Advisory Committee requests that the Standing Rule Committee review the proposed rule and comment, and make recommendations to the Colorado Supreme Court regarding the disclosure rule. The Advisory Committee also requests that the Committee discuss an amendment to the registration statement regarding lack of malpractice insurance.

Attached to this memo is a report dated September 18, 2003, that was provided to the Advisory Committee.

The ABA Standing Committee on Client Protection drafted a proposed amendment to the ABA Model Rule 1.4. To date, however, the ABA Board of the Governors has not adopted it. Four states have adopted disclosure rules. Attached to this memorandum are the following rules: The ABA Standing

Committee on Client Protection proposed rule to Model Rule 1.4; Alaska's rule; New Hampshire's rule; Ohio's rule; and South Dakota's rule.

The proposed amendments to Colo. RPC 1.4 and the Comment are also attached.

Proposed Amendment to Colo. RPC 1.4

(c) a lawyer shall inform a client, in writing, at the time of the client's engagement of the lawyer that the lawyer does not have malpractice insurance of at least $100,000.00 per claim and $300,000.00 annual aggregate, and shall inform the client in writing at any time the lawyer's malpractice insurance drops below these amounts or the lawyer's malpractice insurance is terminated. The lawyer shall maintain a record of these disclosures for a period of seven years from the termination of the client's representation. This disclosure requirement does not apply to lawyers who are in-house counsel or government lawyers who do not represent clients outside their official capacity or in-house employment.

COMMENT

Disclosure of Lack of Malpractice Insurance

Lawyers are not required to maintain professional liability insurance, but if they choose not to, that fact shall be disclosed to a client. Lawyers' funds for client protection are designed to reimburse clients only in the event of their lawyer's dishonesty. *See* C.R.C.P. 252 *et seq.* The absence of professional liability insurance is a material fact that may bear upon a client's decision to hire a lawyer.

Lawyers who are either employed with a governmental entity on a part-time basis are not required to disclose whether they have malpractice insurance of $100,000.00 per claim/$300,000.00 in the aggregate. If, however, the attorney who provides services to a governmental agency is in the private practice of law, then that attorney must make the disclosure described in Colo. RPC 1.4(c). Attorneys representing clients separate from being in-house counsel or representing a governmental entity shall provide disclosure described in this rule.

American Bar Association
Standing Committee on Client Protection

Proposed amendment to Rule 1.4 of the ABA *Model Rules of Professional Conduct* to provide for the disclosure of lack of professional liability insurance

(Changes are bolded and underlined, as of June 5, 2002)

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

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

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

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

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

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

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

(c) A lawyer shall inform new and existing clients, in writing, if the lawyer does not have malpractice insurance. A lawyer shall inform the client, in writing, any time the lawyer's malpractice insurance is terminated. A lawyer shall maintain a record of these disclosures for five years from the conclusion of the client's representation.

(d) The requirements in (c) do not apply to full-time members of the judiciary or full-time, in-house counsel or government lawyers when representing the entity by whom they are employed.

Comment

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

Communicating with Client

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

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

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

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in

significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

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

Withholding Information

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

Disclosure of Lack of Malpractice Insurance

[8] Lawyers are not required to maintain professional liability insurance, but if they choose not to, that fact shall be disclosed to a client. Lawyers' funds for client protection (clients' security funds) are designed to reimburse clients only in the event of their lawyer's dishonesty. See Rule 1.15, Comment [5]. The absence of professional liability insurance is a material fact that may bear upon a client's decision to hire a lawyer.

WEST'S ALASKA COURT RULES
ALASKA RULES OF Search Term Begin PROFESSIONAL Search Term End
CONDUCT

RULE 1.4 COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter undertaken on the client's behalf and promptly comply with reasonable requests for information.

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

(c) A lawyer shall inform an existing client in writing if the lawyer does not have malpractice insurance of at least $100,000 per claim and $300,000 annual aggregate and shall inform the client in writing at any time the lawyer's malpractice insurance drops below these amounts or the lawyer's malpractice insurance is terminated. A lawyer shall maintain a record of these disclosures for six years from the termination of the client's representation.

[Adopted effective July 15, 1993. Amended effective January 15, 1999; effective April 15, 2000.]

Alaska Comment

Subsection (c) does not apply to lawyers in government practice or lawyers employed as in-house counsel.

Lawyers may use the following language in making the disclosures required by this rule:

(1) no insurance: "Alaska Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have malpractice insurance of at least $100,000 per claim and $300,000 annual aggregate and if, at any time, a lawyer's malpractice insurance drops below these amounts or a lawyer's malpractice insurance coverage is terminated. You are therefore advised that (name of attorney or firm) does not have malpractice insurance coverage of at least $100,000 per claim and $300,000 annual aggregate."

(2) insurance below amounts: "Alaska Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have malpractice insurance of at least $100,000 per claim and $300,000 annual aggregate and if, at any time, a lawyer's malpractice insurance drops below these amounts or a lawyer's

malpractice insurance coverage is terminated. You are therefore advised that (name of attorney or firm)'s malpractice insurance has dropped below at least $100,000 per claim and $300,000 annual aggregate."
(3) insurance terminated: "Alaska Rule of Professional Search Term End Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have malpractice insurance of at least $100,000 per claim and $300,000 annual aggregate and if, at any time, a lawyer's malpractice insurance drops below these amounts or a lawyer's malpractice insurance coverage is terminated. You are therefore advised that (name of attorney or firm)'s malpractice insurance has been terminated."

Supreme Court of Ohio

News Releases

April 26, 2001

Court adopts rule requiring disclosure of lack of insurance

The Supreme Court of Ohio is requiring all lawyers without malpractice insurance to notify their clients using a standard form.

The court today adopted in a 5-to-2 vote an amendment to the Code of Professional Responsibility that is based on a recommendation from the Supreme Court Board of Commissioners on Grievances and Discipline. The new rule goes into effect July 1.

If an attorney without malpractice insurance fails to inform his or her client, the court can punish an attorney for violating the disciplinary rule.
"The new rule will provide the public with more information when selecting a lawyer," said Chief Justice Thomas J. Moyer. "A prospective client could consider the existence of malpractice insurance, together with information about an attorney's ability and experience, to make a more informed choice regarding legal counsel."

Mandating disclosure is a direct way of providing information to consumers and an indirect way to encourage more lawyers to get insured without requiring insurance.
Currently, Oregon is the only state to mandate malpractice insurance, providing a policy for lawyers -- an idea that has not been popular elsewhere because of cost and availability. At least three states have some version of a standard disclosure form while Virginia requires disclosure of whether an attorney has malpractice insurance on state attorney registration forms.

Most clients presume lawyers carry insurance, said Jonathan Marshall, secretary to the Board of Commissioners on Grievances and Discipline. "The board was concerned

because of the cases it's seen. There are a large number of lawyers who do not have malpractice insurance and clients who are left completely in the dark."

Both Justices Alice Robie Resnick and Evelyn Lundberg Stratton opposed the new rule. "In the absence of mandating malpractice insurance, the rule is of no practical value since its only requirement is disclosure, which places an unnecessary burden on the scores of attorneys who choose to be self-insured," Resnick said.

Justice Stratton said "If we are not willing to mandate malpractice insurance up front, I believe we should not try to force the issue in such a backdoor manner. This rule creates too many ambiguities that we do not fully address."

TEXT OF OHIO'S AMENDED DR 1-104

(A) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(B) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(C) The notice required by division (A) of this rule shall not apply to a lawyer who is engaged in either of the following:
(1) Rendering legal services to a governmental entity that employs the lawyer;
(2) Rendering legal services to an entity that employs the lawyer as in-house counsel."

WEST'S **SOUTH DAKOTA** CODE
TITLE 16. COURTS AND JUDICIARY
CHAPTER 16-18. POWERS AND DUTIES OF ATTORNEYS
APPENDIX TO CHAPTER 16-18

MODEL RULES OF PROFESSIONAL CONDUCT
CHAPTER 1--CLIENT -LAWYER RELATIONSHIP

Current through End of 2000 Regular Session

Rule 1.4. Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) If a lawyer does not have professional liability insurance with limits of at least $100,000, or if during the course of representation, the insurance policy lapses or is terminated, a lawyer shall promptly disclose to a client by including as a component of the lawyer's letterhead, using the following specific language, either that:
(1) "This lawyer is not covered by professional liability insurance;" or
(2) "This firm is not covered by professional liability insurance."
(d) The required disclosure in 1.4(c) shall be included in every written communication with a client.
(e) This disclosure requirement does not apply to lawyers who are members of the following classes: SDCL 16-18-20.2(1), (3), (4) and full-time, in-house counsel or government lawyers, who do not represent clients outside their official capacity or in-house employment.

Comment
The 1998 amendments establish that the absence of professional liability insurance is a material fact which must be disclosed to clients. The disclosure shall be made at the inception of the attorney-client relationship, or promptly thereafter. Further, if a lawyer has liability insurance and allows it to lapse or if the policy is terminated, there is an affirmative duty to make the disclosure to all clients with active files. The rule provides for uniform disclosure language and mandates that the written disclosure shall be a component of the lawyer's letterhead. Since the rule mandates disclosure only to the client, it necessarily means that lawyers without malpractice insurance will have to maintain two sets of letterhead - one for communications with the client and another for all other letters. Component of the letterhead means pre-printed. In other words, when a lawyer prepares his or her letterhead for printing, the disclosure must appear on the face of the letterhead using the precise language provided in 1.4(c)(1) or (2). It should be noted that Rule 7.5 relating to a lawyer's letterhead requires that this disclosure be printed in black ink and in a type size no smaller than used for printing of the lawyer's name on the letterhead.

Amended by Laws 1999, c. 271 (Sup.Ct. Rule 98-35), eff. Jan. 1, 1999.

WEST'S SOUTH DAKOTA CODE
TITLE 16. COURTS AND JUDICIARY
CHAPTER 16-18. POWERS AND DUTIES OF ATTORNEYS
APPENDIX TO CHAPTER 16-18
MODEL RULES OF PROFESSIONAL CONDUCT
CHAPTER 7--INFORMATION ABOUT LEGAL SERVICES

Rule 7.5. Firm Names and Letterheads.
(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.
(b) A law firm with offices in more than one jurisdiction may use the same name in each

jurisdiction, but identification of the lawyers in an office of the firm shall indicate the ~~jurisdictional limitations on those note licensed to practice in the jurisdiction where the~~ office is located.

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

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

(e) The disclosure required in Rule 1.4(c)(1) or (2) shall be in black ink with type no smaller than the type used for showing the individual lawyer's names.

COMMENT:

Rule 7.5 (e) establishes the requirements for the letterhead component for all lawyers required to make the disclosure of the absence of professional liability insurance. While a lawyer may choose any color of ink for his or her letterhead, the disclosure component must be in black ink. The intent of this requirement is to avoid, for example, a lawyer selecting yellow bond paper for letterhead and printing the mandated disclosure in yellow ink. Further, recognizing the great variance of letterhead styles, rather than mandating a minimum type size, the rule requires that the disclosure be printed with type size no smaller than the type size used to print the lawyer's name. If a lawyer utilizes letterhead that omits the lawyer's name, then the disclosure shall be printed in type size reasonably necessary to comply with the disclosure requirement. Although not required, it is anticipated that most lawyers will prepare letterhead with the disclosure appearing centered and at the bottom of the letterhead.

Amended by Laws 1999, c. 273 (Sup.Ct. Rule 98-37), eff. Jan. 1, 1999.

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[Editor's Note: By order dated December 13, 2002, the New Hampshire Supreme Court adopted Professional Conduct Rule 1.17 as set forth below in Appendix B. This new rule shall be effective on March 1, 2003.]

APPENDIX B

Adopt a new Rule 1.17 to the Rules of Professional Conduct, which shall state as follows:

Rule 1.17. Disclosure of Information to the Client

(a) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement of the lawyer if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance ceases to be in effect. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(b) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(c) The notice required by paragraph (a) of this rule shall not apply to a lawyer who is engaged in either of the following:

(1) Rendering legal services to a governmental entity that employs the lawyer;

(2) Rendering legal services to an entity that employs the lawyer as in-house counsel.

(d) **Transitional period.** Within thirty days after March 1, 2003, which is the effective date of this rule, a lawyer who does not have professional liability insurance in the amounts set forth in paragraph (a) and who is not exempt from the notice requirements under paragraph (c) shall provide notice to each of the lawyer's clients. The notice shall be provided to each client on a separate form set forth following this rule and shall be

signed by the client.

NOTICE TO CLIENT

Pursuant to Rule 1.17 of the New Hampshire Rules of Professional Conduct, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____

(Attorney's signature)

CLIENT ACKNOWLEDGEMENT

I acknowledge receipt of the notice required by Rule 1.17 of the New Hampshire Rules of Professional Conduct that *[insert attorney's name]* does not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____

(Client's signature)

Date: _____

MEMORANDUM

TO: Advisory Committee

FROM: Subcommittee on Malpractice Insurance

DATE: September 18, 2003

Introduction

The subcommittee studied whether the court should mandate disclosure about a lawyer's lack of malpractice insurance coverage to clients and/or the Supreme Court. In 2002, the subcommittee recommended that Colorado lawyers be surveyed to find out how many lawyers do or do not have malpractice insurance. The Supreme Court approved the survey to be included with the 2003 attorney registration form. One purpose of the survey was to obtain information so that the Advisory Committee could make recommendations whether disclosure about the lack of malpractice insurance should be mandated or whether other solutions, such as mandatory insurance, may be feasible.

The Survey Results

The Advisory Committee received responses from 7,720 lawyers. Approximately 60% who responded have malpractice insurance. After the survey results were tabulated and presented to the Advisory Committee, questions arose concerning the feasibility of mandating malpractice insurance and whether a disclosure rule may indirectly convince lawyers to obtain malpractice insurance. A question also arose whether the disclosure rule should include information about the deductible for the professional liability policy.

Based on the survey results, the subcommittee sought additional information about how many lawyers are insured. The Office of Attorney Regulation Counsel (OARC) contacted a number of private insurance companies listed on the Colorado Bar Association website who provide primary insurance coverage. At least one company refused to give any information; others have not responded. Six companies responded, five of which provided information about the number of attorneys each insures. The five companies that gave information, provide coverage to 2,541 lawyers. The subcommittee did not contact ALAS or Lloyds of London, both of which provide malpractice insurance to large local and national law firms.

The OARC also obtained information from Westport Insurance Corporation, the endorsed CBA provider of professional liability insurance. Westport insures 3,500 lawyers. A copy of Chris Buckman's letter is attached.

Mandated Insurance

At the present time, the only state that mandates insurance is Oregon. Oregon, an integrated bar state, adopted its program in the mid 1970's. A description of the Oregon State Bar Professional Liability Fund, its genesis and its success, were reviewed extensively in an article written by Kirk R. Hall, then Chief Executive Officer of the Oregon State Bar Professional Liability Fund. A copy of the article is attached for your information. A summary of cases challenging the Professional Liability Fund's existence and the results of those cases is also attached.

C.R.C.P. 265 addresses the issue of lawyers practicing in a professional corporation or other types of permitted forms of organization. One rule provision addresses the limitation of joint and several liability if the professional company has professional liability insurance of $100,000.00 per claim multiplied by the number of lawyers and $300,000.00 in the aggregate multiplied by the number of lawyers. Limitations on the total amount of required insurance per claim and in the aggregate also addressed information about deductibles or self-retained amounts. Lawyers who want to limit their own liability for misconduct of their partners must comply with C.R.C.P. 265.

Whether the Supreme Court should create a mandatory professional liability fund or mandate malpractice insurance coverage through private carriers are complex questions that need further study and more extensive and diverse participation. The subcommittee therefore recommends appointment of additional members including bar associations' leaders, insurance defense lawyers, underwriting claims representatives (if possible) and private practitioners who engage in various practices of law. Some of the issues to be studied include:

1) If insurance is mandated, should it be through a liability fund or should lawyers be required to obtain insurance through private carriers?

   a. The concern of mandatory insurance from a private carrier is that an insurance company will then determine who is eligible to practice law rather than the Supreme Court.

2) Does the court have the authority to create a fund, similar to the Client Protection Fund, or must legislation be enacted? For example, the state legislature enacted financial responsibility legislation for physicians, dentists and health care institution. *See* C.R.S. §13-64-202. There are exemptions to required professional liability insurance coverage as described in C.R.S. §13-64-301.

3) If a professional liability fund is proposed, who should oversee and operate the fund; what should the maximum claim amounts be, who should fund it, i.e. only private practitioners, and what should the contribution be per lawyer?

Disclosure Requirements

The American Bar Association (ABA) Standing Committee on Client Protection (the committee) has addressed the issue of professional liability insurance coverage. It drafted an amendment to Rule 1.4 of the Model Rules of Professional Conduct on communication to clients about lack of malpractice insurance coverage. The rule provides, in part, that lawyers who lack professional liability insurance or whose policy lapses, give written notice to clients. The committee decided not to submit the proposed rule to the ABA Board of Governors in 2003 because of lack of support. has been recently appointed. The committee, with a new chairperson, meets in mid-October to discuss the status of the proposed rule 1.4.

Based on OARC's participation in organizations at the national level, it is clear that states are currently evaluating disclosure and/or coverage requirements. Four states, Alaska, New Hampshire, Ohio and South Dakota, have malpractice disclosure rules requiring lawyers to inform a client in writing when the lawyer does not carry the mandated minimum level of malpractice.

Alaska's and Ohio's rules require lawyers in private practice to inform a client in writing if the lawyer does not have malpractice insurance of at least $100,000.00 per occurrence and $300,000.00 annual aggregate, or if the lawyer's professional liability insurance is terminated. New Hampshire's rule is similar to the rules adopted by Alaska and Ohio. Ohio and New Hampshire require the client to sign the notice.

South Dakota also amended its Rule 1.4 (communication) by requiring lawyers to disclose to clients in writing, if they lack malpractice insurance of at least $100,000.00 per claim. The information must be made at the beginning of the attorney-client relationship. Ongoing clients must be notified if a policy lapses or is terminated. This information must be included in the lawyer's letterhead using the specific language set forth in the rule. Lawyers who are in-house counsel or government lawyers who do not represent clients outside their official capacity, are not required to include such disclosures. South Dakota also amended its Rule 7.5 (firm names and letterheads) to address malpractice insurance disclosure. That rule provides, *inter alia*, that the disclosure required by Rule 1.4 shall be in black ink with type no smaller than the type used for showing the individual lawyer's names.

Each of the four jurisdictions were contacted to find out the answer to the following: why they chose the professional liability insurance amounts below which disclosure was required; was there any discussion about

deductibles; did the jurisdiction obtain information about an increase in insurance coverage; and was the issue of mandating insurance discussed? The information obtained is discussed below.

Alaska (unified bar state)

Steve Van Goor, Alaska's Bar Counsel, recalls a discussion about the amount listed in the rule. The committee believed the $100,000.00 per claim/$300,000.00 aggregate was a reasonable balance between protection of the client and cost to the lawyer. Mr. Van Goor does not recall any discussion about deductibles or self-insurance, although he didn't think it would make sense that a marginal lawyer has a policy with a high deductible just to avoid telling clients that the lawyer doesn't have coverage.

Alaska prepared a survey before its disclosure rule went into effect. According to Bob Reese of ALPS, an insurance carrier, insurance coverage increased by 10 to 12 percent after the disclosure rule went into effect.

The Alaska Bar considered mandatory malpractice insurance. At that time the cost would have been prohibitive and would have required some contribution by government and public lawyers. The board decided that the disclosure requirement was a reasonable alternative to a mandatory insurance rule.

There have been very few complaints about the mandatory disclosure requirement. The rule has now been in effect for over four years, and it is rare for the state bar to receive a complaint.

New Hampshire (unified bar state)

The New Hampshire Supreme Court created an advisory committee to review suggestions about the disciplinary system and its ethics rules. An attorney who was chair of the professional conduct committee, attended a conference and learned of the South Dakota rule regarding disclosure of lack of malpractice insurance. Acting as an individual, he wrote to the advisory committee and suggested adoption of the South Dakota rule. The rule proposes disclosure of lack of insurance if the amounts are less than $100,000.00 per claim/$300,000.00 aggregate. It is unclear why these amounts were proposed. After the court published the rule, the advisory committee received a comment about disclosing the amount of the deductible. The advisory committee decided it was unnecessary to amend the rule to include such information .

The N.H. advisory committee looked into the issue of mandatory insurance and received information from Oregon. An issue arose whether the court had the authority to issue a rule mandating malpractice insurance. The committee decided not to pursue this option.

New Hampshire's rule was enacted in 2003; no one knows how many lawyers do not carry malpractice insurance. The advisory committee is currently considering a recommendation that the supreme court require all active members of the bar to file an annual form indicating whether they carry such insurance.

Ohio

Ohio decided that lawyers should disclose a lack of insurance if the insurance fell below $100,000.00 per claim and $300,000.00 for aggregate claims. Ohio has a court rule that requires law firms to maintain professional liability insurance in the amount of $50,000.00 per claim and $100,000.00 for aggregate claims, for any liability for acts or omissions in rendering legal services so the committee believed mandating disclosure is appropriate. There was no discussion about deductibles.

