

*District of Columbia  
Court of Appeals*

No. M-223-05

BEFORE: Washington, Chief Judge; and Farrell, Ruiz, Reid, Glickman, Kramer, and Fisher,  
Associate Judges.

**ORDER**  
**(FILED - August 1, 2006)**

On consideration of the proposed amendments to the District of Columbia Rules of Professional Conduct submitted by the Board of Governors of the District of Columbia Bar on June 23, 2005, and the comments thereto, it is

ORDERED that the rules are amended in accordance with the version transmitted by the District of Columbia Court of Appeals to the District of Columbia Bar electronically and by written copy on August 1, 2006. It is

FURTHER ORDERED that the effective date of the Rules as amended is February 1, 2007.

ENTERED BY DIRECTION OF THE COURT:

GARLAND PINKSTON, JR.  
Clerk of the Court

**DISTRICT OF COLUMBIA RULES  
OF PROFESSIONAL CONDUCT**  
(revised effective February 1, 2007)

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## Scope

[1] The Rules of Professional Conduct (Rules) 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 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 interpreting the Rules and practicing in compliance with them.

[2] 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. 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.

[3] 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.

[4] Nothing in these Rules, the Comments associated with them, or this Scope section is intended to enlarge or restrict existing law regarding the liability of lawyers to others or the requirements that the testimony of expert witnesses or other modes of proof must be employed in determining the scope of a lawyer’s duty to others. Moreover, nothing in the Rules or associated Comments or this Scope section is intended to confer rights on an adversary of a lawyer to enforce the Rules in a proceeding other than a disciplinary proceeding. Some judicial decisions have considered the standard of conduct established in these Rules in determining the standard of care applicable in a proceeding other than a disciplinary proceeding. A tribunal presented with claims that the conduct of a lawyer appearing before that tribunal requires, for example, disqualification of the lawyer and/or the lawyer’s firm may take such action as seems appropriate in the circumstances, which may or may not involve disqualification.

[5] In interpreting these Rules, the specific shall control the general in the sense that any rule that specifically addresses conduct shall control the disposition of matters and the outcome of such matters shall not turn upon the application of a more general rule that arguably also applies to the conduct in question. In a number of instances, there are specific rules that address specific types of conduct. The rule of interpretation expressed here is meant to make it clear that the general rule does not supplant, amend, enlarge, or extend the specific rule. So, for instance, the general terms of Rule 1.3 are not intended to govern conflicts of interest, which are particularly discussed in Rules 1.7, 1.8, and 1.9. Thus, conduct that is proper under the specific conflicts rules is not improper under the more general rule of Rule 1.3. Except where the principle of priority stated here is applicable, however, compliance with one rule does not generally excuse compliance with other rules. Accordingly, once a lawyer has analyzed the ethical considerations under a given rule, the lawyer must generally extend the analysis to ensure compliance with all other applicable rules.

[6] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. This note on Scope provides general orientation and general rules of interpretation. The Comments are intended as guides to interpretation, but the text of each Rule is controlling.

## **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) “Consult” or “consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(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, but does not include a government agency or other government entity. *See* Comment, Rule 1.10.

(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) “Law clerk” denotes a person, typically a recent law school graduate, who acts, typically for a limited period, as confidential assistant to a judge or judges of a court; to an administrative law judge or a similar administrative hearing officer; or to the head of a governmental agency or to a member of a governmental commission, either of which has authority to adjudicate or to promulgate rules or regulations of general application.

(h) “Matter” means any litigation, administrative proceeding, lobbying activity, application, claim, investigation, arrest, charge or accusation, the drafting of a contract, a negotiation, estate or family relations practice issue, or any other representation, except as expressly limited in a particular rule.

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

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

(k) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.



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

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

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

(o) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photo stating, photography, audio or video recording, 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**

### **“Fraud” or “fraudulent”**

[1] 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”**

[2] 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(e) and 1.7(c)(1). 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. In all circumstances, the client's consent must be not only informed but also uncoerced by the lawyer or by any other person acting on the lawyer's behalf.

[3] 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 in writing. *See* Rules 1.8(a)(3) and 1.8(g). For a definition of "writing," *see* Rule 1.0(o).

#### **"Screened"**

[4] 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.

[5] 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 upon 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. For a further explanation of screening, *see* D.C. Bar Legal Ethics Committee Opinion 279.

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

## **Rule 1.1 – Competence**

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

(b) A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters.

### **COMMENT**

#### **Legal Knowledge and Skill**

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

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what 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 and continuing attention to the needs of the representation to assure that there is no neglect of such needs. 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.

### **Maintaining Competence**

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and engage in such continuing study and education as may be necessary to maintain competence.

## **Rule 1.2 – Scope of Representation**

(a) A lawyer shall abide by a client's decisions concerning the 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 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 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 objective of the representation if the client gives informed consent.

(d) A government lawyer's authority and control over decisions concerning the representation may, by statute or regulation, be expanded beyond the limits imposed by paragraphs (a) and (c).

(e) 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.

(f) 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.

### **COMMENT**

#### **Scope of Representation**

[1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within these 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.

[2] 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**

[3] 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**

[4] The objectives or scope of services provided by the lawyer may be limited by agreement with the client or by 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. Rule 1.5(b) requires a lawyer to communicate the scope of the lawyer's representation when the lawyer establishes a new lawyer-client relationship, and it is generally prudent for the lawyer to explain in writing any limits on the objectives or scope of the lawyer's services.

[5] 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**

[6] 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.

[7] 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.

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

[9] Paragraph (e) 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 criminal or fraudulent escape of tax liability. Paragraph (e) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (e) 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.

### **Rule 1.3 – Diligence and Zeal**

(a) A lawyer shall represent a client zealously and diligently within the bounds of the law.

(b) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules; or

(2) Prejudice or damage a client during the course of the professional relationship.

(c) A lawyer shall act with reasonable promptness in representing a client.

#### **COMMENT**

[1] The duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law, including the Rules of Professional Conduct and other enforceable professional regulations, such as agency regulations applicable to lawyers practicing before the agency. This duty requires the lawyer to pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and to 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. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. *See* Rule 1.2. A lawyer's workload should be controlled so that each matter can be handled adequately.

[2] This duty derives from the lawyer's membership in a profession that has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of individuals, each member of our society is entitled to have such member's conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

[3] The bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, ambiguous statutes, or judicial opinions, and changing public and judicial attitudes.

[4] Where the bounds of law are uncertain, the action of a lawyer may depend on whether the lawyer is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of a client, an advocate for the most part deals with past conduct and must take the facts



as the advocate finds them. By contrast, a lawyer serving as adviser primarily assists the client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of the client doubts as to the bounds of the law, but even when acting as an advocate, a lawyer may not institute or defend a proceeding unless the positions taken are not frivolous. *See* Rule 3.1. In serving a client as adviser, a lawyer, in appropriate circumstances, should give a lawyer's professional opinion as to what the ultimate decision of the courts would likely be as to the applicable law.

[5] To prevent neglect of client matters in the event that a sole practitioner ceases to practice law, each sole practitioner should prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client that the lawyer is no longer engaged in the practice of law, and determine whether there is a need for immediate protective action. *See* D.C. App. R. XI, § 15(a) (appointment of counsel by District of Columbia Court of Appeals, on motion of Board on Professional Responsibility, where an attorney dies, disappears, or is suspended for incapacity or disability and no partner, associate or other responsible attorney is capable of conducting the attorney's affairs).

[6] In the exercise of professional judgment, a lawyer should always act in a manner consistent with the best interests of the client. However, when an action in the best interests of the client seems to be unjust, a lawyer may ask the client for permission to forgo such action. If the lawyer knows that the client expects assistance that is not in accord with the Rules of Professional Conduct or other law, the lawyer must inform the client of the pertinent limitations on the lawyer's conduct. *See* Rule 1.2(e) and (f). Similarly, the lawyer's obligation not to prejudice the interests of the client is subject to the duty of candor toward the tribunal under Rule 3.3 and the duty to expedite litigation under Rule 3.2.

[7] The duty of a lawyer to represent the client with zeal does not militate against the concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm. Thus, the lawyer's duty to pursue a client's lawful objectives zealously does not prevent the lawyer from acceding to reasonable requests of opposing counsel that do not prejudice the client's rights, being punctual in fulfilling all professional commitments, avoiding offensive tactics, or treating all persons involved in the legal process with courtesy and consideration.