The state bar expressed some opposition and offered alternative language that was rejected. A lay member of the Board of Commissioners originally made the proposal for the rule.

The Ohio Supreme Court enacted the rule absent a survey. No survey has been conducted since the rule was enacted. Ohio disciplinary counsel received information from insurance carriers indicating an increase in inquiries for insurance coverage after adoption of the rule.

Ohio considered mandating insurance; however, there was not enough support. Accordingly, the court enacted the disclosure rule.

South Dakota

The committee that studied the issue of malpractice insurance disclosure requirements for lawyers, decided that amounts of $100,000.00 per claim/$300,000.00 in the aggregate below which disclosure would have to be made, was basic coverage. The committee didn't want to substitute its judgment for that of the lawyer/firm and recognized that malpractice insurance is similar to car insurance – the primary expense is for basic coverage and relatively inexpensive to increase that coverage.

The committee believed that most reputable insurance companies would not sell a policy with a large deductible if the attorney could not cover the deductible.

Prior to enacting the rule, South Dakota unscientifically surveyed its lawyer population concerning the number of private practitioners who were insured. It determined that between 75 to 80 percent of private practitioners were insured. After the rule was enacted, South Dakota conducted two

additional surveys which revealed that 97% of the private practice practitioners were insured.

The State Bar of South Dakota also studied mandatory liability insurance. The Bar rejected mandatory insurance because it believed that an underwriting department of an insurance carrier should not decide who could or could not practice law. The committee believed that disclosure to the client was the next best alternative.

Although there was some opposition to the proposed rule, the proposal was approved overwhelmingly by the state bar membership. Thereafter, the court adopted the rule.

Virginia

Virginia requires lawyers to report the status of their insurance coverage to the state bar on an annual basis. That information is then made available to the public on a web site.

Pennsylvania

Pennsylvania also requires that lawyers provide information about their insurance coverage. This information is enclosed with the attorney registration statement. It does not appear that this information is public, and it is unclear why the information is currently being requested.

Recommendation

After compiling the information and studying the issues, the subcommittee recommends the following.

1. Until the court decides whether mandatory malpractice insurance is feasible, the court should adopt an amendment to Colo. RPC 1.4 (communication) by adding the following language.

> c) a lawyer shall inform a client, in writing, at the time of the client's engagement of the lawyer that the lawyer does not have malpractice insurance of at least $100,000.00 per claim and $300,000.00 annual aggregate, and shall inform the client in writing at any time the lawyer's malpractice insurance drops below these amounts or the lawyer's malpractice insurance is terminated. The lawyer shall maintain a record of these disclosures for a period of seven years from the termination of the client's representation. This disclosure requirement does not apply to lawyers who are in-house counsel or government lawyers who do not represent clients outside their official capacity or in-house employment.

This language is taken from the Alaska and South Dakota rules. The committee believes the records should be maintained for seven years because Colo. RPC 1.15 requires maintenance of financial records for seven years.

2. The Attorney Registration Statement be modified by adding a question about malpractice insurance coverage, i.e. does the attorney have malpractice coverage of at least $100,000.00 per claim/$300,000.00 in the aggregate. This information would then be published on the attorney registration web site.

3. The court continue to study the issue of mandatory insurance and expand the subcommittee to include bar associations leaders, insurance defense lawyers, claim adjusters (if possible) and other private attorneys engaged in different areas of law.

B

REPORT

Continuity of judicial regulation of the legal profession depends on action taken by the profession itself.
Robert B. McKay, 1990

The ABA Standing Committee on Client Protection ("the Committee") recommends that the American Bar Association adopt the *Model Court Rule on Insurance Disclosure* ("the Model Court Rule").

OVERVIEW

The ABA *Model Court Rule on Insurance Disclosure* requires lawyers to disclose on their annual registration statements whether they maintain professional liability insurance. The purpose of the Rule is to provide a potential client with access to relevant information related to a lawyer's representation in order to make an informed decision about whether to retain a particular lawyer. The intended benefit of the Model Court Rule is to facilitate the client's ability to determine whether a lawyer is insured. While the Model Court Rule does not require a lawyer to disclose directly to clients whether insurance is maintained or to maintain professional liability insurance, it does impose a modest annual reporting requirement on the lawyer. The information reported by lawyers will be made available by such means as designated by the highest court in the jurisdiction. While this information could be sought during the initial retention process, many clients are unsophisticated and may be reluctant to raise such issues.

Paragraph A of the Model Court Rule requires a lawyer to disclose on the annual registration statement whether professional liability insurance is maintained. Excluded from the Rule's reporting requirement are those lawyers who are not engaged in the active practice of law and those who are engaged in the practice of law as full-time government lawyers or as counsel employed by an organizational client and do not represent clients outside that capacity. A lawyer who is employed to represent an organization on an ongoing basis generally represents a knowledgeable and sophisticated client. Additionally, organizational or governmental clients may have their own professional liability insurance policies.

Finally, Paragraph A places an affirmative duty upon lawyers to notify the highest court whenever the insurance policy covering the lawyer's conduct lapses or is terminated. This ensures that the information reported to the highest court is accurate during the entire reporting period.

Paragraph B of the Model Court Rule requires lawyers to certify to the accuracy of the information reported. Paragraph B also requires that the information submitted by lawyers will be made available by such means as designated by the highest court. For example, in Nebraska and Virginia, information regarding a lawyer's professional liability insurance is made available to a potential client if the client telephones the bar association and requests it. The information can also be accessed on the bars' websites. (See, www.vsb.org, under the headings Public Information, Attorney Records Search, Attorneys without Malpractice Insurance). It was reported to the Committee that this Virginia Bar website receives 1250 visits per month.

Paragraph C of the Model Court Rule clarifies that failure or refusal to provide the required information would result in a lawyer's administrative suspension from the practice of law until such time as the lawyer complies with the Model Court Rule. The Committee is not recommending that a court amend its current Rules of Professional Conduct. Failure or refusal to make the required disclosure would, therefore, not be considered a disciplinary offense. Nevertheless, providing *false* information in response to the Model Court Rule would subject the lawyer to appropriate disciplinary action, pursuant to ABA *Model Rules of Professional Conduct,* Rule 8.4(c), that prohibits, "conduct involving dishonesty, fraud, deceit or misrepresentation."

INSURANCE REPORTING REQUIREMENTS IN UNITED STATES JURISDICTIONS

To date, ten jurisdictions have addressed the issue of reporting the maintenance of professional liability insurance. The highest courts in five jurisdictions, Delaware, Nebraska, North Carolina, Michigan and Virginia, require lawyers to disclose on their annual registration statements whether they maintain professional liability insurance. The Committee's proposed Model Court Rule is patterned after the reporting requirements in these jurisdictions.

The highest courts in four other jurisdictions, Alaska, New Hampshire, Ohio and South Dakota, have amended their Rules of Professional Conduct to require lawyers to disclose directly to their clients whether they maintain professional liability insurance. The Rule in South Dakota, effective January 1, 1999, is the most comprehensive.[1]

In addition, the Oregon Supreme Court, while not having a disclosure rule *per se*, mandates professional liability insurance as a condition precedent to practicing law.

EXISTING ABA POLICIES

On three previous occasions, the American Bar Association has adopted policies requiring lawyers in some circumstances to maintain professional liability insurance. In August 1989, the ABA House of Delegates adopted *Minimum Quality Standards* for lawyer referral services. The minimum standards were adopted as client protection measures. One of the standards is that participating lawyers maintain malpractice insurance coverage.

In August 1992, the ABA House of Delegates adopted *Model Supreme Court Rules Governing Lawyer Referral And Information Services*. Rule 4 of the *Model Rules* requires that in order for a lawyer to participate in the service, the lawyer shall maintain in force a policy of errors and

[1] Rule 1.4 of the South Dakota Rules of Professional Conduct requires South Dakota lawyers to promptly disclose to their clients if they do not maintain professional liability insurance with limits of at least $100,000, or if during the course of the representation, the insurance policy lapses or is terminated, lawyers shall disclose to their clients by including a component of the lawyers' letterhead, using the following specific language, either that: (1) "This lawyer is not covered by professional liability insurance;" or (2) "This firm is not covered by professional liability insurance." The required disclosure is to be included in every written communication with clients. Rule 7.5 (Firm Names and Letterheads) of the South Dakota Rules of Professional Conduct provides that the disclosure ***shall be in black ink with type no smaller than the type used for showing the individual lawyer's names.***

omissions insurance, or provide proof of financial responsibility, in an amount at least equal to the minimum established by the Committee that oversees the service. The Comment to Model Rule 4 states that the intent of the insurance requirement is to ensure that, in the event errors are made by the participating lawyer, the client has redress through the lawyer's policy of insurance. The requirement is contained in the ABA *Minimum Quality Standards* for lawyer referral services (*See* above.). The Comment notes, that only by requiring such insurance, or a showing of financial responsibility, can a client best be protected. In states where lawyer referral services are not immune from lawsuits for negligent referral, this requirement will help protect the lawyer referral service from such suits; in states where such immunity exists, it ensures that a client may find redress against the principal negligent party, the lawyer.

In August 1993, the ABA House of Delegates adopted the ABA *Model Rule for the Licensing of Legal Consultants*. The Model Rule sets forth the requirements for a foreign lawyer to practice law as a foreign legal consultant in the United States on a permanent basis. The Model Rule requires that foreign legal consultants maintain professional liability insurance.

THE PROPOSED *MODEL COURT RULE ON INSURANCE DISCLOSURE*

The Model Court Rule properly places the burden for reporting the maintenance of insurance on the lawyer. Potential clients should not be required to inquire of a lawyer if professional liability insurance is maintained. Many unsophisticated clients either assume that a lawyer is required to provide malpractice insurance or do not even think to inquire if they lawyer is covered.[2] The proposed Model Court Rule would provide potential clients with the ability to independently determine whether a lawyer maintains professional liability insurance. The Model Court Rule is a balanced standard that allows potential clients to obtain relevant information about a lawyer if they initiate an inquiry, while placing a modest annual reporting requirement on lawyers.

Lawyers in the United States, except in Oregon, are not required to maintain professional liability insurance. While clients have the right to hire lawyers who do not maintain professional liability insurance, those who do so will likely have no avenue of financial redress if the lawyer commits an act of negligence. Lawyer disciplinary proceedings primarily offer prospective protection to the public. They either remove lawyers from practice or seek to change the lawyers' future conduct. Protection of clients already harmed is minimal. While lawyer-respondents are sometimes ordered to pay restitution in disciplinary cases, in many jurisdictions the failure of lawyers to make restitution ordered in disciplinary proceedings will not bar subsequent readmission to practice. Clients can also seek restitution from client protection funds when dishonest conduct is involved. Client protection funds are an innovation of the legal profession unmatched by any other profession. Unfortunately, the ability of client protection funds to compensate clients is limited. Restitution is generally available only when a lawyer has misappropriated client funds. Legal malpractice claims are the only manner by which clients can seek redress for acts of negligence. Prospective clients should have the right to decide

[2] A Minnesota lawyer reported to the Committee that based upon his experience in handling legal malpractice actions since 1996, it is a foregone conclusion that every consumer of legal services in the State of Minnesota presumes that the lawyer they hire is insured. He further stated that it is also a given that virtually none of the consumers of legal services ever ask or receive any confirmation as to the insurance status of their lawyer at the time of retention.

whether they want to hire lawyers who do not maintain liability insurance. The Model Court Rule offers the prospective client the ability to make an informed decision.

Lawyers who lack insurance are not immune from malpractice liability. Claims against uninsured lawyers are often abandoned, precisely because there is no available insurance. Plaintiff's counsel know that in evaluating whether to file such a claim, a threshold issue is whether the lawyer is insured. If the claim for damages is modest, many plaintiff's legal malpractice lawyers will elect not to file suit because the risk that any judgment will prove to be uncollectible, in light of how difficult these claims are in other respects, simply makes such claims not worth pursuing. The data on malpractice claims reported by the ABA Standing Committee on Lawyers' Professional Liability is incomplete since potential claims not pursued due to a lack of insurance are not factored.[3]

Malpractice insurance is not a panacea for injuries caused by lawyer negligence. Nevertheless, whether a lawyer maintains professional liability insurance is a material fact that potential clients should have a right to know in retaining counsel. Professional liability insurance does ensure that a client *may* find financial redress against the principal negligent party, their lawyer. The proposed Model Court Rule provides the public with access to relevant information; it does not mandate that lawyers maintain malpractice insurance. The Model Court Rule incorporates a provision requiring an entity designated by the highest court to make the reported information available to the public. The information would presumably be available by telephone, or preferably, by Internet access.

The bar or the lawyer regulatory agency should also inform the public of the limits on the usefulness of this information, e.g., that most policies are "claims made" policies and that policies generally do not cover dishonesty or other intentional acts. Given the nature of claims-made coverage, it is possible that the insurance policy a lawyer has in place at the time when a prospective client is likely to inquire about it, may have lapsed at the time a claim for legal malpractice is made. Most lawyers will probably purchase "tail" coverage to protect themselves from this situation but the public should be made aware of the unique nature of professional liability insurance. The Committee was advised that the experience in Alaska has been that most lawyers who have malpractice insurance today will most likely have it in the future and that, therefore, the value of making the information available to the public outweighed its potential to be misleading by the fact that the policy had lapsed by the time a claim was made.

The Committee recommends that each jurisdiction adopting the Model Court Rule decide if it wants to include, in its version of the Rule, minimum limits of professional liability coverage. Alaska, New Hampshire and Ohio require lawyers to disclose to their clients if the lawyer does not maintain a policy with limits of at least $100,000 per claim and $300,000 annual aggregate.[4]

[3] Data has been collected on legal malpractice claims from the National Association of Bar-Related Insurance Companies and commercial insurers for the period January 1, 1996 through December 31, 1999. During that period, there were reported to be 36,844 legal malpractice claims nationally. This data did not cover the entire lawyer population: a significant percentage of practicing lawyers have no malpractice coverage and not all U.S. malpractice insurers provided data. *Profile of Legal Malpractice Claims, 1996-1999,* American Bar Association, Standing Committee on Lawyers' Professional Liability.

[4] Alaska Court Rules, Rule 1.4 (c), Alaska Rules of Professional Conduct; Rule 1.17, New Hampshire Rules of Professional Conduct; and Ohio Rules of Court, Code of Professional Responsibility, DR 1-104.

South Dakota requires its lawyers to disclose to their clients if the lawyer does not maintain a policy with limits of at least $100,000.[5] The Committee was also advised that a professional liability insurance policy with limits of liability of $200,000/600,000 is the smallest policy limit now offered by Minnesota Lawyers Mutual, the largest legal malpractice insurer in Minnesota.[6]

CONCLUSION

The *Model Court Rule on Insurance Disclosure* would reduce potential public harm by giving consumers of legal services an opportunity to decline to hire a lawyer who does not maintain professional liability insurance. Under this Model Court Rule, a lawyer would inform the highest court in the jurisdiction, or designated entity, whether insurance is maintained. The court would make this information available to the public. During the reporting year, if the policy is terminated or modified, the lawyer would be required to inform the court. The ultimate decision whether or not to maintain professional liability insurance remains with lawyers.

Robert D. Welden, Chair
Standing Committee on Client Protection
August 2004

[5] South Dakota Rules of Professional Conduct, Rule 1.4.
[6] Letter dated February 27, 2004, to the Committee from the Minnesota State Bar Association Rules of Professional Conduct Committee.

MEMORANDUM

TO: Board of Governors

FROM: Lawyers' Professional Liability Committee

SUBJECT: ***Disclosure of Malpractice Insurance***

DATE: February 11, 2004

The Lawyers' Professional Liability Committee has previously advised the Board of Governors of a developing trend across the country to require lawyers to disclose to their clients whether they have professional liability insurance. A number of states have now enacted certain disclosure requirements. The American Bar Association has proposed a model rule on financial responsibility to be addressed by its House of Delegates. Although the committee is not aware of any empirical evidence to suggest that disclosure of malpractice insurance is needed, the Standing Rules Committee of the Colorado Supreme Court has been presented with a request to require disclosure of malpractice insurance. The LPL Committee does not favor the rule submitted to the Standing Rules Committee.

As a threshold matter, it is important to recognize certain aspects of legal malpractice insurance. Lawyer professional liability policies are written on a "claims made" basis. Claims made policies provide insurance coverage for claims that are made against the insured and reported to the insurer during the policy period. See generally, Ballow v. Phico Insurance Company, 875 P.2d 1354 (Colo. 1993). If a claim is made and reported during a policy period, coverage may arise regardless of when the events giving rise to the claim occurred. St. Paul Fire & Marine Insurance Company v. Estate of Hunt, 811 P.2d 432 (Colo. App. 1991). The policy may restrict coverage, however, for prior acts. Claims first made and reported during the policy period may not be covered if the events giving rise to the claim occurred before the prior act date. It is important to note that claims made insurance ceases upon expiration of the policy period. Ballow v. Phico Insurance Company, Id. In addition to the nature of claims made insurance, there are limitations to malpractice insurance including policy deductibles, policy exclusions and financial issues with the insurance company. If there is insurance, it will only provide coverage if the insured attorney fell below the standard of care and caused financial losses to the client. Legal malpractice cases are hotly contested and expensive to litigate.

A lawyer may disclose to a client that malpractice insurance is in place. If the lawyer does not maintain or renew the insurance, however, the insurance may lapse when the client attempts to make a claim against the lawyer. Even if insurance is in place, a prior acts limitation may restrict coverage for a client's claims. Clients will only be protected by malpractice insurance if a policy is in place at the time a claim is made and liability, causation and damages can be proven against the lawyer. Given some, or all, of these issues, malpractice insurance may not provide financial recourse to an unhappy client.

According to the American Bar Association, nine states have enacted some type of disclosure requirement. Four states, Alaska, New Hampshire, Ohio and South Dakota, require lawyers to disclose to their clients whether they maintain professional liability insurance. Five states, Delaware, Nebraska, North Caroline, Michigan and Virginia, require lawyers to disclose on their annual registration statement whether they maintain professional liability insurance. In Nebraska and Virginia, this information is available to potential clients if the clients contact the state bar association. Oregon is the only state that requires professional liability insurance as a condition of practicing law.

The four states that require disclosure to clients place a difficult burden upon lawyers. The rule requires onerous reporting requirements to all clients. It places the burden on every lawyer to contact every client. It fails to address problems that may arise if lawyers move from firm to firm. In essence, it is designed to force lawyers to purchase malpractice insurance rather than meet the difficult reporting requirements. The two states that gather the information and make it available to the public avoid the reporting requirements while addressing the expressed need for the rule. If a potential or existing client is concerned that the lawyer has malpractice insurance, the information is available to them. Of course, the information is available under the current rules if a client inquires from a lawyer about malpractice insurance.

As noted above, legal malpractice insurance, written on a claims made basis, is not easy to apply to every situation. The valid concern that clients should be protected by malpractice insurance may not be met by a change to the disclosure rules. A requirement that lawyers disclose to clients whether they maintain malpractice insurance places a difficult reporting burden with limited effectiveness. It is important to note that the proposal in Colorado would place this reporting requirement upon all lawyers licensed to practice law in this state. The LPL Committee does not feel that an amendment to the rules is necessary. If a rule is to be drawn, however, making the information available to the public may strike an appropriate balance. Still, this does not mean that a lawyer will have insurance in place when a claim is made.

This memorandum is not intended to, and does not, address all of the issues on this topic. It is important for the Board of Governors to be aware, however, of the developing trend in order to evaluate the potential impact on Colorado lawyers. Questions or comments should be directed to the Chair of the Lawyers' Professional Liability, John M. Palmeri, 950 Seventeenth Street, 21st Floor, Denver, Colorado 80202, (303) 296-2828, jpalmeri@wsteele.com.

Legal News

Attorneys—Malpractice

ABA Committee Proposes Model Court Rule Requiring Malpractice Insurance Disclosure

The American Bar Association standing Committee on Client Protection has recommended that the ABA adopt a Model Court Rule that would require lawyers to disclose on their annual registration statements whether they carry professional liability insurance.

Currently, only five jurisdictions require lawyers to disclose this information in their annual registration: Delaware, Nebraska, North Carolina, Michigan, and Virginia. Four others—Alaska, New Hampshire, Ohio, and South Dakota—insist that lawyers tell a client directly if they do not maintain a minimum measure of malpractice coverage. Oregon is the only state that mandates malpractice insurance as a condition of practicing law. See Or. Rev. Stat. § 9.080.

The proposed model rule, which was circulated April 7 to courts, local bars, various ABA entities, and other interested parties, will be submitted for consideration by the ABA House of Delegates at this year's annual meeting in Atlanta, according to committee chair Robert D. Welden, Seattle.

Effort to Amend Rule 1.4 Collapses. This is not the first time the committee has taken action on this issue. In July 2002, the group circulated a proposed amendment to ABA Model Rule of Professional Conduct 1.4 that would have required lawyers to disclose directly to their clients whether they had malpractice insurance. See 70 U.S.L.W. 2643. The committee invited written submissions from state and local bar associations, ABA entities, and other representative organizations of the legal profession and the public. That proposal, Welden told BNA, "received little support."

In December 2003, the committee distributed a proposed Model Rule on Financial Responsibility, which would have required lawyers in private practice to disclose on their annual registration statement whether they maintained insurance of at least $100,000/$300,000 and to divulge any unsatisfied final malpractice judgments against them or the law firm where they were employed.

Welden, who is the Washington State Bar Association's general counsel, said that most of those commenting on the 2003 proposal supported the general notion that lawyers should disclose to the highest court in the jurisdiction whether they maintain professional liability insurance or another form of financial responsibility. But there was resistance, he added, to the idea that lawyers should be compelled to reveal specific policy limits. Welden said there was also concern that a requirement to report unsatisfied final judgments would be too burdensome, particularly for lawyers who had worked at several law firms. Finally, some commentators felt that the phrase "another form of financial responsibility" was too vague.

Back to Square One. The committee then modified its proposal by eliminating any mention of liability amounts, dropping the idea that clients be informed directly, and recasting the proposal as the Model Court Rule on Insurance Disclosure.

Paragraph A of the rule would call on lawyers to disclose on their annual registration statement whether they have professional liability insurance. This provision would applies only to lawyers engaged in the active practice of law and would not include those who are engaged in the practice of law as full-time government

The Standing Committee on Client Protection has recommended that the ABA adopt the following Model Court Rule:

RULE __. INSURANCE DISCLOSURE

A. Each lawyer admitted to the active practice of law shall certify to the [highest court of the jurisdiction] on or before [December 31 of each year]: 1) whether the lawyer is engaged in the private practice of law; 2) if engaged in the private practice of law, whether the lawyer is currently covered by professional liability insurance; and 3) whether the lawyer is exempt from the provisions of this Rule because the lawyer is engaged in the practice of law as a full-time government lawyer or is counsel employed by an organizational client and does not represent clients outside that capacity. Each lawyer admitted to the active practice of law in this jurisdiction who reports being covered by professional liability insurance shall notify [the highest court in the jurisdiction] in writing within 30 days if the insurance policy providing coverage lapses, is no longer in effect or terminates for any reason.

B. The foregoing shall be certified by each lawyer admitted to the active practice of law in this jurisdiction in such form as may be prescribed by the [highest court of the jurisdiction]. The information submitted pursuant to this Rule will be made available to the public by such means as may be designated by the [highest court of the jurisdiction].

C. Any lawyer admitted to the active practice of law who fails to comply with this Rule in a timely fashion, as defined by the [highest court in the jurisdiction], may be suspended from the practice of law until such time as the lawyer complies. Supplying false information in response to this Rule shall subject the lawyer to appropriate disciplinary action.

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lawyers or as counsel employed by an organizational client who does not represent clients outside that capacity.

According to the accompanying report, this last exception is justified on the ground that a lawyer employed by an organization generally represents a knowledgeable and sophisticated client. Moreover, such entities typically have their own professional liability insurance policies.

Finally, paragraph A would put an affirmative duty on lawyers to notify the highest court whenever the insurance policy covering the lawyer's conduct lapses or is terminated.

The rule would not require a lawyer to disclose directly to clients whether insurance is maintained nor would it obligate the lawyer to maintain professional liability insurance.

No Opposition Yet. Paragraph B of the rule would require lawyers to certify that the information reported is accurate and would call for the information to be made available to the public.

In Nebraska, this information is available to the public by searching the state bar's Web site by an attorney's name. See 72 U.S.L.W. 2260.

In Virginia, the public can access insurance information by going to the state bar's Web site, which lists active lawyers who have been disciplined and lawyers who do not maintain malpractice insurance.

Paragraph C of the model rule states that any lawyer failing to comply with the rule may be suspended. According to the report, the committee is not recommending that failure to disclose be made a disciplinary offense, although it adds that submitting false information would likely violate Model Rule 8.4(c) on dishonesty.

The Standing Committee on Client Protection's report and recommendation are posted at http://www.abanet.org/cpr/client.html on the ABA's Web site.

Attorneys—Multijurisdictional Practice

California Supreme Court Approves Rules Authorizing Limited Cross-Border Practice

The California Supreme Court April 8 announced that it is relaxing some of the barriers that currently prevent out-of-state lawyers from rendering legal services in California.

The new rules will allow in-house counsel and public interest lawyers not licensed in California to practice in the state under a system of registration, and also will permit lawyers licensed elsewhere to briefly enter the state in anticipation of a lawsuit or while following up on a transactional matter initiated elsewhere.

The court has directed the state bar to develop the necessary mechanisms and procedures so that the new rules can take effect Nov. 15.

California is the seventh state to enact multijurisdictional practice reform since the American Bar Association endorsed all nine recommendations of the its Commission on Multijurisdictional Practice in August 2002. See 70 U.S.L.W. 2106.

Registration Required. The new in-house counsel exception, set out in California Rule 964, allows registered out-of-state lawyers to provide nonlitigation legal services to a business entity—including its subsidiaries and organizational affiliates—that has at least 10 full-time employees or employs a licensed California lawyer. There is no limit on the number of years in-house counsel may register under this rule.

A lawyer seeking to fit within this exclusion must meet four requirements: reside in California; be a member in good standing of the bar in another state or U.S. territory; agree to abide by the rules governing members of the California bar and to submit to bar discipline; and agree to satisfy the requirements expected of all California bar members, including participation in mandatory continuing legal education.

The rule adds that a lawyer may not register under this provision if the employer provides legal services to others.

The California Supreme Court has approved a new rule, which provides in part:

CALIFORNIA RULE 964

(a) **[Requirements]** For an attorney to practice law under this rule, the attorney must:

(1) Maintain an office in a United States jurisdiction other than California and in which the attorney is licensed to practice law;

(2) Already be retained by a client in the matter for which the attorney is providing legal services in California, except that the attorney may provide legal advice to a potential client, at the potential client's request, to assist the client in deciding whether to retain the attorney;

(3) Indicate on any Web site or other advertisement that is accessible in California either that the attorney is not a member of the State Bar of California or that the attorney is admitted to practice law only in the states listed; and

(4) Be an active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency.

(b) **[Permissible activities]** An attorney who meets the requirements of this rule and who complies with all applicable rules, regulations, and statutes is not engaging in the unauthorized practice of law in California if the attorney:

(1) Provides legal assistance or legal advice in California to a client concerning a transaction or other nonlitigation matter, a material aspect of which is taking place in a jurisdiction other than California and in which the attorney is licensed to provide legal services;

(2) Provides legal assistance or legal advice in California on an issue of federal law or of the law of a jurisdiction other than California to attorneys licensed to practice law in California; or

(3) Is an employee of a client and provides legal assistance or legal advice in California to the client or to the client's subsidiaries or organizational affiliates.

LW ISSN 0148-8139

Supreme Court of Colorado

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MICHAEL L. BENDER
JUSTICE

TELEPHONE 303.837.3741
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April 16, 2004

Mr. Andrew Rosen
Stone, Sheehy, Rosen & Byrne, P.C.
4710 Table Mesa Drive, Suite B
Boulder, CO 80305

Dear Mr. Rosen:

Thank you very much for your letter concerning Rule 265. I am forwarding a copy of your letter to Marcy Glenn who is the Chair of the Rules of Professional Conduct Standing Committee for consideration by this committee.

Sincerely,

Michael L. Bender

Michael L. Bender

MLB/vad
Cc: Marcy Glenn, Chair
Justice Ben Coats

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Telephone [303] 442-0802 *FAX* [303] 442-1835

April 15, 2004

The Honorable Michael Bender
The Honorable Nathan Coats
Colorado Supreme Court
2 East 14th Ave
Denver CO 80203

Re: Rule 265

Dear Justices Bender and Coats:

I have recently come across a serious flaw in Rule 265 regarding lawyer firms practicing as Professional Corporations and LLCs. The clear intent of the rule is to prevent lawyers operating as a group from avoiding personal liability from the acts of their fellow lawyers and employees unless there is adequate professional liability in place. The flaw relates to when the rule says that the insurance must be in effect. It provides that, if insurance is in place AT THE TIME OF THE ACT OR OCCURRENCE, there is no personal liability for the acts of others. Because all professional liability insurance has been CLAIMS BASED for as long as I can remember, and no one to my knowledge even writes OCCURRENCE BASED professional liability insurance, there are two scenarios which would create unintended outcomes under the rule:

1. A law firm has insurance in place at the time of the occurrence but lets it lapse before suit is filed on the claim. There would be no insurance to cover the loss but the individual attorneys would not be liable for the acts of the others.

2. A law firm does not have insurance at the time of the occurrence but subsequently obtains insurance, which is in effect at the time of the claim. There would be insurance to cover the loss but the individual attorneys would have personal liability, regardless.

I believe that the rule is in need of modification to deal with this issue, as I do not believe that subsection (f) adequately addresses this issue. My recommendation is that the rule provide language similar to what is required to be disclosed regarding insurance under CRCP 16 and 26, namely, whether there is insurance in place which covers the claim.

I would also like to point out a potential "loophole" in the rule. There are some law firms which are PCs or LLCs, whose shareholders or members are either PCs or LLCs themselves, there being no individual attorney shareholders or members. The argument can therefore be made that professional malpractice committed by the "parent" firm only imposes personal liability on the sub-PCs or sub-LLCs, thereby circumventing the intent of the rule.

I would be happy to provide proposed language or participate in a committee to look into this problem. I know that there were amendments to the rule in 1995 to address the creation of LLCs in Colorado but I do not know who worked on those changes.

Very truly yours,

Andrew Rosen

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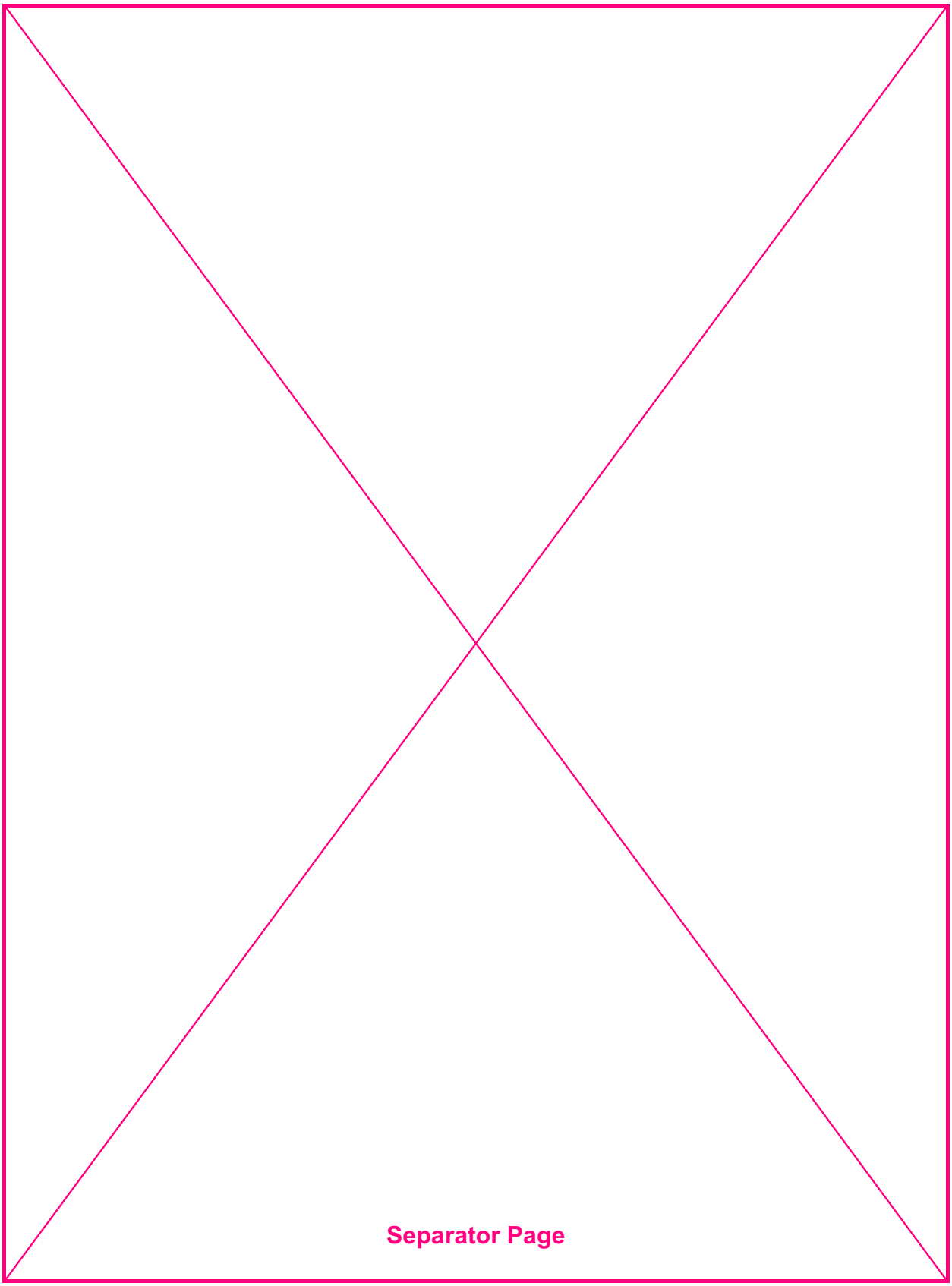

Separator Page

COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

AGENDA

October 1, 2004, 9:30 p.m.
Supreme Court Conference Room (5th Floor)

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1. Approval of minutes – See attached pages 1- 9
2. Administrative matters
   a. Confirmation of e-mail addresses – See attached pages 10-11
   b. Select next meeting dates
3. Ethics 2000 Subcommittee Report on Preamble and Scope and Rules 1.0 through 1.6 – Michael Berger
   a. First Interim Report of Subcommittee – See attached pages 12-98
   b. Letter from Steve C. Briggs – See attached pages 99-106
   c. Robert A. Creamer, "Form Over Federalism: The Case for Consistency in State Ethics Rules Formats," The Professional Lawyer 23 (Spring 2002) – See attached pages 107-110
4. Other business
5. Adjournment (by noon)

Chair
Marcy G. Glenn
Holland & Hart LLP
P.O. Box 8749
Denver, Colorado 80201
(303) 295-8320
mglenn@hollandhart.com

FILE NOTE

The "submitted minutes" of the prior meeting that were provided to Committee members in advance of the current meeting have been omitted from this file.

See the files containing the *approved* minutes of the Supreme Court Standing Committee on the Rules of Professional Conduct, which are available on the Supreme Court's website.

COLORADO SUPREME COURT
STANDING COMMITTEE ON
RULES OF PROFESSIONAL CONDUCT

MEMBERSHIP ROSTER
WITH E-MAIL ADDRESSES

SEPTEMBER 24, 2004

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COLORADO SUPREME COURT COMMITTEE
ON RULES OF PROFESSIONAL CONDUCT

ETHICS 2000 SUBCOMMITTEE

INTERIM REPORT NO. 1

SEPTEMBER 24, 2004

To date, this Subcommittee of the Colorado Supreme Court Standing Committee on Rules of Professional Conduct ("Subcommittee") has met four times to consider the proposals made by the "Ad Hoc ABA Ethics 2000/Colorado Rules of Professional Conduct Committee" ("Ad Hoc Colorado Committee"), chaired by Attorney Regulation Counsel John Gleason. The Ad Hoc Colorado Committee reviewed the proposals made by the American Bar Association Ethics 2000 Commission ("ABA Ethics 2000").

The work of the Subcommittee is proceeding slowly but surely. The Subcommittee is considering a proposal to increase the frequency of its meetings to twice a month to accelerate its work.

At its January 2004 meeting, the Standing Committee decided that the Subcommittee should present periodic reports to the full Standing Committee as the Subcommittee completes portions of its work. Originally, the concept was to report to the full Committee on each series of rules–the Preamble, Scope, Rule 1.x, 2.x, etc. However, the 1.x series of rules is probably the most difficult and complex series and the Subcommittee has not completed its review of all of the Rule 1.x series. This interim report constitutes the recommendations of the Subcommittee on the Preamble, Scope, and Rules 1.1 through 1.6.

At its first meeting, the Subcommittee discussed the weight to be given to the interest of uniformity between the various states that have adopted (or are in the process of adopting) the revised Model Rules of Professional Conduct. The Subcommittee concluded that the interests of uniformity are strong, particularly with respect to the text of the rules. Uniform provisions permit the effective use of precedents (court decisions and opinions of state bar ethics committees) to provide additional guidance to Colorado courts and lawyers. However, in certain areas, longstanding Colorado law, as established by the Colorado Supreme Court, counseled in favor of departures from the ABA Ethics 2000 recommendations. Moreover, where the proposed Comments to the rules (which by their express terms are not authoritative) did not provide sufficient guidance on common issues, the Subcommittee did not hesitate to propose revisions to the Comments.

These are the recommendations of the Subcommittee through Rule 1.6:

Preamble. The Subcommittee recommends, as did the Ad Hoc Colorado Committee, the adoption of the ABA Ethics 2000 proposed changes. The change reflects the deletion of Model Rule 2.2, which pertained to lawyers acting as intermediaries between clients and the addition of Model Rule 2.4, which pertains to lawyers acting as "third party neutrals", such as mediators and arbitrators.

Scope. The first change recommended by ABA Ethics 2000 to the Scope section was to delete a sentence stating that government lawyers "may also have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so." The ABA Commission concluded that that sentence was an inaccurate statement of the law. The Ad Hoc Colorado Committee agreed and so do we.

The second change recommended by ABA Ethics 2000 to the Scope section (and approved by the Ad Hoc Colorado Committee) is more controversial. The scope section of the current Colorado Rules states, in relevant part: "Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty." The ABA Ethics 2000 Commission (with the concurrence of the Colorado Committee) proposed changing the above-quoted language to "Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." The members of the Subcommittee were divided as to whether the proposed change in language and substance was appropriate. Position papers were drafted by members of the subcommittee on both sides of this issue. Rather than summarize these positions here, copies of the position papers are attached.

After considerable debate, a substantial majority of the Subcommittee voted to recommend the adoption of the proposal of ABA Ethics 2000 (and the Ad Hoc Colorado Committee), but with one change. A majority of the Subcommittee recommends the addition of the words "in appropriate cases" in the last sentence of the paragraph such that the sentence, as now recommended by the Subcommittee, reads: "Nevertheless, since the Rules do establish standards of conduct by lawyers, in appropriate cases a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." The addition of the phrase "in appropriate cases" is intended to negate a possible construction of the sentence recommended by ABA Ethics 2000 (and the Ad Hoc Colorado Committee) that evidence of a rules violation is **always** admissible in a civil action for legal malpractice. The Subcommittee believes that the admission of evidence in an adjudicatory proceeding is highly fact intensive and should be evaluated by a trial court (and appellate courts) in the same manner that other evidence is evaluated. No hard and fast rule of admissibility, or even a presumption of admissibility, is warranted.

During this debate, a third position emerged, which is now supported by a minority of the Subcommittee. The minority believes that the last sentence of the paragraph (if not the entire paragraph) should be deleted entirely. In the view of the minority, the last sentence of the paragraph (even as watered down by the majority proposal) is either a rule of evidence or a substantive rule of law. Neither the Subcommittee nor the Standing Committee was charged with

the task of recommending changes to the Rules of Evidence, and certainly neither was charged with making recommendations regarding changes in the substantive law of the civil liability of lawyers. The minority believes that questions regarding the applicability of the Rules of Professional Conduct to civil suits for legal malpractice should be determined on a case by case basis by courts in adversary proceedings, rather than rulemaking proceedings such as these.

Rule 1.0. This is a new rule setting forth the terminology used in the Rules. Some of the defined terms were in the "Terminology" section of the Model Rules. Other defined terms are new. The Ad Hoc Colorado Committee recommended adoption of the ABA Ethics 2000 rule in its entirety, and the Subcommittee joins in that recommendation.

Rule 1.1. ABA Ethics 2000 recommended no changes to the text of Rule 1.1. The changes to the Comment are noncontroversial and the Subcommittee recommends (as did the Ad Hoc Colorado Committee) those changes.

Rule 1.2. ABA Ethics 2000 revised the text of ABA Model Rule 1.2 to include a sentence recognizing a lawyer's implied, as opposed to express, authority to act on a client's behalf. This change was designed to eliminate any suggestion that a lawyer must continually consult with a client to obtain the client's authority to act. In addition, ABA Ethics 2000 also added language to require that any limitation on the scope of representation be reasonable, a corollary of a lawyer's duty to provide competent representation. Some purported limitations on the scope of the representation would eviscerate a lawyer's duty to provide competent representation and where that occurs, the limitation in the scope of representation is not reasonable or permissible.

The Ad Hoc Colorado Committee recommended the adoption of the ABA Ethics 2000 proposal with two modifications. First, the Ad Hoc Colorado Committee recommended the retention of the current text of Colo. RPC 1.2(c), which the Colorado Supreme Court added in 1999 in conjunction with the adoption of the limited representation authorized by C.R.C.P. 11(b) and C.R.C.P. 311(b). The Ad Hoc Colorado Committee also recommended that current Colo. RPC 1.2(f) be retained as new Rule 1.2(e).