[8] Perhaps no professional shortcoming is more widely resented by clients 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. Neglect of client matters is a serious violation of the obligation of diligence.

[9] 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 eliminated 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 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.

[10] Rule 1.3 is a rule of general applicability, and it is not meant to enlarge or restrict any specific rule. In particular, Rule 1.3 is not meant to govern conflicts of interest, which are addressed by Rules 1.7, 1.8, and 1.9.

## 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) A lawyer who receives an offer of settlement in a civil case or proffered plea bargain in a criminal case shall inform the client promptly of the substance of the communication.

### COMMENT

[1] 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. 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 who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case is required to inform the client promptly of its substance. *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.

[2] A client is entitled to whatever information the client wishes about all aspects of the subject matter of the representation unless the client expressly consents not to have certain information passed on. The lawyer must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations. The lawyer must initiate and maintain the consultative and decision-making process if the client does not do so and must ensure that the ongoing process is thorough and complete.

[3] Adequacy of communication depends in part on the kind of advice or assistance involved. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with (1) the duty to act in the client's best interests, and (2) the client's overall requirements and objectives as to the character of representation.

[4] 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. When the lawyer is conducting a trial, it is often not possible for the lawyer

to consult with the client and obtain the client's acquiescence in tactical matters arising during the course of trial. It is sufficient if the lawyer consults with the client in advance of trial on significant issues that can be anticipated as arising during the course of the trial, and consults during trial to the extent practical, given the nature of the trial process.

### **Withholding Information**

[5] In rare 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. Similarly, a lawyer may be justified, for humanitarian reasons, in not conveying certain information, for example, where the information would merely be upsetting to a terminally ill client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation (such as a protective order limiting access to certain types of discovery material to counsel only) may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

## **Rule 1.5 – Fees**

(a) A lawyer'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 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, the scope of the lawyer's representation, and the expenses for which the client will be responsible 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 prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing 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, other expenses to be deducted from the recovery, whether such expenses are to be deducted before or after the contingent fee is calculated, and whether the client will be liable for expenses regardless of the outcome of the matter. 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 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 is advised, in writing, of the identity of the lawyers who will participate in the representation, of the contemplated division of responsibility, and of the effect of the association of lawyers outside the firm on the fee to be charged;

(3) The client gives informed consent to the arrangement; and

(4) The total fee is reasonable.

(f) Any fee that is prohibited by paragraph (d) above or by law is *per se* unreasonable.

## **COMMENT**

### **Basis or Rate of Fee**

[1] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established, together with the scope of the lawyer's representation and the expenses for which the client will be responsible. 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, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client.

[2] A written statement concerning the fee, required to be furnished in advance in most cases by paragraph (b), reduces the possibility of misunderstanding. In circumstances in which paragraph (b) requires that the basis for the lawyer's fee be in writing, an individualized writing specific to the particular client and representation is generally not required. Unless there are unique aspects of the fee arrangement, the lawyer may utilize a standardized letter, memorandum, or pamphlet explaining the lawyer's fee practices, and indicating those practices applicable to the specific representation. Such publications would, for example, explain applicable hourly billing rates, if billing on an hourly rate basis is contemplated, and indicate what charges (such as filing fees, transcript costs, duplicating costs, long-distance telephone charges) are imposed in addition to hourly rate charges.

[3] Where the services to be rendered are covered by a fixed fee schedule that adequately informs the client of the charges to be imposed, a copy of such schedule may be utilized to satisfy the requirement for a writing. Such services as routine real estate transactions, uncontested divorces, or preparation of simple wills, for example, may be suitable for description in such a fixed-fee schedule.

### **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. 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.

[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 the 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.

### **Contingent Fees**

[6] Generally, contingent fees are permissible in all civil cases. However, paragraph (d) continues the prohibition, imposed under the previous Code of Professional Responsibility, against the use of a contingent fee arrangement by a lawyer representing a defendant in a criminal case. Applicable law may impose other limitations on contingent fees, such as a ceiling on the percentage. And in any case, if there is doubt whether a contingent fee is consistent with the client's best interests, the lawyer should explain any existing payment alternatives and their implications.

[7] Contingent fees in domestic relations cases, while rarely justified, are not prohibited by Rule 1.5. Contingent fees in such cases are permitted in order that lawyers may provide representation to clients who might not otherwise be able to afford to contract for the payment of fees on a noncontingent basis.

[8] Paragraph (c) requires that the contingent fee arrangement be in writing. This writing must explain the method by which the fee is to be computed, as well as the client's responsibility for expenses. The lawyer must also provide the client with a written statement at the conclusion of a contingent fee matter, stating the outcome of the matter and explaining the computation of any remittance made to the client.

### **Division of Fee**

[9] 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.

[10] Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole. Joint responsibility for the

representation entails the obligations stated in Rule 5.1 for purposes of the matter involved. Permitting a division on the basis of joint responsibility, rather than on the basis of services performed, represents a change from the basis for fee divisions allowed under the prior Code of Professional Responsibility. The change is intended to encourage lawyers to affiliate other counsel, who are better equipped by reason of experience or specialized background to serve the client's needs, rather than to retain sole responsibility for the representation in order to avoid losing the right to a fee.

[11] The concept of joint responsibility is not, however, merely a technicality or incantation. The lawyer who refers the client to another lawyer, or affiliates another lawyer in the representation, remains fully responsible to the client, and is accountable to the client for deficiencies in the discharge of the representation by the lawyer who has been brought into the representation. If a lawyer wishes to avoid such responsibility for the potential deficiencies of another lawyer, the matter must be referred to the other lawyer without retaining a right to participate in fees beyond those fees justified by services actually rendered.

[12] The concept of joint responsibility does not require the referring lawyer to perform any minimum portion of the total legal services rendered. The referring lawyer may agree that the lawyer to whom the referral is made will perform substantially all of the services to be rendered in connection with the representation, without review by the referring lawyer. Thus, the referring lawyer is not required to review pleadings or other documents, attend hearings or depositions, or otherwise participate in a significant and continuing manner. The referring lawyer does not, however, escape the implications of joint responsibility, *see* Comment [11], by avoiding direct participation.

[13] When fee divisions are based on assumed joint responsibility, the requirement of paragraph (a) that the fee be reasonable applies to the total fee charged for the representation by all participating lawyers.

[14] Paragraph (e) requires that the client be advised, in writing, of the fee division and states that the client must affirmatively give informed consent to the proposed fee arrangement. For the definition of "informed consent," *see* Rule 1.0(e). The Rule does not require disclosure to the client of the share that each lawyer is to receive but does require that the client be informed of the identity of the lawyers sharing the fee, their respective responsibilities in the representation, and the effect of the association of lawyers outside the firm on the fee charged.

## **Disputes Over Fees**

[15] 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 a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.



## **Rule 1.6 – Confidentiality of Information**

(a) Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly:

- (1) reveal a confidence or secret of the lawyer's client;
- (2) use a confidence or secret of the lawyer's client to the disadvantage of the client;
- (3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person.

(b) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

(c) A lawyer may reveal client confidences and secrets, to the extent reasonably necessary:

- (1) to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure of the client's secrets or confidences by the lawyer; or
- (2) to prevent the bribery or intimidation of witnesses, jurors, court officials, or other persons who are involved in proceedings before a tribunal if the lawyer reasonably believes that such acts are likely to result absent disclosure of the client's confidences or secrets by the lawyer.

(d) When a client has used or is using a lawyer's services to further a crime or fraud, the lawyer may reveal client confidences and secrets, to the extent reasonably necessary:

- (1) to prevent the client from committing the crime or fraud if it is reasonably certain to result in substantial injury to the financial interests or property of another; or
- (2) 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 the crime or fraud.

(e) A lawyer may use or reveal client confidences or secrets:

- (1) with the informed consent of the client;
- (2) (A) when permitted by these Rules or required by law or court order; and  
(B) if a government lawyer, when permitted or authorized by law;

(3) to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client;

(4) when the lawyer has reasonable grounds for believing that a client has impliedly authorized disclosure of a confidence or secret in order to carry out the representation;

(5) to the minimum extent necessary in an action instituted by the lawyer to establish or collect the lawyer's fee; or

(6) to the extent reasonably necessary to secure legal advice about the lawyer's compliance with law, including these Rules.