The Subcommittee agrees with the recommendations of the Ad Hoc Colorado Committee in this regard except that the Subcommittee believes that Rule 1.2(e), as proposed by the Ad Hoc Colorado Committee, should be moved to a new Rule 8.4(g). The Subcommittee also voted to make minor stylistic edits to Rule 1.2(e) in order to move that rule (which prohibits conduct that exhibits or is intended to engender bias against a person on the basis of race, gender, etc.) to a new Rule 8.4(g), and to amend the existing Rule 8.4 Comment [3] to read, in its entirety as follows:

"A lawyer who, in the course of representing a client, knowingly manifests by word or conduct, bias or prejudice based upon race, gender , religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (g) and also may violate paragraph (d). Legitimate advocacy respecting the foregoing factors does not violate paragraphs (d) or (g).

A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule."

The subcommittee was of the view that proposed Rule 1.2(e) more properly belonged in Rule 8.4. The Rule 8.4 comment was amended to reflect that under appropriate circumstances, words or conduct reflecting generally inappropriate conduct may be required in the course of legitimate advocacy and should not be subject to sanctions.

Rule 1.3. After considerable discussion, the subcommittee voted to remove the second sentence of proposed Rule 1.3. This sentence is not in the rule as proposed by ABA Ethics 2000, nor was it in the prior version of the ABA Model Rules. It is in the existing Colorado Rule 1.3. The Subcommittee concluded that the second sentence of Rule 1.3 was redundant and unnecessary. The interest of maintaining uniformity with the ABA Model Rules outweighs any interest served by the retention of this redundant sentence.

Rule 1.4. The Subcommittee recommends, as did the Ad Hoc Colorado Committee, the adoption of all of the changes recommended by the ABA Ethics 2000. The Subcommittee also agrees with the Ad Hoc Colorado Committee's recommendation to add Comment [8] to cross reference the communication requirement set forth in Rule 1.5(b).

Rule 1.5. Existing Colorado Rule 1.5 is one of the few rules that differs substantially from the corresponding ABA Model Rule. The Subcommittee agrees with the analysis of the Ad Hoc Colorado Committee and recommends the adoption of the proposal of the Ad Hoc Colorado Committee, with three changes. The first is that the title of the rule should be "Fees and Expenses". The text of the rule obviously deals with expenses (costs) as well as fees and the title should reflect that fact.

Second, the Subcommittee believes that the last sentence of Proposed Rule 1.5(b) (as proposed by the Ad Hoc Colorado Committee) should be replaced by the following:

"Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses, which may reasonably be expected to increase the fees and expenses payable by the client, are subject to the provisions of Rule 1.8(a)."

The Subcommittee believes that the purpose of the sentence in the proposed rule is to protect the client from overreaching by the lawyer. In circumstances where the client is clearly benefited by the amendment to the fee agreement, such as where the lawyer reduces the fee, there is no good reason to require compliance with Rule 1.8(a).

Finally, the Subcommittee recommends the addition of paragraph numbers to the comments following comment [8]. It appears that this was simply a typographical error in the report of the Ad Hoc Colorado Committee.

Rule 1.6. There was considerable discussion in the Subcommittee as to the breadth of both existing and proposed Rule 1.6(a), which is not limited to confidential information. Both versions apply to **all** information relating to the representation of the client and thus include information which is a matter of public record and even information generally known to the public. Notwithstanding the great breadth of Rule 1.6(a), it does not appear that any arguable overbreadth has created serious problems with lawyer compliance. Nor has it apparently led to questionable disciplinary actions in Colorado or elsewhere. The Subcommittee therefore concluded that the interests of uniformity outweighed the concerns about the breadth of the rule and the Subcommittee recommends the adoption of all of the proposed text of Rule 1.6. The Subcommittee does recommend two changes to the Comments.

The first proposed change moves the last sentence of Comment 13 to a newly created Comment 13A. The reason for this is that the last sentence of Comment 13 (concerning a lawyer's duty of disclosure to avoid assisting a client's criminal or fraudulent act) does not relate to the previous portion of Comment 13 (concerning a lawyer's duties of disclosure when faced with court orders or other law), but nevertheless provides important guidance to lawyers. In order to maintain, as much as possible, uniformity in the numbering of the comments between the jurisdictions adopting the Model Rules, a new Comment 13A is proposed to be created.

The Subcommittee also recommends an addition to Comment 13 to specifically address the issue as to whether a subpoena is a "court order" within the meaning of proposed Rule 1.6(b)(6). The Subcommittee recommends the addition of the sentence "For purposes of paragraph (b)(6), a subpoena is a court order." The reason for this addition is the confusion that exists in proposed Comments [12] and [13]. Comment [12] deals with the "other law" exception stated in Rule 1.6(b)(6). To the extent that a subpoena constitutes "other law", neither the proposed Rule nor the proposed Comment provide any real guidance as to how a lawyer should treat a subpoena issued to the lawyer. Obviously, the subpoena cannot be ignored, but what are the obligations of lawyers to protect the confidential (Rule 1.6(a) information) and/or privileged information of the client when the lawyer is served with a lawful subpoena? Rule 1.6(a) does not create any evidentiary privilege either on the part of the lawyer or the client. The rule prohibits the **voluntary** disclosure of such information by the lawyer, without the consent of the client. However, compliance with a subpoena is not voluntary. A lawyer, like any other witness, has the obligation to provide relevant evidence, provided that such evidence is not subject to a legal privilege (or the disclosure of which is prohibited by other law). In the view of the Subcommittee, Comment 13, with the amendment proposed by the Subcommittee, strikes the appropriate balance between the protection of the client's confidential and privileged information and the lawyer's duty (like any other witness) to provide relevant information in response to a subpoena.

REPORT ON PROPOSAL TO AMEND THE PREAMBLE TO THE COLORADO RULES OF PROFESSIONAL CONDUCT

The Colorado Supreme Court Ad Hoc Committee recommended that Colorado adopt a change the American Bar Association made to the Model Rules of Professional Conduct dealing with the utilization of the rules in determining issues of a lawyer's civil liability for malpractice. Specifically the language change would be as follows:

The present language in the Scope section of the Preamble to the Rules reads:

> "Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty."

The recommendation of the Ad Hoc Committee would replace this sentence with the following:

> "Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."

Several issues should be considered in the contemplation of this change. The first is whether this change would then allow the Rules themselves to be used as specific pronouncements of the standard of care (as opposed to conduct) in civil litigation involving a damage claim for a lawyer's breach of the standard of care. If so, the proposal implements the procedures suggested by §52 of the Restatement of the Law Third, The Law Governing Lawyers. §52 (2) (c) suggests that the violation of a Rule regulating the conduct of lawyers may be considered by a trier of fact as an aid in understanding the duty of care to exercise the competence and diligence normally exercised by lawyers in similar circumstances. A "conduct" rule would express the standard of care. Both the Restatement and the ABA make the violation of a Rule available to the claimant in a civil damage action for breach of the standards of care. This utilization raises several questions that ought to be considered by the Standing Committee and by the Supreme Court before adopting what may seem to be a rather radical change in the practical utilization of the Rules.

This change would constitute a fairly dramatic change in the civil litigation process of determining a lawyer's liability for damages occasioned by the lawyer's breach of the standard of care. Up to now Colorado has not allowed the Rules to be used for this purpose. Based largely upon the existing language in the Preamble, the Colorado Supreme Court has held that the Rules of Conduct were not appropriate as the measure for determining civil liability. See Olson & Brown v. City of Englewood, 889 P.2d 673 at 676. "These Rules are not designed to alter civil liability, nor do they serve as the basis for such liability." To be sure, the Court continues in its opinion to discuss the applicability of R.P.C. 1.16 and its influence on the issues involving client's discharge of the law firm and the lawyer's attempt at recovery of the reasonable value of legal services. The case, therefore, may not be entirely consistent.

Prior to the Olson & Brown case, the Tenth Circuit Court of Appeals had addressed similar issues in Miami Int'l Realty Company v. Paynter, 841 F.2d 348 (Tenth Cir. 1988). In that case, the Tenth Circuit opined that the Colorado courts would, in all likelihood, utilize the Rules in some fashion to help determine a lawyer's civil liability although at the time of the decision the Colorado courts had not specifically addressed the issue. For the proponents of the limitation, the Olson & Brown case is seen as a prohibition against the use of the Rules as a measure for determining the standard of care. Its prohibition, however, appears to be predicated largely on the specific language this proposal would change. For the proponents of the change that might encourage utilization of the Rules in the determination of a standard of care, the imprecision of the Olson & Brown case and the encouragement of the Miami Int'l Realty case are seen to be invitations to such utilization and would support the presently proposed change.

The ALI justifies the creation of §52 by its analysis of the number of other jurisdictions that have authorized the use of the Rules in some fashion or other. The anecdotal commentary is that a majority of the states have turned to utilization of the Rules of Conduct as an aid in determining the standard of care. A survey of the several states that have pronouncements on the subject suggest a rather even split between the states allowing the use of the Rules and those which would limit or prohibit their use. The cases cited by the ALI range from the prohibition expressed in Hizey v. Carpenter, 830 P.2d 646 (Wash. 1992) to the extreme of Nolan v. Foreman, 665 F.2d 738 (Fifth Circ. 1982), a Fifth Circuit 1982 case on the Texas Rules Governing the State Bar. (The equivalent of our former Code of Professional Responsibility). Many of the states that have allowed discussion of the Rules of Conduct qualify the use by the general proposition that the Rules do not, by themselves, give rise to a cause of action or by themselves establish the conduct a violation of which would be determinant of the applicable duty of care. Pressley v. Farley, 579 So.2d 160 (Fla. App. 1991). In other words, Rule violations are not negligence *per se* even though they may be admissible as some evidence of negligence. Hill v. Willmott, 561 SW.2d 331 (Ky. App. 1978).

The concern for the effect this change might have on the applicability of the Rules is rooted to a large extent in the distinction between standard of care and standard of conduct. By way of anecdotal information, the Standing Rules Committee was advised by Professor Moore that the Ethics 2000 Committee did not even think about any distinction between these two concepts because the discussion was never presented. Since the issue in a civil litigation focuses on the adherence to or breach of the standard of care, there might be some confusion in the application of a rule defining the standard of conduct as it applies to the common law concept of a standard of care. There may be, for instance, incidents where a lawyer's breach of the Rules of Conduct could very well be in the exercise of due care for the representation of a client. In an extreme case a lawyer might violate the requirement for candor to a tribunal in an effort to further the interests of a client where the lawyer genuinely felt the client's legitimate position could not be advanced in any other way. The lawyer would have no liability to the client for breach of the standard of care, but might be exposed to discipline for breach of the standard of conduct. The much publicized trial tactics in the defense of the Chicago Seven is somewhat illustrative of this concept.

An additional concern has to do with the fear that the utilization of the Rules in civil litigation might give rise to the establishment of *per se* standards of negligence. The Nolan case determining that the Rules define professional duties as a matter of law gives rise to this sort of concern. On the hand, should the lawyer charged with violating the standard of care be able to demonstrate adherence to the black letter of the Rule to demonstrate conformance with the Rule of Conduct and thus compliance with the standard of care. If the standards of care and conduct are concomitant concepts, the utilization of the Rules to establish negligence should also present an opportunity for conformance to establish the duty of care.

In the last analysis this change suggests a fundamental adjustment in the way in which the Rules would be used. As the Rules become more particular and more specific, the definition of the standard of care would become more specific and eventually constitute the codification of the standard of care. Predictably, the Courts in general could begin including the language of the Rules in their instructions to the jury. This could be a logical consequence and should be seriously considered.

If the Committee's recommendation is to adopt the change, some adjustments might be appropriate. For instance, since the ABA's Model Rule is imprecise and creates a confusion between the concept of conduct and the concept of care, should the Committee suggest to the Supreme Court a resolution to this confusion. If in concept the standard of conduct and the standard of care are indeed different, should we not consider whether to recommend that the Rules clearly define the standards of care as opposed to perpetuating the confusion. Should the Rule not candidly state that violation of a Rule, or conformance with it, may be evidence of the breach of the applicable standard of care, or, conversely, conformance with the standard of care? If there indeed is no distinction between ethical conduct and professional care, should not the Rules clear up any confusion there might be between these concepts? If the Rules are indeed intended to be used as evidence of the standards of care, should we not be honest with the practicing Bar and declare this to be so? It would seem that the distinction between a standard of conduct and whatever other duties a lawyer has to a client, if such distinction exists, should be clarified by what are otherwise sure to become very specific standards of care.

The distinction or lack of distinction between the concepts of care and conduct received a thorough discussion in an article by Gary Munneke and Anthony Davis in the Journal of Legal Profession. They wrote The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It? 22 J. Legal Prof. 33 (1997/1998). This is a long dissertation on whether there is confusion between these terms and whether the Rules of Conduct do, in fact and in law, define the standard of care. If, as this article seems to suggest, there is no distinction and the conduct rules do define the standard of care, it seems we should be candid with those to be governed by the Rules and who must adhere to both the Rules of Conduct and the standards of care to make the lack of distinction clear.

MEMORANDUM

TO: The E2K Subcommittee, Supreme Court Standing Committee on Rules of Professional Conduct

FROM: Cecil E. Morris, Jr.

RE: Propose Change to Scope

DATE: August 19, 2004

One aspect of the E2K proposal is to amend the Scope section of the Rules. There has been some controversy before the E2K Subcommittee (and to some extent the Standing Committee as a whole) regarding this proposed amendment. More specifically, an objection has been raised that the proposed amendment makes the violation of a Rule available to the claimant in a civil action for breach of the standard of care and that this is a dramatic change in the practical utilization of the Rules. In reality, the proposed amendment to the Scope section of the Rules does not reflect a dramatic change at all; rather, the proposed amendment simply reflects what courts are actually doing.

Current paragraph 20 of the Scope states:

> Violation of a Rule should not in and of itself give rise to a cause of action nor shall it create any presumption that a legal duty has been breached. 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 a Rule. According, nothing in the Rule should be deemed to augment any substantive legal duty of lawyers or the extra disciplinary consequences of violating such a duty.

Colo. R.P.C., Scope.

Fundamentally, paragraph 20 makes clear that violation of a Rule does not per se give rise to a civil claim – that is, the violation of Rule is not like a per se tort. Indeed, the Colorado Supreme Court made this even clearer in adopting a version of the Scope that is slightly different from the version in the Model Rules. Specifically, the first sentence of section 20 of the Model Rules provides: "Violation of a Rule should not give rise to a cause of action nor shall it create any presumption that a legal duty has been breached." In adopting the Rules, the Colorado Supreme Court added the phrase "in and of itself" to that sentence, so that the Colorado version of a Scope provides: "Violation of a Rule in and of itself should not give rise to a cause of action nor shall it create any presumption that a legal duty has been breached." Colo. R.P.C., Scope.

The version of paragraph 20 of the Scope in the E2K proposal would strike the last sentence of current paragraph 20 ("Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty)" and would add the following as a new final sentence: "Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."

As the Reporter's Explanation of Changes to the Model Rules states: "These changes [in paragraph 20 of the Scope] reflect the decision of courts on the relationship between these Rules and causes of action against a lawyer including the admissibility of evidence of a violation of a Rule in appropriate cases." Report of the ABA Ethics 2000 Commission, Reporter's Explanation of Changes, Scope, ¶ 20 (emphasis added).

The development of the law in this regard is quite clear. The vast majority of courts that have considered the issue do allow evidence of a lawyer's violation of a Rule as evidence of

breach of the applicable standard of conduct, and a very small minority of courts are to the contrary. See, e.g., Admissibility and Effect of Evidence of Professional Ethics Rules and Legal Malpractice Action, 50 ALR 5th 301 (2004); Center for Professional Responsibility, American Bar Association, Annotated Model Rules of Professional Conduct at xx-xxi (5th ed. 2000). As the Center for Professional Responsibility states in the Annotated Model Rule: "Most courts permit use of the ethics rules as evidence in legal malpractice case." Id. at xx. The courts that have precluded evidence expressly referring to the Rules have been criticized for reading the disclaimer in paragraph 20 of the Scope in a way that the drafters did not intend. Note, the Inadmissibility of Professional Ethical Standards and Legal Malpractice actions after Hizey v. Carpenter, 68 Wash. L. Rev. 395 (1993).

The amendment to paragraph 20 of the Scope included in the E2K proposal is also in accord with the Restatement. Restatement (Third) of the Law Governing Lawyers §52 (2) (c).

Currently, evidence of the Rules and a lawyer's compliance with or violation of the Rules is admissible in a host of contexts, including Rule 1.5 as to the reasonableness of attorneys' fees, Rules 1.7 through 1.10 regarding the disqualification of a lawyer for conflicts of interest, and Rule 3.7 regarding the disqualification of a lawyer when the lawyer also acts as a witness as to material, disputed facts. Moreover, in some circumstances, evidence of the Rules and a lawyer's violation of or compliance with the Rules is necessary in order to give definition to a lawyer's duties to his or her client for purposes of a civil claim for damages – specifically, claims for breach of the fiduciary duties of loyalty and confidentiality (principally relating to conflicts of interest among or between current and former clients). In these circumstances, it would not be possible for the trier of fact (whether a judge or juror) to determine what the lawyer's duty was or whether he or she complied with that duty without such evidence. In a real sense, the Rules of

Professional Conduct offer protection to lawyers (as well as their clients and others) by defining the contours of those duties more specifically. Without the Rules, it would be much more difficult for a lawyer to practice law consistent with the lawyer's fiduciary duties, just as it would be more difficult if not impossible for the jury to determine whether a lawyer satisfied his or her fiduciary duties in a particular case without them.

Indeed, even the cases that have purported to preclude express evidence of the Rules have permitted evidence of what the Rules say. Indeed, this is the approach the Washington Supreme Court took in Hizey. In that case, the Washington Supreme Court held that testimony and jury instructions explicitly referring to the Rules is not permissible, but held that expert testimony may quote from the Rules, without identifying the source of the language, if relevant to the witness's opinion on the applicable standard of care and the lawyer's conformity to it.

Moreover, it would not be advisable to attempt through the Rules of Professional Conduct to limit a trial court's discretion as to the admissibility of evidence in a particular case. As indicated above, evidence of the Rules and compliance with or violation of the Rules is admissible in a host of circumstances. Further, this is as it must be, for the Rules do set forth the relevant standards of conduct in various circumstances. Conversely, preventing in advance the admission of any evidence of the Rules or compliance or violation with the Rules could leave courts and juries without standards to apply in certain case.

Finally, the concern that adoption of the amendment to paragraph 20 of the Scope as part of the E2K proposal would lead inexorably to the use of the Rules as standards of care in legal malpractice actions, the mere violation of which would give rise to per se liability, is not well taken. The rest of paragraph 20 of the Scope other than the new last sentence would remain the same, and that paragraph makes quite clear that a violation of a Rule does not give rise to a per se civil liability.

AD HOC COLORADO COMMITTEE VERSION TO SUBCOMMITTEE VERSION

PREAMBLE AND SCOPE

PREAMBLE: A LAWYER'S RESPONSIBILITIES

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

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

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

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

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

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

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

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

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

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

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

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

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

SCOPE

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

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

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

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

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

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

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

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

PREAMBLE, SCOPE AND TERMINOLOGY

Preamble: A Lawyer's Responsibilities

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and each person's capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

In fulfilling their professional responsibilities, lawyers necessarily assume various roles that require the performance of many difficult tasks.

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibilities for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

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

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

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest

level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

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

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

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

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

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

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

Scope

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representations and of the law itself. Some of the Rules are imperative, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. 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 presuppose a large 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. 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. The Rules simply provide a framework for the ethical practice of law.

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 may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

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

Violation of a Rule should not in and of itself give rise to a cause of action nor should it create any presumption that a legal duty has been breached. 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. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled dis-

closure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

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.

Terminology

"Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Firm" or "law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10.

"Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Legal clinic" means a law firm which meets all of the following criteria:

a) It involves a group practice of two or more attorneys practicing law in conjunction with law clerks and / or legal assistants that is structured to handle a high volume of cases.
b) It employs efficient, time saving systems and standardized procedures and forms.
c) It is organized and operated to provide legal services primarily to a moderate income clientele.
d) It charges no more than a minimum initial consultation fee.
e) It assigns work in a manner which enables attorneys in the legal clinic to concentrate in particular areas of law in order to maximize their efficiency and competence.
f) It employs the use of fixed fees for routine legal services and makes available to its clientele a printed fee schedule upon request.
g) It charges fees that are demonstrably lower than the prevailing fees in the legal community in which it is situated.
h) It is organized and operated in a manner to assure that in addition to the responsibilities which each individual attorney has pursuant to Rule 1.1 and Rule 1.3, all attorneys in the legal clinic does not handle any matter beyond its competence and in the event that the clinic is not competent to handle a particular matter, the client shall associate

itself with a lawyer or lawyers who are competent to handle the matter or refer the client to another lawyer or lawyers who are competent to handle the matter, in which event the consulting attorney shall assume primary responsibility for that matter; in addition, the legal clinic shall be organized and operated so that in the event a consulting attorney is retained, the clinic shall make full and immediate disclosure to the client of such a departure from the clinical norm in the handling of the clients case, which disclosure must contain advice that the client is free to select new counsel.