(f) 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 confidences or secrets of a client, except that such persons may reveal information permitted to be disclosed by paragraphs (c), (d), or (e).

(g) The lawyer's obligation to preserve the client's confidences and secrets continues after termination of the lawyer's employment.

(h) The obligation of a lawyer under paragraph (a) also applies to confidences and secrets learned prior to becoming a lawyer in the course of providing assistance to another lawyer.

(i) For purposes of this rule, a lawyer who serves as a member of the D.C. Bar Lawyer Counseling Committee, or as a trained intervenor for that committee, shall be deemed to have a lawyer-client relationship with respect to any lawyer-counselee being counseled under programs conducted by or on behalf of the committee. Information obtained from another lawyer being counseled under the auspices of the committee, or in the course of and associated with such counseling, shall be treated as a confidence or secret within the terms of paragraph (b). Such information may be disclosed only to the extent permitted by this rule.

(j) For purposes of this rule, a lawyer who serves as a member of the D.C. Bar Practice Management Service Committee, formerly known as the Lawyer Practice Assistance Committee<sup>1</sup>, or a staff assistant, mentor, monitor or other consultant for that committee, shall be deemed to have a lawyer-client relationship with respect to any lawyer-counselee being counseled under programs conducted by or on behalf of the committee. Communications between the counselor and the lawyer being counseled under the auspices of the committee, or made in the course of and associated with such counseling, shall be treated as a confidence or secret within the terms of paragraph (b). Such information may be disclosed only to the extent permitted by this rule. However, during the period in which the lawyer-counselee is subject to a

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<sup>1</sup> On May 10, 2005, the D.C. Bar Board of Governors approved a name change for the Lawyer Practice Assistance Committee. Effective July 1, 2005, the Committee will be known as the Practice Management Service Committee.

probationary or monitoring order of the Court of Appeals or the Board on Professional Responsibility in a disciplinary case instituted pursuant to Rule XI of the Rules of the Court of Appeals Governing the Bar, such information shall be subject to disclosure in accordance with the order.

(k) The client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order.

## **COMMENT**

[1] 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.

[2] 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.

[3] 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.

[4] A fundamental principle in the client-lawyer relationship is that the lawyer holds inviolate the client's secrets and confidences. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[5] This rule prohibits a lawyer from revealing the confidences and secrets of a client except as provided in this rule or elsewhere in the Rules. Proper concern for professional duty should cause a lawyer to shun indiscreet conversations concerning clients. 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.

### **Relationship Between Rule 1.6 and Attorney-Client Evidentiary Privilege and Work Product Doctrine**

[6] The principle of confidentiality is given effect in two related bodies of law: the attorney-client privilege and the work product doctrine in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege and the 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. This rule is not intended to govern or affect judicial application of the attorney-client privilege or work product doctrine. The privilege and doctrine 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 disclosure.

[7] The attorney-client privilege is that of the client and not of the lawyer. 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 privilege and work product doctrine.

[8] The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law; furthermore, it applies not merely to matters communicated in confidence by the client (*i.e.*, confidences) but also to all information gained in the course of the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing or would be likely to be detrimental to the client (*i.e.*, secrets). This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of the information or the fact that others share the knowledge. It reflects not only the principles underlying the attorney-client privilege, but the lawyer's duty of loyalty to the client.

### **The Commencement of the Client-Lawyer Relationship**

[9] Principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Although 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, the duty of confidentiality imposed by this rule attaches when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Other duties of a lawyer to a prospective client are set forth in Rule 1.18.

### **Exploitation of Confidences and Secrets**

[10] In addition to prohibiting the disclosure of a client's confidences and secrets, subparagraph (a)(2) provides that a lawyer may not use the client's confidences and secrets to the disadvantage of the client. For example, a lawyer who has learned that the client is investing in specific real estate may not seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Similarly, information acquired by the lawyer in the course of representing a client may not be used to the disadvantage of that client even after the termination of the lawyer's representation 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 former client when later representing another client. Under subparagraphs (a)(3) and (e)(1), a lawyer may use a client's confidences and secrets for the lawyer's own benefit or that of a third party only after the lawyer has obtained the client's informed consent to the use in question.

### **Authorized Disclosure**

[11] A lawyer is impliedly authorized to make disclosures 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.

[12] The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when the client gives informed consent, when necessary to perform the professional employment, when permitted by these Rules, or when required by law. For the definition of “informed consent,” *see* Rule 1.0(e). Unless the client otherwise directs, a lawyer may disclose the affairs of the client to partners or associates of the lawyer’s firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to nonlawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training employees so that the sanctity of all confidences and secrets of clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of the client and act scrupulously in the making of decisions that may involve the disclosure of information obtained in the course of the professional relationship.

[13] A lawyer’s confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer’s personal responsibilities 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 disclosure is not impliedly authorized, paragraph (e)(6) permits such disclosure because of the importance of a lawyer’s compliance with the Rules of Professional Conduct and other law.

[14] Unless the client otherwise directs, it is not improper for a lawyer to give limited information from client files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided the lawyer exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

[15] 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.

[16] Rule 1.6(c) describes situations presenting a sufficiently serious threat such that a client’s confidences and secrets may be revealed to the extent reasonably necessary to prevent the harm described. Thus, a lawyer may reveal confidences and secrets to the extent necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure and to prevent bribery or intimidation of witnesses, jurors, court officials, or other persons involved in proceedings before a tribunal.

[17] Rule 1.6(d) describes situations in which the client’s usual expectation of confidentiality is not warranted because the client has abused the lawyer-client relationship by using the lawyer’s services to further a crime or fraud. In these circumstances, Rule 1.6(d)(1) provides a limited exception to the rule of confidentiality, which permits the lawyer to reveal information to the extent reasonably 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), if such crime or fraud is reasonably certain to result in substantial injury to the financial or property interests of another. The D.C. Court of Appeals has held that the crime-fraud exception to the attorney-client privilege requires that a lawyer's services were actually used to further a crime or fraud that occurred, not merely that the client sought to do so. *See In re Public Defender Service*, 831 A.2d 890 (D.C. 2003). The Rule 1.6(d) exception to the ethical duty of confidentiality also requires that the lawyer's services actually were used to further a crime or fraud. A client can prevent disclosure by refraining from the wrongful conduct or by not using the lawyer's services to further a crime or fraud. Although Rule 1.6(d)(1) 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(e). Rule 1.16 addresses the lawyer's obligation or right to withdraw from the representation of the client in such circumstances if withdrawal is necessary to prevent the client from misusing the lawyer's services or if withdrawal would otherwise prevent, mitigate, or rectify substantial injury caused by the client who misused the lawyer's services. Rules 3.3(a)(1), 3.3(d) and 4.1(b) address circumstances in which disclosure may be mandatory. Rules 3.4(a), 8.1, and 8.3 do not require disclosure of information otherwise protected by Rule 1.6; disclosure that is permissive in the limited situations specified in Rule 1.6 is not mandatory under Rules 3.4(a), 8.1 or 8.3. Rule 1.6(d) applies to organizations as well as to individuals.

[18] Paragraph (d)(2) refers to situations in which the crime or fraud has already commenced and is on-going or completed such that complete prevention is not an option. Thus, the client no longer has the option of preventing disclosure by refraining from the wrongful conduct. In these circumstances, there may be situations in which the loss suffered by an 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 (d)(2) does not apply to disclosure with regard to a crime or fraud committed prior to retaining the lawyer for representation concerning that offense.