"Partner" denotes a member of a partnership or limited liability partnership, a shareholder in a law firm organized as a professional corporation, or a member of a limited liability company.

"Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"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.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonably prudence and competence would ascertain the matter in question.

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

Source: Amended October 17, 1996, effective January 1, 1997.

PREAMBLE AND SCOPE

PREAMBLE: A LAWYER'S RESPONSIBILITIES

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

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

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

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

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

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

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

skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

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

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

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

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

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

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

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken

when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

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

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

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

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

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

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil

liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

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

RULE 1.0 TERMINOLOGY

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

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

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

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "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.

(j) "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.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

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

(m) "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.

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

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Comment to RULE 1.0 TERMINOLOGY

Confirmed in Writing

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

Firm

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

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

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

Fraud

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

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(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.

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

Screened

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

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

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

ABA ETHICS 2000 VERSION

RULE 1.0 TERMINOLOGY

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

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

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

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "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.

(j) "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.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

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

(m) "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.

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

Comment to RULE 1.0 TERMINOLOGY

Confirmed in Writing

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

Firm

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

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

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

Fraud

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

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(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.

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

Screened

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

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

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

[Client-lawyer Relationship]

RULE 1.1 COMPETENCE

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

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Comment to RULE 1.1 COMPETENCE

Legal Knowledge and Skill

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

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

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

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

Thoroughness and Preparation

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

Maintaining Competence

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

RULE 1.1 — COMPETENCE

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

Comment

Legal knowledge and skill

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.

While the licensing of a lawyer is evidence that the lawyer has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which the lawyer is not qualified. However, a lawyer may accept such employment if in good faith the lawyer expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to clients. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which the lawyer is not and does not expect to become so qualified should either decline the employment or, with the consent of the client, accept the employment and associate with a lawyer who is competent in the matter.

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

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 counsel for an unrepresented person.

Thoroughness and Preparation

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 elaborate treatment than matters of lesser consequence.

Because of a lawyer's vital role in the legal process, a lawyer should act with competence and proper care in representing clients. The lawyer should strive to become and remain proficient in law practice and should accept employment only in matters in which the lawyer is or intends to become competent to handle.

Maintaining Competence

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should use it in appropriate circumstances.

A lawyer is aided in attaining and maintaining competence by keeping abreast of current legal literature and developments, participating in continuing legal education programs, concentrating in particular areas of the law, and by utilizing other available means. A lawyer has the additional ethical obligation to assist in improving the legal profession, and may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of younger associates and giving sound guidance to all lawyers who consult the lawyer. In short, a lawyer should strive at all levels to aid the legal profession in advancing the highest possible standards of integrity and competence and to personally meet those standards.

Having undertaken representation, a lawyer should use proper care to safeguard the interests of the client. If a lawyer has accepted employment in a matter beyond the lawyer's competence but in which the lawyer is expected to become competent, the lawyer should diligently undertake the work and study necessary to qualify. In addition to being qualified to handle a particular matter, the lawyer's obligation to the client requires the lawyer to prepare adequately for and give appropriate attention to all legal work.

Lawyers should have pride in their professional endeavors. The lawyer's obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.

Committee Comment

Canon 6 of the Code of Professional Responsibility deals with competent representation but defines competence negatively. Model Rule 1.1 more fully particularizes the elements of competence and does so affirmatively by requiring that the lawyer be competent.

The Committee integrated salutary provisions of the Ethical Considerations found in the Code into the Comments to Rule 1.1.

[Client-lawyer Relationship]

RULE 1.1 COMPETENCE

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

Comment to RULE 1.1 COMPETENCE

Legal Knowledge and Skill

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

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

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

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

Thoroughness and Preparation

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

Maintaining Competence

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

AD HOC COLORADO COMMITTEE VERSION TO SUBCOMMITTEE VERSION

[Client-lawyer Relationship]

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

(a) Subject to paragraphs (c), (d) and (e), a lawyer shall abide by a client's decisions concerning the scope and 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 or objectives, or both, of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited representation to pro se parties as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b).

(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.

~~(e) In representing a client, a lawyer shall not engage in conduct that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process.~~
[Subcommittee Note: the Subcommittee proposes to move this rule to a new Rule 8.4(g).

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Comment to RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

Allocation of Authority between Client and Lawyer

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

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may

be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

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

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

Independence from Client's Views or Activities

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

Agreements Limiting Scope of Representation

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

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

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

Criminal, Fraudulent and Prohibited Transactions

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

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

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

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

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

RULE 1.2 — SCOPE AND OBJECTIVES OF REPRESENTATION

(a) A lawyer shall abide by a client's decisions concerning the scope and objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of 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 or objectives, or both, of the representation if the client consents after consultation. A lawyer may provide limited representation to pro se parties as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b).

(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.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

(f) In representing a client, a lawyer shall not engage in conduct that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process.

Source: (a), (c), and comment amended and adopted June 17, 1999, effective July 1, 1999.

Comment

Scope and Objectives of Representation

The scope or objectives, or both, of the lawyer's representation of the client may be limited if the client consents after consultation with the lawyer.

In litigation matters on behalf of a pro se party, limitation of the scope or objectives of the representation is subject to C.R.C.P. 11(b) or 311 (b) and C.R.C.P. 121, section 1-1, and, therefore, involves not only the client and the lawyer but also the court. When a lawyer is providing limited representation to a pro se party as permitted by C.R.C.P. 11(b) or 311(b), the consultation with the client shall include an explanation of the risks and benefits of such limited representation. A lawyer must provide meaningful legal advice consistent with the limited scope of the lawyer's representation, but a lawyer's advice may be based upon the pro se party's representation of the facts and the scope of representaton agreed upon by the lawyer and the pro se party.

A lawyer remains liable for the consequences of any negligent legal advice. Nothing in this Rule is intended to expand or restrict, in any manner, the laws governing civil liability of lawyers.

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has the ultimate authority to determine the purposes to be served by the legal representation, within the limits imposed by the law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

In a case in which the client appears to be suffering mental disability, 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

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

Services Limited in Objectives or Means

The objectives or scope of services 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. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

Criminal, Fraudulent and Prohibited Transactions

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. 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.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

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

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

Committee Comment

Rule 1.2 has no direct counterpart in the Disciplinary Rules of the Code of Professional Responsibility. The provisions of several Disciplinary Rules and Ethical Considerations are included in the Rule.

[Client-lawyer Relationship]

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.

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Comment to RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

Allocation of Authority between Client and Lawyer

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

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

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

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

Independence from Client's Views or Activities

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

Agreements Limiting Scope of Representation

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

objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

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

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

Criminal, Fraudulent and Prohibited Transactions

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

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

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

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

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

[Client-lawyer Relationship]

RULE 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client. ~~A lawyer shall not neglect a legal matter entrusted to that lawyer.~~

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Comment to RULE 1.3 DILIGENCE

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

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

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

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

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

AD HOC COLORADO COMMITTEE VERSION TO SUBCOMMITTEE VERSION

RULE 1.3 — DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client. A lawyer shall not neglect a legal matter entrusted to that lawyer.

Comment

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy on the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer's work load should be controlled so that each matter can be handled adequately.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests can often be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

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 client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

Committee Comment

The Committee added the second sentence to Rule 1.3 in order to establish an enforceable standard as well as an affirmative obligation to act with reasonable diligence and promptness. The second sentence restates DR 6-101(A)(3).

[Client-lawyer Relationship]

RULE 1.3 DILIGENCE

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

Comment to RULE 1.3 DILIGENCE

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

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

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

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

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

[Client-lawyer Relationship]

RULE 1.4 COMMUNICATION

(a) A lawyer shall:

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

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

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

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

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

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

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Comment to RULE 1.4 COMMUNICATION

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

Communicating with Client

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

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

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible,

that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

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

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

Withholding Information

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

Explanation of Fees and Expenses

[8] Information provided to the client under Rule 1.4(a) should include information concerning fees charged, costs, expenses, and disbursements with regard to the client's matter. Additionally, the lawyer should promptly respond to the client's reasonable requests concerning such matters. It is strongly recommended that all these communications be in writing. As to the basis or rate of the fee, see Rule 1.5.

RULE 1.4 — COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

Source: Comment amended April 20, 2000, effective July 1, 2000.

Comment

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. In order to avoid misunderstandings and hence to maintain public confidence in law and lawyers, a lawyer should fully and promptly inform the client of material developments in the matters being handled for the client. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer ought to initiate this decision-making process if the client does not do so. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter. A lawyer should exert best efforts to insure that decisions of the client are made only after the client has been informed of relevant considerations.

Adequacy of communication depends in part on the kind of advice or assistance involved. A lawyer should advise the client of the possible legal effect of each alternative course of action. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer would 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.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Information Pertaining to Fees Charged, Costs, Expenses, and Disbursements

Information provided to the client under Rule 1.4(a) should include information concerning fees charged, costs, expenses, and disbursements with regard to the client's matter. Additionally, the

lawyer should promptly respond to the client's reasonable requests concerning such matters. It is strongly recommended that all these communications be in writing. As to the basis or rate of the fee, see Rule 1.5.

Withholding Information

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. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Committee Comment

Twenty-eight (28) of 39 States which have adopted some form of the Model Rules have adopted or recommended adoption of Rule 1.4 without substantive change. This Committee views it as a necessary recognition of a lawyer's obligation to the client.

The Rule states a lawyer's obligation in an affirmative way. Although there is no direct counterpart to Rule 1.4 in the Code the subject matter is covered in several provisions of the Code. The Committee intends no substantive change from the provisions of the Code of Professional Responsibility.

[Client-lawyer Relationship]

RULE 1.4 COMMUNICATION

(a) A lawyer shall:

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

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

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

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

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

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

Comment to RULE 1.4 COMMUNICATION

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

Communicating with Client

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

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

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

Explaining Matters

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

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

be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

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

[Client-lawyer Relationship]

RULE 1.5 FEES AND EXPENSES

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

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. Except as provided in a written ~~the~~ fee agreement, any material changes to the basis or ~~the~~ rate of the fee or expenses, which may reasonably be expected to increase the fees and expenses payable by the client ~~may be~~ are subject to the provisions of Rule 1.8(a) ~~limitations~~.

(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 otherwise prohibited. A contingent fee shall meet all of the requirements of Chapter 23.3 of the Colorado Rules of Civil Procedure, "Rules Governing Contingent Fees."

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

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

(2) the client agrees to the arrangement, including the basis upon which the division of fees shall be made, and the client's agreement is confirmed in writing; and

(3) the total fee is reasonable.

(e) Referral fees are prohibited.

(f) Fees are not earned until the lawyer confers a benefit on the client or performs a legal service for the client. Advances of unearned fees are the property of the client and shall be deposited in the lawyer's trust

account pursuant to Rule 1.15(f)(1) until earned. If advances of unearned fees are in the form of property other than funds, then the lawyer shall hold such property separate from the lawyer's own property pursuant to Rule 1.15(a).

(g~~h~~) Nonrefundable fees and nonrefundable retainers are prohibited. Any agreement that purports to restrict a client's right to terminate the representation, or that unreasonably restricts a client's right to obtain a refund of unearned or unreasonable fees, is prohibited.

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Comment to RULE 1.5 FEES

Reasonableness of Fee and Expenses

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

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, the basis or rate of the fee must be promptly communicated in writing to the client. When the lawyer has regularly represented a client, they ordinarily will have reached an understanding concerning the basis or rate of the fee; but, when there has been a change from their previous understanding, the basis or rate of the fee should be promptly communicated in writing. All contingent fee arrangements must be in writing, regardless of whether the client-lawyer relationship is new or established. See C.R.C.P., Ch. 23.3, Rule 1. A written communication must disclose the basis or rate of the lawyer's fees, but it need not take the form of a formal engagement letter or agreement, and it need not be signed by the client. Moreover, it is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, to identify the factors that may be take into account in finally fixing the fee, or to furnish the client with a simple memorandum or the lawyer's customary fee schedule. When developments occur during the representation that render an earlier disclosure substantially inaccurate, a revised written disclosure should be provided to the client.

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

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an

enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

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

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

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

Disputes over Fees

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

Advances of Unearned Fees and Engagement Retainer Fees

[10] The analysis of when a lawyer may treat advances of unearned fees as property of the lawyer must begin with the principle that the lawyer must hold in trust all fees paid by the client until there is a basis on which to conclude that the lawyer has earned the fee; otherwise the funds must remain in the lawyer's trust account because they are not the lawyer's property.

[11] To make a determination of when an advance fee is earned, the written statement of the basis or rate of the fee, when required by Rule 1.5(b), should include a description of the benefit or service that justifies the lawyer's earning the fee, the amount of the advance unearned fee, as well as a statement describing when the fee is earned. Whether a lawyer has conferred a sufficient benefit to earn a portion of the advance fee will depend on

the circumstances of the particular case. The circumstances under which a fee is earned should be evaluated under an objective standard of reasonableness. Colo. RPC 1.5(a).

-Rule 1.5(f) Does Not Prohibit Lump- sum Fees or Flat Fees

[12] Advances of unearned fees, including "lump- sum" fees and "flat fees," are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.15, the lawyer must deposit an advance of unearned fees in the lawyer's trust account. The funds may be earned only as the lawyer performs specified legal services or confers benefits on the client as provided for in the written statement of the basis of the fee, if a written statement is required by Rule 1.5(b). See also Restatement (Third) of the Law Governing Lawyers §§ 34, 38 (1998). Rule 1.5(f) does not prevent a lawyer from entering into these types of arrangements.

[13] For example, the lawyer and client may agree that portions of the advance of unearned fees are deemed earned at the lawyer's hourly rate and become the lawyer's property as and when the lawyer provides legal services.

[14] Alternatively, the lawyer and client may agree to an advance lump- sum or flat fee that will be earned in whole or in part based upon the lawyer's completion of specific tasks or the occurrence of specific events, regardless of the precise amount of the lawyer's time involved. For instance, in a criminal defense matter, a lawyer and client may agree that the lawyer earns portions of the advance lump- sum or flat fee upon the lawyer's entry of appearance, initial advisement, review of discovery, preliminary hearing, pretrial conference, disposition hearing, motions hearing, trial, and sentencing. Similarly, in a trusts and estates matter, a lawyer and client may agree that the lawyer earns portions of the lump- sum or flat fee upon client consultation, legal research, completing the initial draft of testamentary documents, further client consultation, and completing the final documents.

[15] The portions of the advance lump- sum or flat fee earned as each such event occurs need not be in equal amounts. However, the fees attributed to each event should reflect a reasonable estimate of the proportionate value of the legal services the lawyer provides in completing each designated event to the anticipated legal services to be provided on the entire matter. See Colo. RPC 1.5(a); Feiger, Collison & Killmer v. Jones, 926 P.2d 1244, 1252- 53 (Colo. 1996) (client's sophistication is relevant factor).

-Rule 1.5(f) Does Not Prohibit an "Engagement Retainer Fee"

[16] "[A]n 'engagement retainer fee' is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required. An engagement retainer must be distinguished from a lump-sum fee constituting the entire payment for a lawyer's service in a matter and from an advance payment from which fees will be subtracted (see §§ 38, Comment g). A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed." Restatement (Third) of the Law Governing Lawyers §§ 34 cmt. e. An engagement retainer fee agreement must comply with Rule 1.5(a), (b), and (g), and should expressly include the amount of the engagement retainer fee, describe the service or benefit that justifies the lawyer's earning the engagement retainer fee, and state that the engagement retainer fee is earned upon receipt. As defined above, an engagement retainer fee will be earned upon receipt because the lawyer provides an immediate benefit to the client, such as forgoing other business opportunities by making the lawyer's services available for a given period of time to the exclusion of other clients or potential clients, or by giving priority to the client's work over other matters.

[17] Because an engagement retainer fee is earned at the time it is received, it must not be commingled with client property. However, it may be subject to refund to the client in the event of changed circumstances.

[18] It is unethical for a lawyer to fail to return unearned fees, to charge an excessive fee, or to characterize any lawyer's fee as nonrefundable. Lawyer's fees are always subject to refund if either excessive or unearned. If all or some portion of a lawyer's fee becomes subject to refund, then the amount to be refunded should be paid directly to the client if there is no further legal work to be performed or if the lawyer's employment is terminated. In the alternative, if there is an ongoing client- lawyer relationship and there is further work to be done, it may be deposited in the lawyer's trust account, to be withdrawn from the trust account as it is earned.

RULE 1.5 — FEES

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

(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 otherwise prohibited. A contingent fee shall meet all of the requirements of Chapter 23.3 of the Colorado Rules of Civil Procedure, "Rules Governing Contingent Fees."

(d) Other than in connection with the sale of a law practice pursuant to Rule 1.17, a division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed and responsibility assumed by each lawyer;

(2) the client consents to the employment of an additional lawyer after a full disclosure of the division of fees to be made;

(3) the total fee is reasonable; and

(4) the division is set forth in writing signed by the lawyers and by the client with informed consent.

(e) Referral fees are prohibited.

(f) Fees are not earned until the lawyer confers a benefit on the client or performs a legal service for the client. Advances of unearned fees are the property of the client and shall be deposited in the lawyer's trust account pursuant to Rule 1.15(f)(1) until earned. If advances of unearned fees are in the form of property other than funds, then the lawyer shall hold such property separate from the lawyer's own property pursuant to Rule 1.15(a).

(g) Nonrefundable fees and nonrefundable retainers are prohibited. Any agreement that purports to restrict a client's right to terminate the representation, or that unreasonably restricts a client's right to obtain a refund of unearned or unreasonable fees, is prohibited.

Source: (b) and Comment amended April 20, 2000, effective July 1, 2000; (d) amended and adopted April 18, 2001, effective July 1, 2001; entire rule [(f) and (g) adopted] and Comment amended and adopted May 30, 2002, effective July 1, 2002.

Comment

Basis or Rate of Fee

In a new client-lawyer relationship, the basis or rate of the fee must be promptly communicated in writing to the client. When the lawyer has regularly represented a client, they ordinarily will have reached an understanding concerning the basis or rate of the fee; but, when there has been a change from their previous understanding, the basis or rate of the fee should be promptly communicated in writing. All contingent fee arrangements must be in writing, regardless of whether the client-lawyer relationship is new or established. See C.R.C.P., Ch. 23.3, Rule 1. A written communication must disclose the basis or rate of the lawyer's fees, but it need not take the form of a formal engagement letter or agreement, and it need not be signed by the client. Moreover, it is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, to identify the factors that may be taken into account in finally fixing the fee, or to furnish the client with a simple memorandum or the lawyer's customary fee schedule. When developments occur during the representation that render an earlier disclosure substantially inaccurate, a revised written disclosure should be provided to the client.

A written statement concerning the fee reduces the possibility of misunderstanding. Lawyers are well-advised to use written disclosures even when they are not required. Moreover, it is preferable, although not mandatory, to obtain the client's signature acknowledging the basis or rate of the fee.

In setting a fee, a lawyer should also consider the inability of the client to pay a reasonable fee. Persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

Terms of Payment

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Chapter 23.3 of the Colorado Rules of Civil Procedure governs contingent fee arrangements, and contingent fees otherwise may be limited by applicable law.

Division of Fee

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contin-

gent and the division is between a referring lawyer and a trial specialist. Paragraph (d) permits the lawyers to divide a fee on the basis of the proportion of services they render and responsibility assumed by each. The client must consent to the fee division in writing. The client must be advised of and agree to the share of the fee that each lawyer is to receive.

Disputes over Fees

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

Advances of Unearned Fees and Engagement Retainer Fees

The analysis of when a lawyer may treat advances of unearned fees as property of the lawyer must begin with the principle that the lawyer must hold in trust all fees paid by the client until there is a basis on which to conclude that the lawyer has earned the fee; otherwise the funds must remain in the lawyer's trust account because they are not the lawyer's property.

To make a determination of when an advance fee is earned, the written statement of the basis or rate of the fee, when required by Rule 1.5(b), should include a description of the benefit or service that justifies the lawyer's earning the fee, the amount of the advance unearned fee, as well as a statement describing when the fee is earned. Whether a lawyer has conferred a sufficient benefit to earn a portion of the advance fee will depend on the circumstances of the particular case. The circumstances under which a fee is earned should be evaluated under an objective standard of reasonableness. Colo. RPC 1.5(a).

Rule 1.5(f) Does Not Prohibit Lump-Sum Fees or Flat Fees

Advances of unearned fees, including "lump-sum" fees and "flat fees," are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.15, the lawyer must deposit an advance of unearned fees in the lawyer's trust account. The funds may be earned only as the lawyer performs specified legal services or confers benefits on the client as provided for in the written statement of the basis of the fee, if a written statement is required by Rule 1.5(b). *See also* Restatement (Third) of the Law Governing Lawyers §§ 34, 38 (1998). Rule 1.5(f) does not prevent a lawyer from entering into these types of arrangements.

For example, the lawyer and client may agree that portions of the advance of unearned fees are deemed earned at the lawyer's hourly rate and become the lawyer's property as and when the lawyer provides legal services.

Alternatively, the lawyer and client may agree to an advance lump-sum or flat fee that will be earned in whole or in part based upon the lawyer's completion of specific tasks or the occurrence of specific events, regardless of the precise amount of the lawyer's time involved. For instance, in a criminal defense matter, a lawyer and client may agree that the lawyer earns portions of the advance lump-sum or flat fee upon the lawyer's entry of appearance, initial advisement, review of discovery, preliminary hearing, pretrial conference, disposition hearing, motions hearing, trial, and sentencing. Similarly, in a trusts and estates matter, a lawyer and client may agree that the lawyer earns portions of the lump-sum or flat fee upon client consultation, legal research, completing the initial draft of testamentary documents, further client consultation, and completing the final documents.

The portions of the advance lump-sum or flat fee earned as each such event occurs need not be in equal amounts. However, the fees attributed to each event should reflect a reasonable estimate of the proportionate value of the legal services the lawyer provides in completing each designated event to the anticipated legal services to be provided on the entire matter. *See* Colo. RPC 1.5(a); *Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244, 1252-1253 (Colo. 1996) (client's sophistication is relevant factor).

Rule 1.5(f) Does Not Prohibit an "Engagement Retainer Fee"

"[A]n 'engagement retainer fee' is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required. An engagement retainer must be distinguished from a lump-sum fee constituting the entire payment for a lawyer's service in a matter and from an advance payment from which fees will be subtracted (see § 38, Comment *g*). A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed." Restatement (Third) of the Law Governing Lawyers § 34 cmt. e. An engagement retainer fee agreement must comply with Rule 1.5(a), (b), and (g), and should expressly include the amount of the engagement retainer fee, describe the service or benefit that justifies the lawyer's earning the engagement retainer fee, and state that the engagement retainer fee is earned upon receipt. As defined above, an engagement retainer fee will be earned upon receipt because the lawyer provides an immediate benefit to the client, such as forgoing other business opportunities by making the lawyer's services available for a given period of time to the exclusion of other clients or potential clients, or by giving priority to the client's work over other matters.

Because an engagement retainer fee is earned at the time it is received, it must not be commingled with client property. However, it may be subject to refund to the client in the event of changed circumstances.

It is unethical for a lawyer to fail to return unearned fees, to charge an excessive fee, or to characterize any lawyer's fee as nonrefundable. Lawyer's fees are always subject to refund if either excessive or unearned. If all or some portion of a lawyer's fee becomes subject to refund, then the amount to be refunded should be paid directly to the client if there is no further legal work to be performed or if the lawyer's employment is terminated. In the alternative, if there is an ongoing client-lawyer relationship and there is further work to be done, it may be deposited in the lawyer's trust account, to be withdrawn from the trust account as it is earned.

Committee Comment

The fee splitting provisions of Model Rule 1.5(e), now 1.5(d), have been revised to resemble more closely DR 2-107(A) and to tighten up the client consent requirements.

[Client-lawyer Relationship]

RULE 1.5 FEES

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

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

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

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

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

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

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

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

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

(3) the total fee is reasonable.

Comment to RULE 1.5 FEES

Reasonableness of Fee and Expenses

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

Basis or Rate of Fee

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

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

Terms of Payment

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

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

Prohibited Contingent Fees

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

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

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

Disputes over Fees

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

[Client-lawyer Relationship]

RULE 1.6 CONFIDENTIALITY OF INFORMATION

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

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

* * * * * * * * * * *

Comment to RULE 1.6 CONFIDENTIALITY OF INFORMATION

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

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

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

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

Authorized Disclosure

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

Disclosure Adverse to Client

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

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[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] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. For purposes of paragraph (b)(6), a subpoena is a court order. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order. ~~Similarly, Rule 4.1(b) requires a disclosure when necessary to avoid assisting a client's criminal or fraudulent act, if such disclosure will not violate this Rule 1.6.~~

[13A] Rule 4.1(b) requires a disclosure when necessary to avoid assisting a client's criminal or fraudulent act, if such disclosure will not violate this Rule 1.6.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to

persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[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). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

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

[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, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

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

[SUBCOMMITTEE NOTE: THE SUBCOMMITTEE HAS NOT COMPLETED ITS REVIEW OF PROPOSED RULE 8.4. IT IS REPRODUCED HERE TO SHOW THE MOVEMENT OF PROPOSED RULE 1.2 (e) TO A NEW RULE 8.4(g) AND THE PROPOSED AMENDMENT OF THE RELATED COMMENT]

~~[Maintaining the Integrity of the Profession]~~

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law or

(g) ~~engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.~~in the course of representing a client, to engage in conduct that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process.

(h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

* * * * * * * * * * *

Comment to RULE 8.4 MISCONDUCT

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

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, ~~sex,~~ gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (g) ~~(d)~~ and may also violate (d). ~~when such actions are prejudicial to the administration of justice.~~ Legitimate advocacy respecting the foregoing factors does not violate paragraphs (d) or (g). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[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.

[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.

RULE 1.6 — CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.

(c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceedings concerning the lawyer's representation of the client.

(d) 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 such information, except that a lawyer may reveal the information allowed by paragraphs (b) and (c) through such persons.

Comment

Confidentiality

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

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

The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard confidential information of the client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, the lawyer should avoid professional discussion in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

A lawyer is impliedly authorized to make disclosure about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

The confidentiality Rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends to commit a crime. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Several situations must be distinguished. First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (b), the lawyer has professional discretion to reveal information in order to prevent such consequences.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b) does not violate this Rule.

Withdrawal

If the lawyer's service will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning a Lawyer's Conduct

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (c) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an

assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the Rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (c) 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. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Former Client

Duty of confidentiality continues after the client-lawyer relationship has terminated.

Committee Comment

This Rule raises the delicate and complicated question of the balance between a lawyer's responsibility to keep clients' confidences inviolate and the scope of permissible disclosure of such information in particular instances. Rule 1.6 as proposed by the Committee sets forth the broader scope of permissive disclosure as provided in DR 4-101(C)(3) rather than the more limited scope of such disclosure as contained in the Proposed Model Rules. EC 4-4 has been included in the comments to further explain the distinction between the evidentiary attorney-client privilege and the principle of confidentiality. Subparagraph (d) of the Rule is comparable to DR 4-101(D) and is intended to amplify Rule 5.3.

[Client-lawyer Relationship]

RULE 1.6 CONFIDENTIALITY OF INFORMATION

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

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

Comment to RULE 1.6 CONFIDENTIALITY OF INFORMATION

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

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

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

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

Authorized Disclosure

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

Disclosure Adverse to Client

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

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[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] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's 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. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[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). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

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

[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, however, does not require that the lawyer use special security

measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

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

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July 19, 2004

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JUL 20 2004

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Marcy G. Glenn, Esq.
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Re: Proposed Additional Change To Ad Hoc Ethics 2000 Committee's Recommended Changes To Colorado Rules Of Professional Conduct

Dear Marcy:

Thanks for taking the time to speak with me last week about the good work of the Ad Hoc Ethics 2000 Committee and of your committee. Pursuant to our conversation, I am sending this letter to summarize my request for an additional change to our Colorado Rules of Professional Conduct.

The additional change is to remove any reference to "zeal" and "zealous" in describing our professional obligations. This would require a change in Paragraphs 2, 8, and 9 of the Preamble, "A Lawyer's Responsibilities," and to the Commentary to Rule 1.3. The change is not substantial.[i] The need for the change is.

A. The Lack Of Need For "Zealous Advocates"

In discussing why the word "zealous" should be eliminated, let's begin with what the Code provides without it. Under Rule 1.1, a lawyer must provide competent representation. Rule 1.3 requires that a lawyer act with reasonable diligence and promptness, and not neglect a legal matter. Under Rule 1.6, a lawyer shall not reveal confidential information relating to representation of a client. Rule 1.7 proscribes conflicts of interests.

Aside from the duties to the client, Rule 3.1 provides that a lawyer shall not bring or defend a proceeding, or assert or controvert an issue unless there is a basis for doing so that is not frivolous. Rule 3.3 addresses a lawyer's duty of candor toward a tribunal. Rule 3.4 states that a lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal evidence, or knowingly disobey an obligation under the rules of a tribunal. That includes the rules of discovery. A lawyer also shall not allude to evidence that the lawyer does not reasonably believe is relevant or is otherwise inadmissible.

Rule 4.1 provides that a lawyer shall not make a false or misleading statement of fact or law to a third party. Rule 8.4 defines unprofessional misconduct to include engaging in conduct that is prejudicial to the administration of justice.

Diligence, competence, confidentially, with no conflicts of interest: elegant simplicity. The rules are comprehensive, describing a lawyer's duties not only to clients, but also to others. In short, the word "zealous" is not a word needed to describe a lawyer's ethical duties.

Now let's consider where the word "zealous" actually appears in our rules of ethics. We can begin with our prior Code of Professional Responsibility. There were only two references. One was in the title to Rule 7, "Zealously Representing Clients within the Bounds of the Law." Read the actual rule and the word never appears. The second was in the title to DR 7-101, "Representing a Client Zealously." Again, the word is never used in the rule.

The word is of no more importance in our current Rules of Professional Conduct or in the Rules with proposed changes. The Preamble includes the following in Paragraph 2: "As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." The Preamble at Paragraph 8 further states: "A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done." Finally, the Preamble at Paragraph 9 states: "These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system." These statements do nothing to explain what the supposed duty of "zealous advocacy" encompasses beyond the duties expressed in the other rules.

The commentary to Rule 1.3, the rule on diligence, states in part: "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Again, no mention in the rule itself, and no definition in the commentary.

Some might argue that "zealous advocacy" is part of what distinguishes our profession from a business. The distinction between a profession and a business is certainly important. Many occupations have appropriated the term "profession," but only the clergy, doctors, and lawyers actually occupy that special position in society. The distinction, however, does not rest in any part on being a "zealous advocate." Rather, lawyers, doctors, and the clergy are entitled to be called professions because their members work within a confidential relationship to provide services based on a special trust with deeply personal matters, the services rendered only after highly specialized training.

Others might argue that "zealous advocacy" is part of the ideals of our profession. However, removing any reference to acting as a "zealous advocate" does not impact the ideals of being "fearless" in representing an unpopular cause, or of being "conscientious" or

"tireless" in the efforts expended for a client. As already noted in the Comment to Rule 1.3 Diligence: "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer . . . . A lawyer should act with commitment and dedication to the interest of the client." In short, Atticus Finch need not back down.[ii]

The extent of the supposed duty of "zealous advocacy" has been the subject of careful scrutiny. The American Law Institute has nicely summarized the scope of that duty as follows: "The Preamble to the ABA Model Rules of Professional Conduct (1983) . . . and EC 7-1 of the ABA Model Code of Professional Responsibility refer to a lawyer's duty to act 'zealously' for a client. The term sets forth a traditional aspiration, but it should not be misunderstood to suggest that lawyers are legally required to function with a certain emotion or style of litigating, negotiating, or counseling. For legal purposes, the term encompasses the duties of competence and diligence."[iii] (emphasis added)

If that's all there is to it, what is the genesis of the supposed duty to be a zealous advocate? W. Bradley Wendel, in his article, "Public Values And Professional Responsibility," traces the history of the phrase back to a comment in a speech in the English parliament in 1820 by Lord Brougham. Mr. Wendel concludes:

> "The Restatement view [that the term merely encompasses the duties of competence and diligence] is in line with a more nuanced understanding of the Lord Brougham defense, which was never intended as a maxim of legal ethics. Brougham made his statement in the context of a parliamentary debate, not a judicial proceeding, and the speech was intended as a veiled political threat to King George IV. In any event, . . . it can hardly be argued that the Brougham speech describes the prevailing norms of the English Bar in 1820. It certainly has no general applicability."[iv] (emphasis added)

So that's it for the role of the zealous advocate: the duties of competence and diligence. And those duties are adequately described in our Code of Professional Conduct. The phrase "zealous advocacy" is full of sound and fury, signifying nothing.

B. Impact Of The Supposed Duty Of "Zealous Advocacy"

The duty of "zealous advocacy" may be empty of meaning. However, this does not mean that references to it are without import. Put simply, the duty to be a "zealous advocate" is the single most common justification used by trial lawyers for conduct ranging from incivility to dishonesty, from abuses of discovery, to abuses of opposing counsel, even to abuses of the presiding tribunal.

In short, the illusory duty is treated as synonymous with a duty to be ruthless. It creates the impression, or can at least be used as an excuse to claim, that the duty to the

client is paramount, and that a lawyer is therefore justified in minimizing or even ignoring the other duties expressly stated in our Rules of Profession Conduct.

Here are just a few conclusions by others who have studied the matter:

> "We believe the adversary system and the duty of zealous representation often serve to justify . . . objectionable behaviors and help to create and reinforce the very cynicism, selfishness, and social mistrust that legal culture instead should attempt to overcome."[v]

> "It is those normative commitments themselves – zealous representation of clients and business rationality working in combination to reinforce economic self-interest – that need to be made the subject of critical scrutiny."[vi]

> "The civil litigation system has fostered an adversarial culture in which legal professionals practice delay and deception, and rationalize such conduct based on an ideal of zealous representation."[vii]

> "Justifying one's ethical deliberation through reliance on the role prescribed by the zealous-advocate model raises the potential for ethical problems from the very moment the attorney-client relationship is formed."[viii]

> "Several commentators believe that lawyers have resolved the conflicts by simply adopting an amoral professional role. . . [T]he attorney simply functions as a technician whose role is to advance the client's interests zealously without regard to the lawyer's personal morals or value, society's needs or morals. The lawyer's actions are constrained only by the 'bounds of the law' and ethics codes. . . . The amoral professional role has been blamed for fostering unprofessional tactics and actions by lawyers in the name of zealous advocacy."[ix]

> "What often parades as zealous advocacy for a client is merely unrestrained competitiveness driven by an obsessive desire to win and a compulsive fear of losing."[x]

> "I believe the root cause of this professional pathology is the increasingly combative and aggressive nature of the legal profession. I suggest that too often we treat ruthlessness, paranoia and insensitivity as professional virtues, cloaking these traits in the amiable guise of zealous advocacy . . . ."[xi]

Here in Colorado, Cathlin Donnell chaired the Legal System Dynamics Subcommittee of the Professionalism Committee. The Subcommittee reported in 1993 as follows:

> "The underlying perspective of most of the subcommittees is that unprofessional conduct is a problem created by certain individual lawyers within the profession who are unaware of appropriate professional standards, or who are not convinced that they need comply, and who may well gain advantage and success by not complying. This Subcommittee has been exploring a contrary perspective, namely that our legal system itself, not the misbehavior of particular individuals, is the principal cause of growing unprofessionalism. [The reasons include our] ethical rules and the 'lawyer culture' which require zealousness . . ."[xii]

To recognize the pernicious impact of the perceived duty of "zealous" representation is not to indict the adversary system of justice. While inherently flawed, such a system, properly used, can aid in the search for truth and justice. The problem is that too many lawyers rely on their duty to be a "zealous advocate" to subvert our adversary system into a mechanism for distorting truth, subverting justice, and treating others with incivility.

The Preamble to the Rules of Professional Conduct contains an important statement commonly overlooked: "Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience. . . ."[xiii]

As Professor Rhode stated in her article, The Professionalism Problem: "A . . . guiding principle calls for lawyers to accept personal moral responsibility for the consequences of their professional acts. . . . The rationale for professional actions cannot depend on retreats into roles that deny the need for reflection at precisely the moment when reflection is more needed."[xiv]

This is <u>not</u> about refusing to represent clients who may have different life goals and morals. This is a pluralistic society. Legal ethics must be understood as a discipline that accepts conflicting values. Thus, while a client may need the advocate to espouse a legal position inconsistent with the lawyer's personal values, it is not necessarily contrary to personal values to represent such a client. A lawyer understands the importance of having all voices in society properly represented. Nevertheless, this <u>is</u> about representing the client within the bounds of our adversary system, our current Rules of Professional Conduct – and our own personal conscience.

When a lawyer ignores personal conscience and abuses the system or acts with incivility, the impact is not suffered just by opposing counsel. The impact is also on the lawyer who thinks that he or she has to ignore personal conscience in order to fulfill the duty

of being a "zealous advocate." Such a lawyer is confronted, not only with office battle fatigue, but also what I call "moral incongruity."[xv] In short, when lawyers feel forced to behave as lawyers in ways they would not behave in their private lives, the internal conflict contributes to their "rust out" as human beings.

The authors of Moral Vision and Professional Decisions put it like this:

> "It is small wonder that lawyers, who are trained in the ethics of the jugular attack [and] all-out battles, find it difficult to sustain stable, convivial and compatible work groups, not to mention families. . . . You can't work there sixty hours a week and then shed its influence as you return to the more civilized suburbs. . . . In a very real sense people merge with the roles they play. What begins as a role becomes part of a person's identity. . . Because they are so comprehensive and time-demanding, professional roles tend to be particularly dominant and threatening to personal identity."[xvi]

In his article on professionalism, Daniel R. Coquillette vehemently argues that lawyers are deluding themselves if they believe that they can resolve the internal conflict by divorcing their personal lives from the professional lives.[xvii] Citing Aristotle, he stresses that "one's person or professional actions and identity cannot be independent from one's personal morality. . . [O]ne's behavior determines one's character."[xviii]

As Rabbi Harold L. Kudan has put it: "That which dominates our imagination and our daily thoughts will determine our life and character. Therefore it behooves us to be careful what we are worshipping, for what we are worshipping we are becoming."[xix] Or, as Aristotle himself put it, "You are what you repeatedly do."

C. Conclusion

Our Rules of Professional Conduct provide for every duty a lawyer owes a client. These include the duties of competence and diligence. There is no additional duty to be a "zealous advocate." Yet the perception of that duty either creates the perceived need for, or is used as an excuse to justify, incivility and abuse of our adversary system. It is also the source of internal conflict, the "moral incongruity," that so greatly contributes to our "rust out" as human, and humane, beings.

Let me stress that I am writing this to expressly my personal request. The Colorado Bar Association has not been asked to take a position on the matter. However, I would point out that the subject was addressed during the work of the CBA's Professionalism Reform Task Force. As reported in the Colorado Lawyer two years ago this month[xx], the Lawyer To Lawyer Working Group listed as its first two recommendations:

* Remove all references to "zealous advocacy" from the preamble and comments to the Rules of Professional Conduct."

* Use the occasion of the removal of zealousness from the Rules for seminars and other presentations by well-respected members of the bar on the reasons for its removal and the pernicious effects of dishonesty on a lawyers' reputation, on the well being of clients, on the public, and on the profession as a whole.

You mentioned that this might be appropriate for discussion at your meeting on the morning of October 1. Unfortunately, I will be in Alamosa that day hosting a CBA Regional Bar Visit. However, because the program will not start before noon, I could be available to take part through a telephone conference. I will await word from you on how to proceed. In the meantime, my thanks to you and your committee for your consideration of my proposal and for the time you are volunteering to a good cause.

Sincerely,

Steve C. Briggs

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[i] Some have advocated that we should immediately go further than my modest proposal. For example, it has been suggested that new rules of professional responsibility and civil procedure could be fashioned for the investigative and discovery stages of civil litigation. During these stages, counsel would be required to view themselves primarily as officers of the court rather than partisan advocates. Brazil, Wayne D., "The Adversary Character of Civil Discovery: A Critique And Proposals For Change," 31 Vanderbilt L. Rev. 1295 (November 1978); see also Rhode, Deborah L., "The Professionalism Problem," 39 Wm. & Mary L. Rev. 283 (January 1998).

[ii] The fearless and tireless lawyer in the book, To Kill A Mockingbird, by Harper Lee.

[iii] Restatement of the Law Third, The Law Governing Lawyers, §16, p. 148 (The American Law Institute 1998).

[iv] Wendel, W Bradley, "Public Values and Professional Responsibility," 75 Notre Dame L. Rev. 1, fn. 205 (1999).

[v] Symposium, "Rediscovering the Role of Religion in the Lives of Lawyers and Those They Represent," Panel Discussion Responses to the Keynote Address, 26 Fordham Urb. L.J. 841, fn 54 (1999) (Moderator Rabbi Gerald Wolpe, Respondents Eugene W. Harper, Jr., Nanette H. Schorr, and Mohammed Fadel).

[vi] Gordon, Robert, "The Ethical Worlds of Large-Firm Litigators: Preliminary Observations," 67 Fordham L. Rev. 709, 737 (1998)

[vii] Nelson, Robert L., "The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors That Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation," 67 Fordham L. Rev. 773, p. 805.

[viii] Higgins, Shannan E., "Ethical Rules of Lawyering: An Analysis Of Role-Based Reasoning From Zealous Advocacy to Purposivism," 12 Geo. J. Legal Ethics 639, p. 650.

[ix] Daicoff, Susan, "Asking Leopards To Change Their Spots," 11 Geo. J. Legal Ethics 547 (Spring 1998).