[19] Rule 1.2, Comment [7] and Rule 4.1, Comment [3] acknowledge that, to avoid assisting in a client crime or fraud, a lawyer in some instances may be required to withdraw from representation, give notice of the fact of withdrawal, or disaffirm an opinion, document, affirmation or the like. In some instances when a lawyer's services have been or are being used to further a client's crime or fraud, a lawyer may conclude that more than withdrawal and disaffirmance is required to avoid assisting in the client's crime or fraud and that disclosure of client information protected by this rule is warranted. If the lawyer has such a reasonable belief, the lawyer may make such disclosures to the extent reasonably necessary to permit corrective action, for example, prompt initiation of proceedings in order to seize or recover assets fraudulently obtained by the client. Once the lawyer has disclosed information reasonably necessary to prevent, rectify, or mitigate loss, the lawyer may not take additional actions that would harm the client. Thus, a lawyer is not warranted under Rule 1.6(d) in providing legal advice or assistance to a victim as the victim's lawyer or voluntarily serving as a witness or otherwise cooperating in a proceeding brought by the victim or anyone else seeking compensation for the victim. The lawyer also may not use or disclose information for the purpose of voluntarily assisting a law-enforcement agency to apprehend and prosecute the client,

unless the lawyer reasonably believes that such disclosure would be reasonably necessary to prevent, rectify, or mitigate the victim's loss.

[20] This rule permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified. In exercising the discretion conferred by this rule by paragraphs (c) and (d), 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. The lawyer's exercise of discretion in determining whether to make disclosures that are reasonably likely to prevent the death or substantial bodily injury of another requires consideration of such factors as the client's tendency to commit violent acts or, conversely, to make idle threats. When a lawyer is given discretion to disclose under this rule, the lawyer's decision not to disclose as permitted by the Rule does not violate Rule 1.6. Other Rules may impose disclosure obligations. *See* Rules 1.2(e), 2.3, 3.3, 3.4(a), 4.1(b), 8.1, and 8.3 regarding the reconciliation of the confidentiality protections of this rule with disclosure provisions of those Rules.

[21] Paragraphs (c) and (d) permit disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. The "reasonably believes" standard is applied because it is difficult for a lawyer to "know" when acts with such potentially serious consequences will actually be carried out, for the client may have a change of mind. 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.

[22] Other law may require that a lawyer disclose information otherwise protected by Rule 1.6. Whether a law requires such disclosure is a question of law beyond the scope of these Rules. When such disclosure 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 requires disclosure, paragraph (e)(2)(A) permits the lawyer to make such disclosure as is necessary to comply with the law.

### **Dispute Concerning Lawyer's Conduct**

[23] 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. Charges, in defense of which a lawyer may disclose client confidences and secrets, 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.

[24] The lawyer may not disclose a client's confidences or secrets to defend against informal allegations made by third parties; the Rule allows disclosure only if a third party has formally instituted a civil, criminal, or disciplinary action against the lawyer. Even if the third party has formally instituted such a proceeding, the lawyer should advise the client of the third party's action and request that the client respond appropriately, if this is practicable and would not be prejudicial to the lawyer's ability to establish a defense.

[25] If a lawyer's client, or former client, has made specific allegations against the lawyer, the lawyer may disclose that client's confidences and secrets in establishing a defense, without waiting for formal proceedings to be commenced. The requirement of subparagraph (e)(3) that there be "specific" charges of misconduct by the client precludes the lawyer from disclosing confidences or secrets in response to general criticism by a client; an example of such a general criticism would be an assertion by the client that the lawyer "did a poor job" of representing the client. But in this situation, as well as in the defense of formally instituted third-party proceedings, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, 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.

### **Fee Collection Actions**

[26] Subparagraph (e)(5) permits a lawyer to reveal a client's confidences or secrets if this is necessary in an action to collect fees from the client. 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. Subparagraph (e)(5) should be construed narrowly; it does not authorize broad, indiscriminate disclosure of secrets or confidences. The lawyer should evaluate the necessity for disclosure of information at each stage of the action. For example, in drafting the complaint in a fee collection suit, it would be necessary to reveal the "secrets" that the lawyer was retained by the client, that fees are due, and that the client has failed to pay those fees. Further disclosure of the client's secrets and confidences would be impermissible at the complaint stage. If possible, the lawyer should prevent even the disclosure of the client's identity through the use of John Doe pleadings.

[27] If the client's response to the lawyer's complaint raised issues implicating confidences or secrets, the lawyer would be permitted to disclose confidential or secret information pertinent to the client's claims or defenses. Even then, the rule would require that the lawyer's response be narrowly tailored to meet the client's specific allegations, with the minimum degree of disclosure sufficient to respond effectively. In addition, the lawyer should continue, throughout the action, to make every effort to avoid unnecessary disclosure of the client's confidences and secrets and to limit the disclosure to those having the need to know it. To this end the lawyer should seek appropriate protective orders and make any other



arrangements that would minimize the risk of disclosure of the confidential information in question, including the utilization of *in camera* proceedings.

### **Disclosures Otherwise Required or Authorized**

[28] 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, subparagraph (e)(2) requires the lawyer to invoke the privilege when it is applicable. The lawyer may comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client. But a lawyer ordered by a court to disclose client confidences or secrets should not comply with the order until the lawyer has personally made every reasonable effort to appeal the order or has notified the client of the order and given the client the opportunity to challenge it.

### **Former Client**

[29] The duty of confidentiality continues after the client-lawyer relationship has terminated.

### **Services Rendered in Assisting Another Lawyer Before Becoming a Member of the Bar**

[30] There are circumstances in which a person who ultimately becomes a lawyer provides assistance to a lawyer while serving in a nonlawyer capacity. The typical situation is that of the law clerk or summer associate in a law firm or government agency. Paragraph (h) addresses the confidentiality obligations of such a person after becoming a member of the Bar; the same confidentiality obligations are imposed as would apply if the person had been a member of the Bar at the time confidences or secrets were received. This resolution of the confidentiality obligation is consistent with the reasoning employed in D.C. Bar Legal Ethics Committee Opinion 84. For a related provision dealing with the imputation of disqualifications arising from prior participation as a summer associate or in a similar position, *see* Rule 1.10(b). For a provision addressing the imputation of disqualifications arising from prior participation as a law clerk, *see* Rule 1.11.

### **Bar Sponsored Counseling Programs**

[31] Paragraph (i) adds a provision dealing specifically with the disclosure obligations of lawyers who are assisting in the counseling programs of the D.C. Bar's Lawyer Counseling Committee. Members of that committee, and lawyer-intervenors who assist the committee in counseling, may obtain information from lawyer-counsees who have sought assistance from the counseling programs offered by the committee. It is in the interest of the public to encourage lawyers who have alcohol or other substance abuse problems to seek counseling as a first step toward rehabilitation. Some lawyers who seek such assistance may have violated provisions of the Rules of Professional Conduct, or other provisions of law, including criminal statutes such as those dealing with embezzlement. In order for those who are providing counseling services to evaluate properly the lawyer-counselee's problems and enhance the prospects for rehabilitation, it is necessary for the counselors to receive completely candid information from the lawyer-

counselee. Such candor is not likely if the counselor, for example, would be compelled by Rule 8.3 to report the lawyer-counselee's conduct to Bar Counsel, or if the lawyer-counselee feared that the counselor could be compelled by prosecutors or others to disclose information.

[32] It is similarly in the interest of the public to encourage lawyers to seek the assistance of the D.C. Bar's Practice Management Service Committee to address management problems in their practices. In order for those who are providing counseling services through the Practice Management Service Committee to evaluate properly the lawyer-counselee's problems and enhance the prospects for self-improvement by the counselee, paragraph (j) adds a provision addressing the confidentiality obligations of lawyers who are assisting in the counseling programs of the Practice Management Service Committee.

[33] These considerations make it appropriate to treat the lawyer-counselee relationship as a lawyer-client relationship, and to create an additional limited class of information treated as secrets or confidences subject to the protection of Rule 1.6. The scope of that information is set forth in paragraph (i) and (j). The lawyer-client relationship is deemed to exist only with respect to the obligation of confidentiality created under Rule 1.6, and not to obligations created elsewhere in these Rules, including the obligation of zealous representation under Rule 1.3 and the obligation to avoid conflicts of interest set forth in Rules 1.7 and 1.9. The obligation of confidentiality extends to non-lawyer assistants of lawyers serving the committee. *See* Rule 5.1

[34] Notwithstanding the obligation of confidentiality under paragraph (j), during the period in which a lawyer-counselee is subject to a probationary or monitoring order of the Court of Appeals or the Board on Professional Responsibility in a disciplinary case instituted pursuant to Rule XI of the Rules of the Court of Appeals Governing the Bar, communications between the counselor and the lawyer being counseled under the auspices of the Practice Management Service Committee shall be subject to disclosure in accordance with an Order of the Court or the Board, since the participation of the lawyer-counselee in the programs of the committee in such circumstances is not voluntary.