[x] Josephson, Mickael, "Ethics Beyond The Code," Talk at the Colorado Bar Association Annual Meeting (September 1994).

[xi] Shuman, David, "Beyond The Waste Land," Oregon State Bar Bulletin, p. 10. (May 1991).

[xii] Donnell, Cathlin, "Legal System Dynamics: Has the System Cracked?" 20 Colorado Lawyer, June 1135, 1136 (June 1991).

[xiii] One scholar has argued that it is not sufficient merely to use personal morality to temper any supposed duty to act as a zealous advocate for a client. Rather, a lawyer's duty should be to act as a zealous advocate for justice, not the client. Simon, William, The Practice of Justice: A Theory of Lawyer's Ethics (1998). That approach has been criticized as not sufficiently protecting the interest of the client and, ultimately, society. Monopoli, Paula A., "Teaching Lawyers To Be More Than Zealous Advocates", 2001 Wis. L. Rev. 1159.

[xiv] Rhodes, supra, note 1.

[xv] Susan Daicoff stated it this way: "A conflict arises between a lawyer's own personal values and morals and the behavior she believes is necessary to fulfill her professional role to advocate zealously for the client." Daicoff, Susan, *supra*, note 9, p. 561.

[xvi] Rand, Jack and Rand, Dana Crowley. Moral Vision and Professional Decisions (Cambridge University Press)

[xvii] Coquillette, Daniel R. "Professionalism: The Deep Theory." 72 N.C.L. Rev. 1271 (1994).

[xviii] Daicoff, Susan, *supra,* note 9, p. 574.

[xix] Schuman, David, *supra*, note 11.

[xx] "Colorado Bar Association PRI Task Force Interim Report to the Board of Governors, May 2002," 31 Colo. Law. 53 (July 2002)

Form Over Federalism: The Case for Consistency in State Ethics Rules Formats

*Robert A. Creamer**

State ethics rules are now in play nationwide. The work of the American Bar Association's Commission on the Evaluation of the Rules of Professional Conduct, popularly known as the Ethics 2000 Commission, is virtually complete. The ABA House of Delegates finished its review of the Commission's proposed revisions to the Model Rules at the February 2002 midyear meeting.[1] The House approved substantially all of the Commission's recommendations, and so the Ethics 2000 version of the Model Rules has become the new ABA Model Rules.

Because forty-three jurisdictions have adopted some form of the original 1983 version of the Model Rules, bar associations and courts in nearly all of those jurisdictions have or will soon appoint committees to review the 2002 version of the Model Rules and make recommendations for changes to their existing rules. This simultaneous nationwide review of state ethics rules offers a rare chance to correct a real defect in the current system: the inconsistent and sometimes bewildering formats that many jurisdictions have used in adapting their rules to the Model Rules.

The most common variation appears to be in the rules regulating lawyer advertising and solicitation.

The purpose of this paper is to urge those who are reviewing their state rules to seize this unique opportunity to recast the form of those rules in a manner consistent with the ABA Model Rules. Six simple "Conventions of Consistency" are listed at the end of this paper. Following these conventions would result in a consistent format for legal ethics rules in all states. This, in turn, will enable lawyers to promptly and safely determine whether and how any particular state ethics rule varies from the corresponding ABA Model Rule.

THE CURRENT SITUATION

The current situation of state ethics rules formats is a crazy quilt. Forty-two states and the District of Columbia have adopted a form of the 1983 Model Rules. Among the rest, New York and Oregon have retained the format of the 1969 ABA Model Code of Professional Responsibility, but engrafted several provisions of the Model Rules into the Model Code format.[2] Even California, which has its own unique system of rules, has borrowed Model Rules language for some of its rules of conduct.[3]

A majority of the jurisdictions that have adopted a form of the Model Rules have kept their rules format substantially consistent with the Model Rules, but several have strayed to varying degrees. The most common variation appears to be in the rules regulating lawyer advertising and solicitation. Many states have altered both the form and substance of those rules.[4] Fortunately, these changes have usually been made within the general Model Rules format, and therefore substantive variations are relatively easy to locate.

Another subject of frequent revision is Model Rule 1.6, the rule on confidentiality of client information. Most states have amended Model Rule 1.6 to expand the circumstances in which a lawyer *may*, or in a few states *must*, disclose a client's criminal or fraudulent conduct.[5] Like the changes to the advertising rules, these variations have typically been located in each state's version of Rule 1.6, so that any lawyer familiar with the Model Rules should find them readily.

Changes in many other state rules have not been as easy to track. As noted above, Oregon adopted much of the substance of the 1983 Model Rules, but retained the 1969 Model Code format. It has also created some new provisions. For example, unlike either the 1983 Model Rules or the Model Code, Oregon has a separate rule [Oregon DR 10-101] on definitions. The definition in DR 10-101(B)(2) of "full disclosure" in the context of consent to an actual or likely conflict of interest imposes the substantive requirement that disclosure must "include a recommendation that the recipient seek independent legal advice to determine if consent should be given and shall be contemporaneously confirmed in writing." This significant duty is not referenced in the conflicts provisions of the Oregon rules, and so it is not likely to be noted by a lawyer not already familiar with those rules.

Texas adopted most of the Model Rules, but renumbered the rules that it chose in its own unique system. It added a digit, usually a zero, to many of the rule numbers so that all the rules have three-digit numbers. Thus, the rule on fees [Model Rule 1.5] is now Texas Rule 1.05. Model Rule 2.2 ["Intermediary"] was revised and renumbered to become Texas Rule 1.07. The rule on organizational clients [Model Rule 1.13] became Texas Rule 1.12. These changes are logical and would cause no confusion if the Texas rules were the only set of rules. However, these rules are only a part of the national system of lawyer regulation, and changing the numbering system can create confusion among Texas and non-Texas lawyers alike. The greatest disservice may be to Texas practitioners researching the Model Rules analogues from which their rules are derived. Unless the lawyers work regu-

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larly with the ethics rules, such research will be challenging.

But Oregon and Texas are not alone. While Illinois generally followed the Model Rules format when adopting its current rules, it parked provisions held over from its former rules, which were based on the Model Code, in places where many lawyers are unlikely to find them. One example is Illinois Rule 1.2, titled "Scope of Representation" as is the corresponding Model Rule. However, in addition to the five paragraphs of the Model Rule (one of which has been moved from paragraph (e) to a new paragraph (i)), four new and different subjects are covered by the rule. New paragraph (e) perpetuates a former Illinois Code provision [DR 7-105] against threatening criminal charges to gain an advantage in a civil matter, a prohibition not found in the Model Rules. Regardless of whether this rule is good policy, its obscure placement suggests that many Illinois lawyers may never find it, even if they are looking for such a rule.

Another anomaly in Illinois Rule 1.2 is that new paragraphs (f), (g), and (h), which deal primarily with a lawyer's duties with respect to representation in litigated matters, cover topics that are also covered in Illinois Rules 3.1 and 3.3. Illinois Rule 1.2(f) is simply repetitious of Illinois Rule 3.1, which is substantially the same as Model Rule 3.1. Of greater concern is Illinois Rule 1.2(g), another former Illinois Code provision [DR 7-102(b)] that deals with a lawyer's duty of candor to a court in cases of client fraud. Illinois Rule 1.2(g) is inconsistent with Illinois Rule 3.3(b) on the same subject, giving Illinois lawyers potentially conflicting directions in this important situation.[6] If more attention had been paid to the form of the rules, the substantive confusion most likely would have been avoided.

Another instance where a change in form could have substantive consequences is shown by a recent (October 2001) amendment to the Missouri Rules of Professional Conduct. The amendment was a new provision that deals with potential conflicts of interest of private lawyers who also hold public office. It became new paragraph (d) of Missouri Rule 1.11, which is analogous to Model Rule 1.11, and entitled "Successive Government and Private Employment." The change displaced original paragraphs (d) and (e), which became new paragraphs (e) and (f), respectively, making those provisions less easy to find. Moreover, the new provision concerns *simultaneous*, rather than *successive*, public and private service, formerly the only subject of the rule. Thus, many lawyers will have difficulty finding the new provision even if they are aware that such a rule exists. In contrast, when New Hampshire adopted a new regulation concerning private lawyers holding public office, it created a separate rule, which became that state's Rule 1.11A. There is much less chance for confusion in this format.

Several jurisdictions have made similar types of changes.[7] Some, like Washington, that did not adopt Model Rule 1.13 on organizational clients, failed to reserve that rule number and renumbered subsequent rules so that those numbers do not match the corresponding Model Rule numbers. Others have moved the definitions or "Terminology" section of their rules to the end, rather than the beginning of the rules, as in the Model Rules. Again, such changes would not matter in a world with only one set of ethics rules. But these inconsistencies can cause needless confusion, especially among those who are familiar with the Model Rules format. As explained below, a majority of lawyers in every state are in fact already familiar with the Model Rules.

A final observation on the current situation in state ethics rules is that several states that adopted a form of the Model Rules nevertheless failed to adopt the ABA comments to those rules.[8] This omission is more than an issue of form. The comments are an integral element of the Model Rules. The ABA comments were reviewed and revised by the Ethics 2000 Commission with the same care and attention as the black letter rules, and they were subject to the same approval process by the House of Delegates. Thus, the ABA comments provide important explanatory detail to the Model Rules, information that could be critical to the application of the rules by practicing lawyers. The present review process offers an opportunity for those states without comments to correct that unfortunate situation.

[T]he Model Rules format is the lingua franca of ethics discourse.

THE MODEL RULES RULE

Despite the variation among the states, the Model Rules format is the *lingua franca* of ethics discourse. All the standard works on legal ethics, including the treatises by Professors Hazard and Hodes, Professor Wolfram, and Professor Rotunda, are organized around the Model Rules format.[9] The American Legal Ethics Library of the Legal Information Institute, Cornell Law School, the primary source of ethics rules and commentary on the Internet, is organized on the Model Rules format. Another important primary reference work on ethics, the *Annotated Model Rules of Professional Conduct* (4th ed. 1999), published by the ABA, is organized on the Model Rules. Finally, the principal periodical on ethics and professional responsibility, the *ABA/BNA Lawyers' Manual on Professional Conduct*, also organizes its reporting on the Model Rules.

Even lawyers who do not work regularly with ethics issues are likely to be familiar with the Model Rules. Every law school that is accredited by the ABA must teach the Model Rules to all its students. Standard 302(b) of the ABA *Standards of Approval of Law Schools* (2001) provides that a law school "... shall require all students in the J.D. degree program to receive instruction in the ... responsibilities of the legal profession and its members, including instruction in the Model Rules of Professional Conduct...." For that reason, the Model Rules have become part of the standard law school curriculum.

Study of the Model Rules continues beyond law school for the vast majority of American lawyers. The Multistate Professional Responsibility Examination (MPRE) is now

required for admission to the bar of every United States jurisdiction except Maryland, Washington, and Wisconsin.[10] For questions on the MPRE that deal with lawyer discipline, the "... correct answer will be governed by the current ABA Model Rules...."[11] Regarding individual state ethics rules, the National Conference of Bar Examiners, the sponsor of the MPRE advises: "As a general rule, particular local statutes or rules of court will not be tested in the MPRE."[12] Thus, the ethics rules format that most practicing lawyers know, regardless of where they practice, is the Model Rules format.

FORM DOES MATTER

There is no dispute that the most important task of any committee reviewing its state ethics rules will be to seek the right result on the substance of each rule. But form can have important consequences. An elegant rule is of little use if a significant number of practitioners are unlikely or unable to find it when they have an ethics issue to resolve.

Outside the area of ethics, there seems to be general agreement that a consistent format is appropriate for regulatory schemes with multijurisdictional application. No one would suggest, for example, that the Uniform Commercial Code should take a different form in different states. Recognition of the need to avoid confusion and misunderstanding of the law governing commercial transactions has apparently overcome any local interests in maintaining unique statutory formats.

[I]t seems safe to predict that the incidence of multijurisdictional practice will continue to grow.

The same approach should apply to state ethics rules. Like the issues governed by the Uniform Commercial Code, the practice of law is no longer a purely local matter. The work of the ABA Commission on Multijurisdictional Practice has shown that an increasing number of lawyers now represent clients in connection with transactions and litigation that take place in jurisdictions where the lawyers may not be licensed. The Commission's Interim Report (November 2001) recommends that as a general matter: "it is not the unauthorized practice of law for a lawyer admitted in another United States jurisdiction to render legal services on a temporary basis in a jurisdiction in which the lawyer is not admitted if the lawyer's services do not create an unreasonable risk to the interests of a lawyer's client, the public or the courts."[13] The Interim Report also recommends a new choice-of-rule provision that will make a state's legal ethics rules applicable to conduct of any lawyer rendering or offering to render legal services in that state, even if the lawyer is not licensed there.[14] If out of state lawyers are to be bound by a state's legal ethics rules when providing services in that state, it is obviously in the state's interest to facilitate compliance with those rules by those not familiar with them.

Regardless of the precise nature of the ultimate changes in the Model Rules concerning multijurisdictional practice, it seems safe to predict that the incidence of multijurisdictional practice will continue to grow. This means that lawyers will need to consult the ethics rules of other states more frequently than in the past. Lawyers are more likely to find the rules provision relevant to their inquiry if they are already familiar with the rules format. This may be especially true in times of stress, which may be the only time that many lawyers consult the ethics rules.

Fortunately, there seems to be no compelling reason not to follow a consistent ethics rules format based on the Model Rules in every jurisdiction. Even if following the Model Rules format in a particular jurisdiction would result in substantial changes to the existing rules, such changes would cause little, if any, confusion among the majority of practicing lawyers. As discussed above, the average lawyer's acquaintance with ethics rules is most likely to be based on the Model Rules. For ethics mavens, there will be no confusion at all because they already know the Model Rules.

The only conceivable argument against adoption of a format consistent with the Model Rules might be that it would take too much of the drafting committee's time. However, the relatively small number of hours spent by the drafting committee conforming a state's rules to the Model Rules format will surely save countless additional hours of lawyers trying to translate that state's system in the future. The cost-benefit analysis for the profession seems clear.

In sum, it seems evident that an ethics rules format that is consistent from state to state will assist all lawyers in finding the rules that govern their conduct. A consistent format may even help lawyers to better learn and understand the ethics rules.[15] The only way to achieve such consistency is to use the ABA Model rules as a template. The following conventions are an attempt to aid that result.

CONVENTIONS OF CONSISTENCY

1. Use the 2002 Model Rules numbering system for all "black letter" rules and comments.
2. If a particular rule, paragraph, or comment of a Model Rule is not adopted, leave that rule, paragraph, or comment blank. Designate omitted rules, paragraphs, or comments as "reserved." This serves two purposes. First, it tells the lawyers in that jurisdiction and the rest of the world that the jurisdiction decided not to adopt or modify that particular provision of the Model Rules. Second, it eliminates the need to renumber the rules, paragraphs, or comments that follow, a practice that would inevitably cause additional confusion.
3. Keep the same rule and paragraph designations for similar subject matter whenever possible, even if the substance is changed from the Model Rules. For example, the exceptions to the general duty of confidentiality are stated in Model Rule 1.6(b). It will aid understanding of the rule if lawyers could always find that information in rule 1.6(b) in every jurisdiction.
4. Place new and unique provisions at the end of the rule.

For example, if a jurisdiction wishes to add a new provision regarding imputation of conflicts, it should become new Rule 1.10(e) of that jurisdiction. As in Convention 2, this serves two purposes. It signals clearly that the jurisdiction has a new and different rule; and it reduces the confusion caused when unique state provisions are assigned rule numbers or paragraphs that cover different subjects in the Model Rules and other states.

5. Place new or additional comments dealing with similar subject matter after the corresponding Model Rules comment. For example, Comment [2] to Model Rule 1.13 concerns communications with a constituent of an organizational client. If the jurisdiction wishes to create an additional comment on that topic, the additional comment should be new Comment [2A]. Again, this will highlight the new material and minimize potential confusion. New comments with no analogous or related material in the Model Rules should be placed at the end of all other comments.

6. Explain in comments any variations from the Model Rules. There are many reasons why a jurisdiction, having made the decision to adopt the Model Rules and comments in general, may decide not to adopt particular provisions of those rules or comments. However, it is important for lawyers to know those reasons so they may better understand the rules and conform their conduct to the standards that the jurisdiction's supreme court has set.

CONCLUSION

The completion of the ABA Ethics 2000 review and revision of the Model Rules of Professional Conduct has led to the near simultaneous review of ethics rules throughout the United States. If the reviewers in each state are willing to follow a few simple conventions, they can easily address important local substantive concerns in a form compatible with the Model Rules format, the format with which their lawyers are already familiar. A consistent rules format in all jurisdictions will make lawyers better informed about their duties to their clients, the courts, and the profession.

ENDNOTES

* The views expressed in this paper are the author's and not necessarily those of ALAS. The author is indebted to Joseph R. Lundy of ALAS and Professor Paul B. Creamer of Columbia University for their comments on this paper.

1. Consideration of proposed revisions to Model Rules 5.5 and 8.5 was deferred pending the final report of the ABA Commission on Multijurisdictional Practice.

2. For example, New York DR 1-105 ("Disciplinary Authority and Choice of Law") is almost identical to Model Rule 8.5; New York DR 5-108 ("Conflict of Interest - Former Client") is based on provisions of Model Rules 1.9 and 1.10; and New York DR 1-109 ("Organization as Client") incorporates most of Model Rule 1.13.

3. For example, California Rule 3-300 ("Avoiding Interests Adverse to a Client") is substantially similar to Model Rule 1.8(a); and California Rule 3-600 ("Organization as Client") is clearly derived from Model Rule 1.13.

4. For example, the District of Columbia amended Rule 7.1 and omitted Rules 7.2, 7.3, and 7.4 entirely, but retained Rule 7.5.

5. For an explanation of the variations, *see* Reporter's Note to RESTATEMENT THIRD, THE LAW GOVERNING LAWYERS § 67 (2000).

6. For an explanation of the inconsistency between Illinois Rules 1.2(g) and 3.3(b), *see* Illinois State Bar Association Opinion 94-24 (May 17, 1995).

7. For example, the counterparts in various states to Model Rule 1.16 on declining or terminating representation include Kentucky Rule 3.130, Nevada Rule 166, Rhode Island Rule 1.17, Texas Rule 1.15, and Washington Rule 1.15.

8. These states include Arizona, Illinois, Louisiana, Montana, Nevada, Oregon, Rhode Island, and Washington.

9. These treatises are: THE LAW OF LAWYERING (3d ed. 2001), by Professors Geoffrey C. Hazard, Jr., of the University of Pennsylvania Law School, and W. William Hodes, of Indiana University School of Law (Emeritus); MODERN LEGAL ETHICS (1986), by Professor Charles W. Wolfram of Cornell Law School; and LEGAL ETHICS, THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY (2000), by Professor Ronald D. Rotunda of the University of Illinois College of Law.

10. *See* National Conference of Bar Examiners Web site: www.ncbex.org/tests.htm.

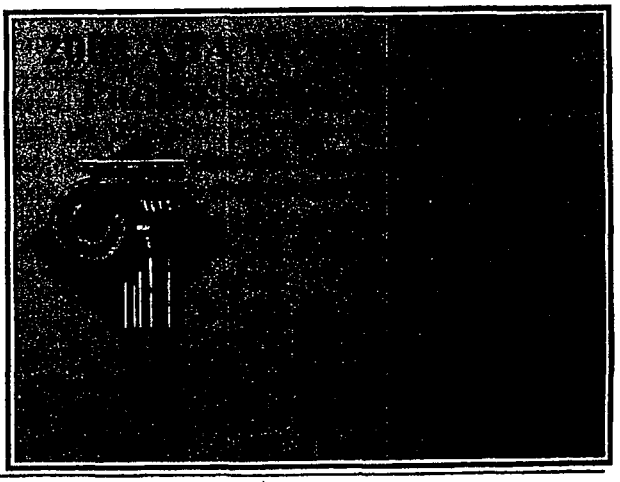
11. *Id.*

12. *Id.*

13. The Commission's Report is available at www.abanet.org/cpr. *See* Recommendation 2.

14. *Id.*, Appendix N, proposing to add to Model Rule 8.5(a) the following sentence: "A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer renders or offers to render any legal services in this jurisdiction."

15. A discussion of the influence of a consistent format on learning is beyond the scope of this short paper. However, recent studies of the learning process have suggested that consistent context can play an important role in conceptual processing. *See* Jeffrey P. Toth and Eyal M. Reingold, *Beyond Perception: Conceptual Contributions to Unconscious Influences of Memory*, in IMPLICIT COGNITION, Geoffrey Underwood ed., Oxford University Press (1996).