[35] Ethical rules established by the District of Columbia Court of Appeals with respect to the kinds of information protected from compelled disclosure may not be accepted by other forums or jurisdictions. Therefore, the protections afforded to lawyer-counsees by paragraphs (i) and (j) may not be available to preclude disclosure in all circumstances. Furthermore, lawyers who are members of the bar of other jurisdictions may not be entitled, under the ethics rules applicable to members of the bar in such other jurisdictions, to forgo reporting violations to disciplinary authorities pursuant to the other jurisdictions' counterparts to Rule 8.3.

### **Government Lawyers**

[36] Subparagraph (e)(2) was revised, and paragraph (k) was added, to address the unique circumstances raised by attorney-client relationships within the government.

[37] Subparagraph (e)(2)(A) applies to both private and government attorney-client relationships. Subparagraph (e)(2)(B) applies to government lawyers only. It is designed to permit disclosures that are not required by law or court order under Rule 1.6(e)(2)(A), but which

the government authorizes its attorneys to make in connection with their professional services to the government. Such disclosures may be authorized or required by statute, executive order, or regulation, depending on the constitutional or statutory powers of the authorizing entity. If so authorized or required, subparagraph (e)(2)(B) governs.

[38] The term “agency” in paragraph (j) includes, *inter alia*, executive and independent departments and agencies, special commissions, committees of the legislature, agencies of the legislative branch such as the Government Accountability Office, and the courts to the extent that they employ lawyers (*e.g.*, staff counsel) to counsel them. The employing agency has been designated the client under this rule to provide a commonly understood and easily determinable point for identifying the government client.

[39] Government lawyers may also be assigned to provide an individual with counsel or representation in circumstances that make clear that an obligation of confidentiality runs directly to that individual and that subparagraph (e)(2)(A), not (e)(2)(B), applies. It is, of course, acceptable in this circumstance for a government lawyer to make disclosures about the individual representation to supervisors or others within the employing governmental agency so long as such disclosures are made in the context of, and consistent with, the agency’s representation program. *See, e.g.*, 28 C.F.R. §' 50.15 and 50.16. The relevant circumstances, including the agreement to represent the individual, may also indicate whether the individual client to whom the government lawyer is assigned will be deemed to have granted or denied informed consent to disclosures to the lawyer’s employing agency. Examples of such representation include representation by a public defender, a government lawyer representing a defendant sued for damages arising out of the performance of the defendant’s government employment, and a military lawyer representing a court-martial defendant.

### **Acting Competently to Preserve Confidences**

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

### **Rule 1.7 – Conflict of Interest: General**

(a) A lawyer shall not advance two or more adverse positions in the same matter.

(b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:

(1) That matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer;

(2) Such representation will be or is likely to be adversely affected by representation of another client;

(3) Representation of another client will be or is likely to be adversely affected by such representation;

(4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

(c) A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if

(1) Each potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and

(2) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

(d) If a conflict not reasonably foreseeable at the outset of representation arises under paragraph (b)(1) after the representation commences, and is not waived under paragraph (c), a lawyer need not withdraw from any representation unless the conflict also arises under paragraphs (b)(2), (b)(3), or (b)(4).

### **COMMENT**

[1] Rule 1.7 is intended to provide clear notice of circumstances that may constitute a conflict of interest. Rule 1.7(a) sets out the limited circumstances in which representation of conflicting interests is absolutely prohibited even with the informed consent of all involved clients. Rule 1.7(b) sets out those circumstances in which representation is barred in the absence of informed client consent. For the definition of "informed consent," *see* Rule 1.0(e). The difference between Rule 1.7(a) and Rule 1.7(b) is that in the former, the lawyer is representing multiple interests in the same matter, while in the latter, the lawyer is representing a single interest, but a client of the lawyer who is represented by different counsel has an interest adverse

to that advanced by the lawyer. The application of Rules 1.7(a) and 1.7(b) to specific facts must also take into consideration the principles of imputed disqualification described in Rule 1.10. Rule 1.7(c) states the procedure that must be used to obtain the client's informed consent if representation is to commence or continue in the circumstances described in Rule 1.7(b). Rule 1.7(d) governs withdrawal in cases arising under Rule 1.7(b)(1).

### **Representation Absolutely Prohibited – Rule 1.7(a)**

[2] Institutional interests in preserving confidence in the adversary process and in the administration of justice preclude permitting a lawyer to represent adverse positions in the same matter. For that reason, paragraph (a) prohibits such conflicting representations, with or without client consent.

[3] The same lawyer (or law firm, *see* Rule 1.10) should not espouse adverse positions in the same matter during the course of any type of representation, whether such adverse positions are taken on behalf of clients or on behalf of the lawyer or an association of which the lawyer is a member. On the other hand, for purposes of Rule 1.7(a), an “adverse” position does not include inconsistent or alternative positions advanced by counsel on behalf of a single client. Rule 1.7(a) is intended to codify the result reached in D.C. Bar Legal Ethics Committee Opinion 204, including the conclusion that a rulemaking whose result will be applied retroactively in pending adjudications is the same matter as the adjudications, even though treated as separate proceedings by an agency. However, if the adverse positions to be taken relate to different matters, the absolute prohibition of paragraph (a) is inapplicable, even though paragraphs (b) and (c) may apply.

[4] The absolute prohibition of paragraph (a) applies only to situations in which a lawyer would be called upon to espouse adverse positions for different clients in the same matter. It is for this reason that paragraph (a) refers to adversity with respect to a “position taken or to be taken” in a matter rather than adversity with respect to the matter or the entire representation. This approach is intended to reduce the costs of litigation in other representations where parties have common, non-adverse interests on certain issues, but have adverse (or contingently or possibly adverse) positions with respect to other issues. If, for example, a lawyer would not be required to take adverse positions in providing joint representation of two clients in the liability phase of a case, it would be permissible to undertake such a limited representation. Then, after completion of the liability phase, and upon satisfying the requirements of paragraph (c) of this rule, and of any other applicable Rules, the lawyer could represent either one of those parties as to the damages phase of the case, even though the other, represented by separate counsel as to damages, might have an adverse position as to that phase of the case. Insofar as the absolute prohibition of paragraph (a) is concerned, a lawyer may represent two parties that may be adverse to each other as to some aspects of the case so long as the same lawyer does not represent both parties with respect to those positions. Such a representation comes within paragraph (b), rather than paragraph (a), and is therefore subject to the consent provisions of paragraph (c).

[5] The ability to represent two parties who have adverse interests as to portions of a case may be limited because the lawyer obtains confidences or secrets relating to a party while

jointly representing both parties in one phase of the case. In some circumstances, such confidences or secrets might be useful, against the interests of the party to whom they relate, in a subsequent part of the case. Absent the informed consent of the party whose confidences or secrets are implicated, the subsequent adverse representation is governed by the “substantial relationship” test, which is set forth in Rule 1.9.

[6] The prohibition of paragraph (a) relates only to actual conflicts of positions, not to mere formalities. For example, a lawyer is not absolutely forbidden to provide joint or simultaneous representation if the clients’ positions are only nominally but not actually adverse. Joint representation is commonly provided to incorporators of a business, to parties to a contract, in formulating estate plans for family members, and in other circumstances where the clients might be nominally adverse in some respect but have retained a lawyer to accomplish a common purpose. If no actual conflict of positions exists with respect to a matter, the absolute prohibition of paragraph (a) does not come into play. Thus, in the limited circumstances set forth in Opinion 143 of the D.C. Bar Legal Ethics Committee, this prohibition would not preclude the representation of both parties in an uncontested divorce proceeding, there being no actual conflict of positions based on the facts presented in Opinion 143. For further discussion of common representation issues, including intermediation, *see* Comments [14]-[18].

### **Representation Conditionally Prohibited – Rule 1.7(b)**

[7] Paragraphs (b) and (c) are based upon two principles: (1) that a client is entitled to wholehearted and zealous representation of its interests, and (2) that the client as well as the lawyer must have the opportunity to judge and be satisfied that such representation can be provided. Consistent with these principles, paragraph (b) provides a general description of the types of circumstances in which representation is improper in the absence of informed consent. The underlying premise is that disclosure and informed consent are required before assuming a representation if there is any reason to doubt the lawyer’s ability to provide wholehearted and zealous representation of a client or if a client might reasonably consider the representation of its interests to be adversely affected by the lawyer’s assumption of the other representation in question. Although the lawyer must be satisfied that the representation can be wholeheartedly and zealously undertaken, if an objective observer would have any reasonable doubt on that issue, the client has a right to disclosure of all relevant considerations and the opportunity to be the judge of its own interests.

[8] A client may, on occasion, adopt unreasonable positions with respect to having the lawyer who is representing that client also represent other parties. Such an unreasonable position may be based on an aversion to the other parties being represented by a lawyer, or on some philosophical or ideological ground having no foundation in the Rules regarding representation of conflicting interests. Whatever difficulties may be presented for the lawyer in such circumstances as a matter of client relations, the unreasonable positions taken by a client do not fall within the circumstances requiring notification and informed consent. Clients have broad discretion to terminate their representation by a lawyer and that discretion may generally be exercised on unreasonable as well as reasonable grounds.

[9] If the lawyer determines or can foresee that an issue with respect to the application of paragraph (b) exists, the only prudent course is for the lawyer to make disclosure, pursuant to paragraph (c), to each affected client and enable each to determine whether in its judgment the representation at issue is likely to affect its interests adversely.

[10] Paragraph (b) does not purport to state a uniform rule applicable to cases in which two clients may be adverse to each other in a matter in which neither is represented by the lawyer or in a situation in which two or more clients may be direct business competitors. The matter in which two clients are adverse may be so unrelated or insignificant as to have no possible effect upon a lawyer's ability to represent both in other matters. The fact that two clients are business competitors, standing alone, is usually not a bar to simultaneous representation. Thus, in a matter involving a specific party or parties, paragraphs (b)(1) and (c) require notice and informed consent if the lawyer will take a position on behalf of one client adverse to another client even though the lawyer represents the latter client only on an unrelated position or in an unrelated matter. Paragraphs (b)(2), (3), (4) and (c) require disclosure and informed consent in any situation in which the lawyer's representation of a client may be adversely affected by representation of another client or by any of the factors specified in paragraph (b)(4).

### **Individual Interest Conflicts**

[11] 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 adversely affect the lawyer's representation of the client. *See* D.C. Bar Legal Ethics Committee Opinion No. 210 (defense attorney negotiating position with United States Attorney's Office). 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* Comment [34] for specific commentary concerning affiliated business interests; Rule 1.8 for specific Rules pertaining to a number of individual attorney's interest conflicts, including business transactions with clients; Rule 1.8(j) for the effect of firm-wide imputation upon individual attorney interests.

[12] For the effect of a blood or marital relationship between lawyers representing different clients, *see* Rule 1.8(h). Disqualification arising from a close family relationship is not imputed. *See* Rule 1.8(j).

### **Positional Conflicts**

[13] Ordinarily a lawyer may take inconsistent legal positions in different forums 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, without more, 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 in a given matter, as referred to in Rule 1.7(b), will adversely affect the lawyer's effectiveness in representing another client in the same or different matter; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position being taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the matters are pending, 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, subject to the exception provided in Rule 1.7(d). *See* D.C. Legal Ethics Committee Opinion No. 265.

### **Special Considerations in Common Representation**

[14] 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. 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.

[15] 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.

[16] 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 relevant to the common representation will be shared, and explain the circumstances in which the lawyer may have to withdraw from any or all representations if one client later objects to continued common representation or sharing of such information. 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.

[17] 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).

[18] 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.

### **Lawyer's Duty to Make Inquiries to Determine Potential Conflicts**

[19] The scope of and parties to a "matter" are typically apparent in on-the-record adversary proceedings or other proceedings in which a written record of the identity and the position of the parties exists. In Rule 1.7(b)(1), the phrase "matter involving a specific party or parties" refers to such situations. In other situations, however, it may not be clear to a lawyer whether the representation of one client is adverse to the interests of another client. For example, a lawyer may represent a client only with respect to one or a few of the client's areas of interest. Other lawyers, or non-lawyers (such as lobbyists), or employees of the client (such as government relations personnel) may be representing that client on many issues whose scope and content are unknown to the lawyer. Clients often have many representatives acting for them, including multiple law firms, nonlawyer lobbyists, and client employees. A lawyer retained for a limited purpose may not be aware of the full range of a client's other interests or positions on issues. Except in matters involving a specific party or parties, a lawyer is not required to inquire of a client concerning the full range of that client's interests in issues, unless it is clear to the lawyer that there is a potential for adversity between the interests of clients of the lawyer. Where lawyers are associated in a firm within the meaning of Rule 1.10(a), the rule stated in the preceding sentence must be applied to all lawyers and all clients in the firm. Unless a lawyer is aware that representing one client involves seeking a result to which another client is opposed, Rule 1.7 is not violated by a representation that eventuates in the lawyer's unwittingly taking a position for one client adverse to the interests of another client. The test to be applied here is one of reasonableness and may turn on whether the lawyer has an effective conflict checking system in place.

## Situations That Frequently Arise

[20] A number of types of situations frequently arise in which disclosure and informed consent are usually required. These include joint representation of parties to criminal and civil litigation, joint representation of incorporators of a business, joint representation of a business or government agency and its employees, representation of family members seeking estate planning or the drafting of wills, joint representation of an insurer and an insured, representation in circumstances in which the personal or financial interests of the lawyer, or the lawyer's family, might be affected by the representation, and other similar situations in which experience indicates that conflicts are likely to exist or arise. For example, a lawyer might not be able to represent a client vigorously if the client's adversary is a person with whom the lawyer has longstanding personal or social ties. The client is entitled to be informed of such circumstances so that an informed decision can be made concerning the advisability of retaining the lawyer who has such ties to the adversary. The principles of disclosure and informed consent are equally applicable to all such circumstances, except that if the positions to be taken by two clients in a matter as to which the lawyer represents both are actually adverse, then, as provided in paragraph (a), the lawyer may not undertake or continue the representation with respect to those issues even if disclosure has been made and informed consent obtained.

## Organization Clients

[21] As is provided in Rule 1.13, the lawyer who represents a corporation, partnership, trade association or other organization-type client is deemed to represent that specific entity, and not its shareholders, owners, partners, members or "other constituents." Thus, for purposes of interpreting this rule, the specific entity represented by the lawyer is the "client." Ordinarily that client's affiliates (parents and subsidiaries), other stockholders and owners, partners, members, etc., are not considered to be clients of the lawyer. Generally, the lawyer for a corporation is not prohibited by legal ethics principles from representing the corporation in a matter in which the corporation's stockholders or other constituents are adverse to the corporation. *See* D.C. Bar Legal Ethics Committee Opinion No. 216. A fortiori, and consistent with the principle reflected in Rule 1.13, the lawyer for an organization normally should not be precluded from representing an unrelated client whose interests are adverse to the interests of an affiliate (*e.g.*, parent or subsidiary), stockholders and owners, partners, members, etc., of that organization in a matter that is separate from and not substantially related to the matter on which the lawyer represents the organization.

[22] However, there may be cases in which a lawyer is deemed to represent a constituent of an organization client. Such *de facto* representation has been found where a lawyer has received confidences from a constituent during the course of representing an organization client in circumstances in which the constituent reasonably believed that the lawyer was acting as the constituent's lawyer as well as the lawyer for the organization client. *See generally* ABA Formal Opinion 92-365. In general, representation may be implied where on the facts there is a reasonable belief by the constituent that there is individual as well as collective representation. *Id.* The propriety of representation adverse to an affiliate or constituent of the organization client, therefore, must first be tested by determining whether a constituent is in fact a client of the lawyer. If it is, representation adverse to the constituent requires compliance with Rule 1.7.