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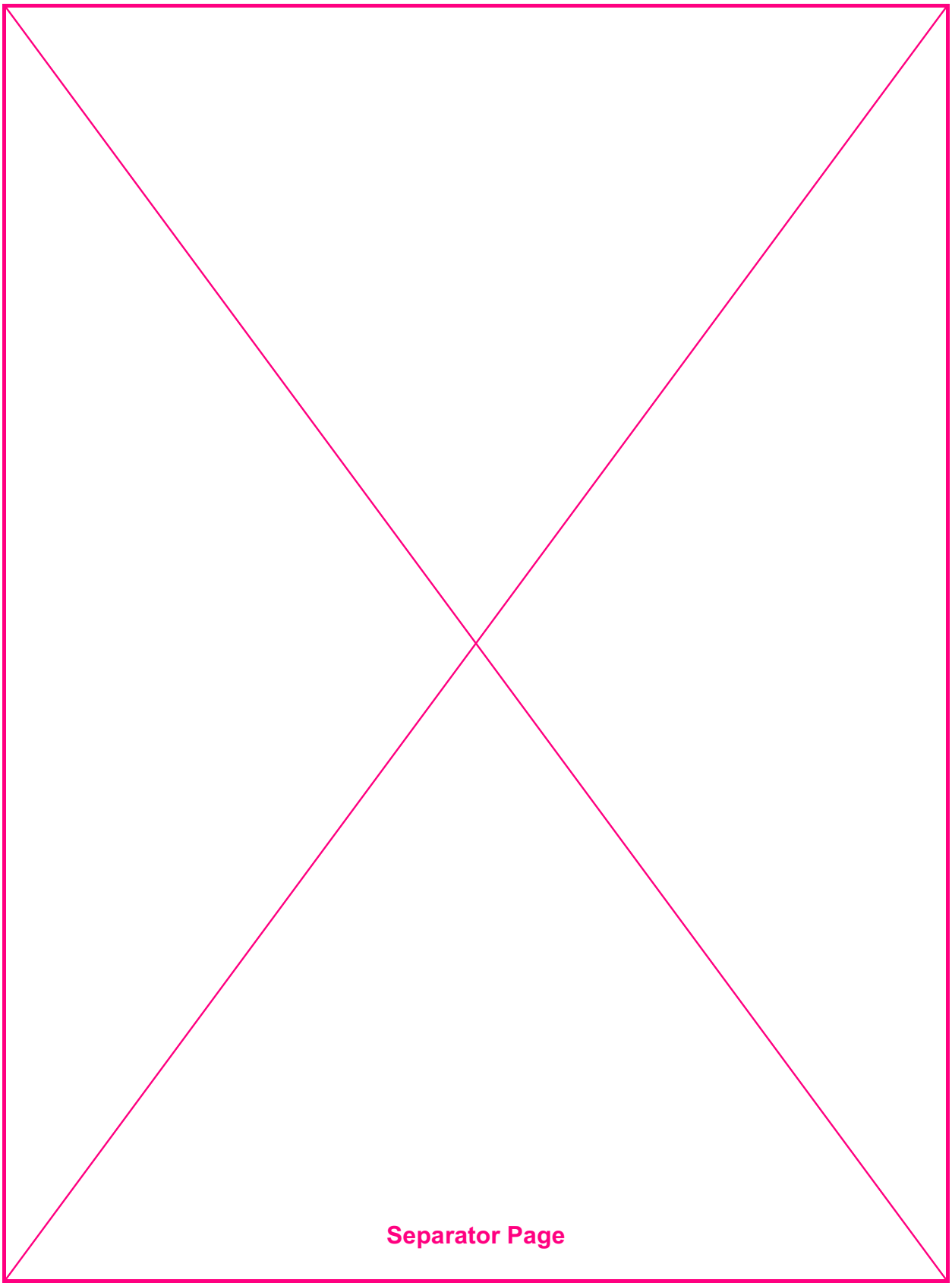

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COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

AGENDA

December 3, 2004, 9:00 a.m.
Supreme Court Conference Room (5th Floor)

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1. Approval of minutes – See attached pages 1-15
2. Administrative matter – Select next meeting date
3. Ethics 2000 Subcommittee Report on Rules 1.5 through 1.9 – Michael Berger
   a. First Interim Report of Subcommittee – **See pages 12-98 from October 1, 2004 meeting materials**
   b. Second Interim Report of Subcommittee – See pages 16-67
4. Other business
5. Adjournment (by noon)

Chair
Marcy G. Glenn
Holland & Hart LLP
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Denver, Colorado 80201
(303) 295-8320
mglenn@hollandhart.com

FILE NOTE

The "submitted minutes" of the prior meeting that were provided to Committee members in advance of the current meeting have been omitted from this file.

See the files containing the *approved* minutes of the Supreme Court Standing Committee on the Rules of Professional Conduct, which are available on the Supreme Court's website.

COLORADO SUPREME COURT COMMITTEE
ON RULES OF PROFESSIONAL CONDUCT

ETHICS 2000 SUBCOMMITTEE

INTERIM REPORT NO. 2

NOVEMBER 23, 2004

The Subcommittee has completed its work through Rule 1.09. This Interim Report No. 2 addresses Rules 1.7 through 1.09. Interim Report No. 1, dated September 24, 2004 addressed the Preamble through Rule 1.6. After the date of Interim Report No. 1, a member of the Subcommittee sought to reopen discussion of Rule 1.6. While no changes resulted to the Subcommittee=s recommendation with respect to Rule 1.6 as reported in Interim Report No. 1, the discussions were important and this Interim Report No. 2 provides a summary of those discussions.

Rule 1.6 Revisited. Professor Wald requested that the Subcommittee revisit its prior recommendation to adopt (with minor changes and additions not pertinent here) the ABA Ethics 2000 version of Rule 1.6 (which was also recommended for adoption by the Ad Hoc Colorado Committee.) He noted that existing Colo.RPC 1.6(b) permits (but does not require) a lawyer to Areveal the intention of the lawyer=s client to commit a crime and the information necessary to prevent the crime.@ By its terms, the existing exception to a lawyer=s duty of confidentiality does not depend upon the nature of the crime or the probable consequences, i.e, whether any person or entity will suffer substantial (or indeed, any) bodily or financial harm. In contrast, proposed Rule 1.6(b)(2) provides that a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests of another and in furtherance of which the client has used or is using the lawyer=s services." Thus, proposed Rule 1.6(b)(2), viewed in isolation, is considerably narrower than existing Colo.RPC 1.6(b), which permits disclosure to prevent the commission of **any** crime. However, Proposed Rule 1.6(b)(1), unlike the existing rule, also permits (but again does not require) a lawyer to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary "to prevent reasonably certain death or substantial bodily harm." In this regard, the permitted disclosures under the proposed rule are considerably broader than under the existing rule.

Professor Wald argues that proposed Rule 1.6(b)(1) should be the same as existing Colo. RPC 1.6(b)— which provides that a lawyer has professional discretion to reveal "the intention of

the lawyer's client to commit a crime and the information necessary to prevent the crime." According to Professor Wald, existing Colo.RPC 1.6(b) is a more desirable rule than proposed Rule 1.6(b)(1) because it better serves the public interest; according to him the proposed rule narrows existing Rule 1.6(b) for no compelling reason. He also points out that Rule 1.6 is a rule that exhibits great diversity, inconsistencies and lack of uniformity among the various states.

The majority of the Subcommittee disagrees with Professor Wald=s position for two separate reasons. First of all, the majority believes, as did ABA Ethics 2000 and the Colorado Ad Hoc Committee, that proposed Rule 1.6(b)(2), when read in conjunction with proposed Rule 1.6(b)(1), provides the proper balance. "Blowing the whistle" on a client is a serious matter that has substantial repercussions to the continued vitality of the attorney-client relationship. If a client believes that his or her lawyer will disclose the confidences of the client, the utility of the attorney-client relationship is impaired. Important societal interests demand that the duty of confidentiality give way when honoring confidentiality is likely to cause serious harm to third parties. But, blowing the whistle should be reserved for those rare circumstances where the client=s proposed actions are likely to cause such serious harm. While a lawyer should have professional discretion to blow the whistle when a client=s actions will result in death, serious bodily injury or substantial financial injury, there is no warrant for breaching the most fundamental tenet of the lawyer-client relationship where the lawyer has information that the client has an intention to commit a non-serious crime or where the financial consequences of such actions are minimal or non-existent.

Second, as discussed in Interim Report No. 1, uniformity between the states in the adoption of the ABA Model Rules of Professional Conduct is an important and worthy goal. That objective reaches its zenith with respect to Rule 1.6, which expresses one of the most fundamental duties owed by a lawyer to a client. The majority believes that unless there is a serious defect in the Rule proposed by ABA Ethics 2000, the interest of uniformity should trump the possibility that the rule could be marginally improved. Because the majority believes that the proper balance is struck in proposed Rule 1.6, it necessarily concludes that there is no major defect in proposed Rule 1.6, Therefore the Subcommittee continues to recommend the adoption of proposed Rule 1.6 with the minor changes described in Interim Report No. 1.

Rule 1.7. The words of proposed Rule 1.7 are very different than existing Colo.RPC 1.7. Although the Reporter of ABA Ethics 2000 has stated that the ABA Ethics 2000 Commission intended no substantive change in the rule, the Subcommittee believes that the language of proposed Rule 1.7 will, in fact, permit some representations that would be prohibited under existing Colorado Rule 1.7. Whether this is a good (or acceptable) result is discussed below.

Modern conflicts of interest analysis focuses on the risk that factors external to the lawyer=s representation of a client will impair the lawyer=s representation of the client. This analysis recognizes that in the modern world, it is impossible to avoid all conflicting interests and thus the focus is on whether a particular conflicting interest raises an unacceptable risk that the representation will be materially affected. This analysis eschews the former distinction between

Aactual@ and Apotential@ conflicts of interest.

The proposed rule follows the conflicts analysis that is utilized by the American Law Institute=s Restatement of the Law Governing Lawyers, section 121 (2000). As stated by Geoffrey Hazard & William Hodes, the "law of lawyering must focus on identifying conflicts of interest in a realistic manner, and regulate them in such a way as to avoid infringing upon the effective representation of clients, where total elimination of the conflict is not practical." G. Hazard & W. Hodes. *The Law of Lawyering*, Section 10.1 at p. 10-5 (3d Ed.2004).

Proposed Rule 1.7(b) specifies the conditions that permit a lawyer to represent a client despite the existence of a conflict under 1.7(a)(1) (directly adverse) or 1.7(a)(2) (significant risk of a material limitation on the representation.) The proposed rule permits a client to waive (under the circumstances stated) a conflict where there is a A**significant risk** that the representation of. . . [the client] will be **materially limited** by the lawyer=s responsibilities to another client or a third person, or by a personal interest of the lawyer.@ [emphasis supplied.] Several members of the Subcommittee questioned whether a client ever could (or should) waive such a conflict because, by definition, there is a **significant risk** that the representation **will be** materially limited by outside factors. Other members noted that proposed Rule 1.7(b)(1) addresses this issue to some extent because the lawyer is required to reasonably believe that the lawyer will be able to provide competent and diligent representation to each affected client. This objective test will place practical limits on a lawyer=s ability to obtain an enforceable waiver even when the client is willing to provide the waiver.

Despite this objective limitation on the waiver of conflicts, most members of the Subcommittee concluded that the proposed rule may, in fact, permit some conflicted representations that are presently prohibited under existing Colo.RPC 1.7 because the definition of a conflict that must be dealt with seems to have a higher threshold under the proposed rule than under the current rule. In partial justification of such a result, some members noted that waivers by sophisticated clients who want to accept the risks of such a representation should not be absolutely precluded by the rules.

Although several members of the Subcommittee expressed discomfort over the wording of proposed Rule 1.7(a)(2) and 1.7(b), once again a clear majority was convinced that the interest of uniformity trumped these concerns. Like Rule 1.6, Rule 1.7 is one of the most basic rules of professional conduct. Where such core rules are involved, the Subcommittee believes that deviations from the ABA Model Rules should be made only if we are convinced that the proposed rule is wrong and is contrary to the policy of this state. The majority does not believe that to be the case and accordingly recommends the adoption of ABA Ethics 2000 proposed Rule 1.7, as did the Colorado Ad Hoc Committee. One member of the Subcommittee dissents from this recommendation for the reasons discussed above.

Rule 1.8. Proposed Rule 1.8 is not controversial except for the expanded imputation of

prohibitions contained in proposed Rule 1.8(k). Proposed Rule 1.8(k) imputes to all members of the firm the Rule 1.8(a) restrictions on business transactions between the client and the lawyer. A number of disturbing hypotheticals were presented by members of the subcommittee in which a lawyer in a firm who knew nothing about an unrelated business transaction between another member of the firm and the firm=s client, would be subject to discipline for violating the proposed rule. Some members noted that irrespective of whether the rule 1.8(a) prohibition is imputed, Rule 1.7 continues to apply (a proposition which is explicit in Comment [3]) and thus should cover the circumstances (which probably are rare) where a business transaction between a client and a member of the firm will materially and adversely affect the representation of a client by another member of the firm. For these reasons, the Subcommittee voted to recommend the deletion of the imputation of the Rule 1.8(a) prohibitions in proposed Rule 1.10 (k). This change required the rewriting of Comment [20] to provide an example of the coverage of the rule as proposed by the Subcommittee.

The Subcommittee also notes that proposed Rule 1.8 (e) changes the existing Colorado rule. Under the present rule, a lawyer is prohibited from making an agreement with a client in advance to forego the payment of costs in a contingency fee case. The lawyer is permitted to relieve the client from that obligation at the conclusion of the case if the repayment obligation would impose a financial hardship on the client. The present rule has resulted in a game where the lawyer, who has no intention of enforcing the client=s cost obligation, tells the client that while she can=t make that determination now, that if the client=s financial circumstances remain the same at the conclusion of the representation, the obligation of the client to pay the costs will not be enforced. There is no good reason for requiring this dance; the client=s interests are advanced by the certainty that the lawyer will not look to the client for repayment of the costs and the lawyer simply bears the burden of his agreement with the client.

Accordingly, the Subcommittee recommends with the changes discussed above the adoption of ABA Ethics 2000 Proposed Rule 1.8 and the Comments. The Ad Hoc Colorado Committee recommended the adoption of proposed ABA Rule 1.8 without the changes recommended by the Subcommittee.

Rule 1.9. There was no controversy regarding Rule 1.9 and the Subcommittee, as did the Ad Hoc Colorado Committee, recommends the adoption of proposed Rule 1.9 (including the Comments) in their entirety.

[Client-lawyer Relationship]

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

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

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

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

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

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

(2) the representation is not prohibited by law;

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

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

* * * * * * * * * *

Comment to RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

General Principles

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

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

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1.

Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

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

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

Identifying Conflicts of Interest: Directly Adverse

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

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

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself

require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third

Persons

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

Personal Interest Conflicts

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

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

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

Interest of Person Paying for a Lawyer's Service

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

Prohibited Representations

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

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

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

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

Informed Consent

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

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the

clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

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

Revoking Consent

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

Consent to Future Conflict

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

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2).

A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar 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 effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

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

Nonlitigation Conflicts

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

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

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

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

Special Considerations in Common Representation

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

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

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

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

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

Organizational Clients

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

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

RULE 1.7 — CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) For the purposes of this Rule, a client's consent cannot be validly obtained in those instances in which a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances of the particular situation.

Source: Committee Comment amended October 17, 1996, effective January 1, 1997.

Comment

Loyalty to a Client

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined.

If such conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests.

The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

A client may consent to representation notwithstanding a conflict, but only after consultation which involves full disclosure of the possible effect of such dual representation on the exercise of the lawyer's independent professional judgment on behalf of each client. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's Interests

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. 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. 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 interest.

Conflicts in Litigation

Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar

interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in the appellate court.

Interest of Person Paying for a Lawyer's Service

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8 (f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other Conflict Situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also 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 arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict,

the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

Committee Comment

The Rule adopted is identical to Model Rule 1.7 except for section (c) which the Committee felt was necessary in order to provide more protection for a client whose consent is sought as a way of resolving a conflict of interest between the lawyer and client. The addition states that consent should not be obtained from a client in a situation in which a disinterested lawyer would advise the client not to agree to the representation.

For a discussion of the ethical ramifications of sexual relationships between a lawyer and a client see the Committee Comment to Rule 8.4.

CLIENT-LAWYER RELATIONSHIP

Rule 1.7
Conflict of Interest: Current Clients

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

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

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

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

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

(2) the representation is not prohibited by law;

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

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

COMMENT

General Principles

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

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

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

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

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

Identifying Conflicts of Interest: Directly Adverse

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

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

Identifying Conflicts of Interest: Material Limitation

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

Lawyer's Responsibilities to Former Clients and Other Third Persons

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

Personal Interest Conflicts

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

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment.

As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

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

Interest of Person Paying for a Lawyer's Service

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

Prohibited Representations

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

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

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before

a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

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

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

Consent Confirmed in Writing

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

Revoking Consent

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

Conflicts in Litigation

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

client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

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

Nonlitigation Conflicts

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

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

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

Special Considerations in Common Representation

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

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

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

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

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

Organizational Clients

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

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

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[Client-lawyer Relationship]

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a 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) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

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

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

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

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

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

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

(1) the client gives informed consent;

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

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

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to

guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

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

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

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

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

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

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

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

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

Business Transactions Between Client and Lawyer

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

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood.

Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a 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(e) (definition of informed consent).

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

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

Use of Information Related to Representation

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

Gifts to Lawyers

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

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

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

Literary Rights

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

Financial Assistance

[10] Lawyers may not subsidize law suits 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 law suits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

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

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be

materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

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

Limiting Liability and Settling Malpractice Claims

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

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

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The

exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

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

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

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs ~~(a)~~ (b) 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.~~ For example, one lawyer in a firm may not solicit a substantial gift from a client of another member of the firm, even if the soliciting lawyer is not personally involved in the representation of the client, because the prohibition in paragraph (c) applies to all lawyers associated in the firm. The prohibitions set forth in paragraphs (a) and (j) ~~is~~ are personal and ~~is~~ are not applied to associated lawyers.

RULE 1.8 — CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is informed that use of independent counsel may be advisable and is given a reasonable opportunity to seek the advice of such independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

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

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

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the lawyer's client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses. A lawyer may forego reimbursement of some or all of the expenses of litigation if it is or becomes apparent that the client is unable to pay such expenses without suffering substantial financial hardship.

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

(1) the client consents after consultation;

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

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

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling, or spouse or as one who has a cohabiting relationship shall not represent a client in a representation directly adverse to

a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) 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 granted 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.

Comment

Transactions Between Client and Lawyer

As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, 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.

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 token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

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

Person Paying for a Lawyer's Services

Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Acquisition of Interest in Litigation

Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e).

Relationships Between Lawyers

Paragraph (i) applies to related and cohabiting lawyers who are in different firms. Such lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated.

Limiting Liability

This Rule is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.

Committee Comment

Section (a)(2) of the Model Rule was amended by the Committee because it was felt that the Model Rule was not clear enough when it stated simply that a client should be given "reasonable opportunity" to consult with independent counsel in a conflict situation such as (a) contemplates. The Committee version adds the clarifying precaution that a client in such a situation should be told that "the use of independent counsel may be advisable."

Section (h) allows a lawyer to limit liability where such limitation is lawful and has been negotiated with a client who is independently represented.

Finally, both the Rule (section i) and the Comment thereto were amended to add "a cohabiting relationship" to the list of familial relationships in which disclosure and consent are needed prior to representation.

Rule 1.8
Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a 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) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

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

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

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

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

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

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

(1) the client gives informed consent;

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

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

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

(h) A lawyer shall not:

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

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

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

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

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

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

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

COMMENT

Business Transactions between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for

a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a 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(e) (definition of informed consent).

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

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

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Use of Information Related to Representation

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

Gifts to Lawyers

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

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

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

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning

literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

[10] Lawyers may not subsidize lawsuits 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 on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

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

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

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule

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

Limiting Liability and Settling Malpractice Claims

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

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

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more dif-

ficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

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

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

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer 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 busi-

ness transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

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[Client-lawyer Relationship]

RULE 1.9 DUTIES TO FORMER CLIENTS

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

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

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

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

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

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Comment to RULE 1.9 DUTIES TO FORMER CLIENTS

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

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

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

Lawyers Moving Between Firms

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

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

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

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

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

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

RULE 1.9 — CONFLICT OF INTEREST: FORMER CLIENT

(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 consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rule 1.6 that is material to the matter; unless the former client consents after consultation.

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

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Source: [1.9(c)] amended March 17, 1994, effective July 1, 1994.

Comment

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

The scope of a "matter" for purposes of this Rule may depend 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 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 wholly 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 jurisdiction. 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.

Lawyers Moving Between Firms

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

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by the

partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a two fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

Confidentiality

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

Application of paragraph (b) depends on a situation's particular facts. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

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

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

Adverse Positions

The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of paragraphs (b) and (c) concerning confidentiality have been met.

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

Disqualification from subsequent representation is for the protection of former clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.

With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Committee Comment

This Rule, which was viewed by the Committee as an important contribution of the Model Rules, is identical to amended Model Rule 1.9 (which was amended at the February 1989 Mid-Year ABA meeting) and its comments.

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.

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(1) whose interests are materially adverse to that person; and

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COMMENT

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

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a par-

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

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

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking

on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

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

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

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

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

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