*See* ABA Opinion 92-365. The propriety of representation must also be tested by reference to the lawyer's obligation under Rule 1.6 to preserve confidences and secrets and to the obligations imposed by paragraphs (b)(2) through (b)(4) of this rule. Thus, absent informed consent under Rule 1.7(c), such adverse representation ordinarily would be improper if:

(a) the adverse matter is the same as, or substantially related to, the matter on which the lawyer represents the organization client,

(b) during the course of representation of the organization client the lawyer has in fact acquired confidences or secrets (as defined in Rule 1.6(b)) of the organization client or an affiliate or constituent that could be used to the disadvantage of any of the organization client or its affiliate or constituents, or

(c) such representation seeks a result that is likely to have a material adverse effect on the financial condition of the organization client.

[23] In addition, the propriety of representation adverse to an affiliate or constituent of the organization client must be tested by attempting to determine whether the adverse party is in substance the "alter ego" of the organization client. The alter ego case is one in which there is likely to be a reasonable expectation by the constituents or affiliates of an organization that each has an individual as well as a collective client-lawyer relationship with the lawyer, a likelihood that a result adverse to the constituent would also be adverse to the existing organization client, and a risk that both the new and the old representation would be so adversely affected that the conflict would not be "consentable." Although the alter ego criterion necessarily involves some imprecision, it may be usefully applied in a parent-subsidary context, for example, by analyzing the following relevant factors: whether (i) the parent directly or indirectly owns all or substantially all of the voting stock of the subsidiary, (ii) the two companies have common directors, officers, office premises, or business activities, or (iii) a single legal department retains, supervises and pays outside lawyers for both the parent and the subsidiary. If all or most of those factors are present, for conflict of interest purposes those two entities normally would be considered alter egos of one another and the lawyer for one of them should refrain from engaging in representation adverse to the other, even on a matter where clauses (a), (b) and (c) of the preceding paragraph [22] are not applicable. Similarly, if the organization client is a corporation that is wholly owned by a single individual, in most cases for purposes of applying this rule, that client should be deemed to be the alter ego of its sole stockholder. Therefore, the corporation's lawyer should refrain from engaging in representation adverse to the sole stockholder, even on a matter where clauses (a), (b) and (c) of the preceding paragraph [22] are not applicable.

[24] If representation otherwise appropriate under the preceding paragraphs seeks a result that is likely ultimately to have a material adverse effect on the financial condition of the organization client, such representation is prohibited by Rule 1.7(b)(3). If the likely adverse effect on the financial condition of the organization client is not material, such representation is not prohibited by Rule 1.7(b)(3). Obviously, however, a lawyer should exercise restraint and sensitivity in determining whether to undertake such representation in a case of that type,

particularly if the organization client does not realistically have the option to discharge the lawyer as counsel to the organization client.

[25] The provisions of paragraphs [20] through [23] are subject to any contrary agreement or other understanding between the client and the lawyer. In particular, the client has the right by means of the original engagement letter or otherwise to restrict the lawyer from engaging in representations otherwise permissible under the foregoing guidelines. If the lawyer agrees to such restrictions in order to obtain or keep the client's business, any such agreement between client and lawyer will take precedence over these guidelines. Conversely, an organization client, in order to obtain the lawyer's services, may in the original engagement letter or otherwise give informed consent to the lawyer in advance to engage in representations adverse to an affiliate, owner or other constituent of the client not otherwise permissible under the foregoing guidelines so long as the requirements of Rule 1.7(c) can be met.

[26] In any event, in all cases referred to above, the lawyer must carefully consider whether Rule 1.7(b)(2) or Rule 1.7(b)(4) requires informed consent from the second client whom the lawyer proposes to represent adverse to an affiliate, owner or other constituent of the first client.

## **Disclosure and Consent**

[27] Disclosure and informed consent are not mere formalities. Adequate disclosure requires such disclosure of the parties and their interests and positions as to enable each potential client to make a fully informed decision as to whether to proceed with the contemplated representation. If a lawyer's obligation to one or another client or to others or some other consideration precludes making such full disclosure to all affected parties, that fact alone precludes undertaking the representation at issue. Full disclosure also requires that clients be made aware of the possible extra expense, inconvenience, and other disadvantages that may arise if an actual conflict of position should later arise and the lawyer be required to terminate the representation.

[28] It is ordinarily prudent for the lawyer to provide at least a written summary of the considerations disclosed and to request and receive a written informed consent, although the rule does not require that disclosure be in writing or in any other particular form in all cases. Lawyers should also recognize that the form of disclosure sufficient for more sophisticated business clients may not be sufficient to permit less sophisticated clients to provide informed consent. Moreover, under the District of Columbia substantive law, the lawyer bears the burden of proof that informed consent was secured.

[29] The term "informed consent" is defined in Rule 1.0(e). As indicated in Comment [2] to that rule, a client's consent must not be coerced either by the lawyer or by any other person. In particular, the lawyer should not use the client's investment in previous representation by the lawyer as leverage to obtain or maintain representation that may be contrary to the client's best interests. If a lawyer has reason to believe that undue influence has been used by anyone to obtain agreement to the representation, the lawyer should not undertake the representation.

[30] The lawyer's authority to solicit and to act upon the client's consent to a conflict is limited further by the requirement that the lawyer reasonably believe that he or she will be able to provide competent and diligent representation to each affected client. Generally, it is doubtful that a lawyer could hold such a belief where the representation of one client is likely to have a substantial and material adverse effect upon the interests of another client, or where the lawyer's individual interests make it likely that the lawyer will be adversely situated to the client with respect to the subject-matter of the legal representation.

[31] Rule 1.7 permits advance waivers within certain limits and subject to certain client protections. Such waivers are permissible only if the prerequisites of the rule – namely “full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation” – are satisfied. Under the Rules' definition of “informed consent,” the client must have “adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of action.” *See* Rule 1.0(e). Ordinarily this will require that either (1) the consent is specific as to types of potentially adverse representations and types of adverse clients (e.g., a bank client for whom the lawyer performs corporate work waives the lawyer's representation of borrowers in mortgage loan transactions with that bank) or (2) the waiving client has available in-house or other current counsel independent of the lawyer soliciting the waiver.

[32] Rule 1.7(a) provides that a conflict arising from the lawyer's advancing adverse positions in the same matter cannot be waived in advance or otherwise. Although an advance waiver may permit the lawyer to act adversely to the waiving client in matters that are substantially related to the matter in which the lawyer represents that client, lawyers should take particular care in obtaining and acting pursuant to advance waivers where such a matter is involved.

## **Withdrawal**

[33] It is much to be preferred that a representation that is likely to lead to a conflict be avoided before the representation begins, and a lawyer should bear this fact in mind in considering whether disclosure should be made and informed consent obtained at the outset. If, however, a conflict arises after a representation has been undertaken, and the conflict falls within paragraph (a), or if a conflict arises under paragraph (b) and informed and uncoerced consent is not or cannot be obtained pursuant to paragraph (c), then the lawyer should withdraw from the representation, complying with Rule 1.16. Where a conflict is not foreseeable at the outset of representation and arises only under Rule 1.7(b)(1), a lawyer should seek informed consent to the conflict at the time that the conflict becomes evident, but if such consent is not given by the opposing party in the matter, the lawyer need not withdraw. In determining whether conflict is reasonably foreseeable, the test is an objective one. In determining the reasonableness of a lawyer's conduct, such factors as whether the lawyer (or lawyer's firm) has an adequate conflict-checking system in place, must be considered. Where more than one client is involved and the lawyer must withdraw because a conflict arises after representation has been undertaken, the question of whether the lawyer may continue to represent any of the clients is determined by Rule 1.9.

## **Imputed Disqualification**

[34] All of the references in Rule 1.7 and its accompanying Comment to the limitation upon a "lawyer" must be read in light of the imputed disqualification provisions of Rule 1.10, which affect lawyers practicing in a firm.

[35] In the government lawyer context, Rule 1.7(b) is not intended to apply to conflicts between agencies or components of government (federal, state, or local) where the resolution of such conflicts has been entrusted by law, order, or regulation to a specific individual or entity.

## **Businesses Affiliated With a Lawyer or Firm**

[36] Lawyers, either alone or through firms, may have interests in enterprises that do not practice law but that, in some or all of their work, become involved with lawyers or their clients either by assisting the lawyer in providing legal services or by providing related services to the client. Examples of such enterprises are accounting firms, consultants, real estate brokerages, and the like. The existence of such interests raises several questions under this rule. First, a lawyer's recommendation, as part of legal advice, that the client obtain the services of an enterprise in which the lawyer has an interest implicates paragraph 1.7(b)(4). The lawyer should not make such a recommendation unless able to conclude that the lawyer's professional judgment on behalf of the client will not be adversely affected. Even then, the lawyer should not make such a recommendation without full disclosure to the client so that the client can make a fully informed choice. Such disclosure should include the nature and substance of the lawyer's or the firm's interest in the related enterprise, alternative sources for the non-legal services in question, and sufficient information so that the client understands that the related enterprise's services are not legal services and that the client's relationship to the related enterprise will not

be that of a client to attorney. Second, such a related enterprise may refer a potential client to the lawyer; the lawyer should take steps to assure that the related enterprise will inform the lawyer of all such referrals. The lawyer should not accept such a referral without full disclosure of the nature and substance of the lawyer's interest in the related enterprise. *See also* Rule 7.1(b). Third, the lawyer should be aware that the relationship of a related enterprise to its own customer may create a significant interest in the lawyer in the continuation of that relationship. The substantiality of such an interest may be enough to require the lawyer to decline a proffered client representation that would conflict with that interest; at least Rule 1.7(b)(4) and (c) may require the prospective client to be informed and to give informed consent before the representation could be undertaken. Fourth, a lawyer's interest in a related enterprise that may also serve the lawyer's clients creates a situation in which the lawyer must take unusual care to fashion the relationship among lawyer, client, and related enterprise to assure that the confidences and secrets are properly preserved pursuant to Rule 1.6 to the maximum extent possible. *See* Rule 5.3.

### **Sexual Relations Between Lawyer and Client**

[37] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. Because of this fiduciary duty to clients, combining a professional relationship with any intimate personal relationship may raise concerns about conflict of interest, impairment of the judgment of both lawyer and client, and preservation of attorney-client privilege. These concerns may be particularly acute when a lawyer has a sexual relationship with a client. Such a relationship may create a conflict of interest under Rule 1.7(b)(4) or violate other disciplinary rules, and it generally is imprudent even in the absence of an actual violation of these Rules.

[38] Especially when the client is an individual, the client's dependence on the lawyer's knowledge of the law is likely to make the relationship between lawyer and client unequal. A sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role and thereby violate the lawyer's basic obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant risk that the lawyer's emotional involvement will impair the lawyer's independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict the extent to which client confidences will be protected by the attorney-client privilege, because client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. The client's own emotional involvement may make it impossible for the client to give informed consent to these risks.

[39] Sexual relationships with the representative of an organization client may not present the same questions of inherent inequality as the relationship with an individual client. Nonetheless, impairment of the lawyer's independent professional judgment and protection of the attorney-client privilege are still of concern, particularly if outside counsel has a sexual relationship with a representative of the organization who supervises, directs, or regularly consults with an outside lawyer concerning the organization's legal matters. An in-house employee in an intimate personal relationship with outside counsel may not be able to assess and waive any conflict of interest for the organization because of the employee's personal

involvement, and another representative of the organization may be required to determine whether to give informed consent to a waiver. The lawyer should consider not only the disciplinary rules but also the organization's personnel policies regarding sexual relationships (for example, prohibiting such relationships between supervisors and subordinates).

### **Short-Term Limited Legal Services**

[40] For the application of this rule and Rules 1.9 and 1.10 when the lawyer undertakes to provide short-term limited legal services to a client under the auspices of a program sponsored by a nonprofit organization or court, *see* Rule 6.5(a).



### **Rule 1.8 – Conflict of Interest: 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 to the client in a manner which can be reasonably understood by the client;

(2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) The client gives informed consent in writing thereto.

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

(c) 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.

(d) While representing a client in connection with contemplated or pending litigation or administrative proceedings, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may pay or otherwise provide:

(1) The expenses of litigation or administrative proceedings, including court costs, expenses of investigation, expenses or medical examination, costs of obtaining and presenting evidence; and

(2) Other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceedings.

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

(1) The client gives informed consent 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.

(f) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims for 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 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.

(g) A lawyer shall not:

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

(2) Settle a claim or potential claim for malpractice arising out of the lawyer's past conduct with unrepresented client or former client unless that person is advised in writing of the desirability of seeking the advice of independent legal counsel and is given a reasonable opportunity to do so in connection therewith.

(h) A lawyer related to another lawyer as parent, child, sibling, or spouse 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 informed consent by the client after consultation regarding the relationship.

(i) A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

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

## COMMENT

### 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 the 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 the requirements of this rule must be met when the lawyer accepts an interest in the client's business or other non-monetary 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 and services that the client generally markets to others; for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utility 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] The client's consent need not be an actual or electronic signature but must be in written or electronic form and show the client's assent to the terms communicated by the lawyer, *e.g.*, a return electronic mail. 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, where appropriate, should explain that the client may wish to seek the advice of independent counsel.

[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 adversely affected by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. For the definition of "informed consent," *see* Rule 1.0(e). 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] 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) requires.

[5] 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 effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should be advised by the lawyer to obtain the detached advice that another lawyer can provide. Paragraph (b) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

[6] 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 adversely affect the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability

of alternative candidates for the position.

[7] This rule does not prevent a lawyer from entering into a contingent fee arrangement with a client in a civil case, if the arrangement satisfies all the requirements of Rule 1.5(c).

### **Literary Rights**

[8] 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 that might otherwise be taken in the representation of the client may detract from the publication value of an account of the representation. Paragraph (c) 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.

### **Paying Certain Litigation Costs and Client Expenses**

[9] Historically, under the Code of Professional Responsibility, lawyers could only advance the costs of litigation. The client remained ultimately responsible, and was required to pay such costs even if the client lost the case. That rule was modified by this court in 1980 in an amendment to DR 5-103(B) that eliminated the requirement that the client remain ultimately liable for costs of litigation, even if the litigation was unsuccessful. The provisions of Rule 1.8(d) embrace the result of the 1980 modification, but go further by providing that a lawyer may also pay certain expenses of a client that are not litigation expenses. Thus, under Rule 1.8(d), a lawyer may pay medical or living expenses of a client to the extent necessary to permit the client to continue the litigation. The payment of these additional expenses is limited to those strictly necessary to sustain the client during the litigation, such as medical expenses and minimum living expenses. The purpose of permitting such payments is to avoid situations in which a client is compelled by exigent financial circumstances to settle a claim on unfavorable terms in order to receive the immediate proceeds of settlement. This provision does not permit lawyers to "bid" for clients by offering financial payments beyond those minimum payments necessary to sustain the client until the litigation is completed. Regardless of the types of payments involved, assuming such payments are proper under Rule 1.8(d), client reimbursement of the lawyer is not required. However, no lawyer is required to pay litigation or other costs to a client. The rule merely permits such payments to be made without requiring reimbursement by the client.

### **Person Paying for Lawyer's Services**

[10] 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. In some circumstances, such as the relationship among insured, insurer, and defense counsel, substantive law regarding the role of the third-party payer may affect the applicability of this rule. Paragraph (e) 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. *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). The requirements of Rule 1.8(e)(1) do not apply to lawyers appointed to represent indigent criminal defendants whose fees are paid under the Criminal Justice Act or any similar statute or rule.

[11] 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(b)(4), a conflict of interest exists if there is a significant risk that the lawyer's representation will be adversely affected by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7, the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is non-consentable under Rule 1.7(a).

### **Aggregate Settlements**

[12] 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 paragraph (f) of this rule is a corollary of both Rules 1.7 and 1.2(a), 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. Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, must comply with applicable rules regulating notification of class members, compensation of class counsel, and other procedural requirements designed to ensure adequate protection of the entire class.

### **Limiting Liability and Settling Malpractice Claims**

[13] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen. Rule 1.8(g) does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, to the extent that such an

agreement is valid and enforceable and the client is fully informed of the scope and effect of the agreement. Nor does the rule 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.

[14] Agreements settling a claim or potential claim for malpractice arising out of the lawyer's past conduct are not prohibited by Rule 1.8(g). Nevertheless, in view of the danger that the lawyer will take unfair advantage of an unrepresented client or a 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. Settlement of a potential claim most often will occur in the context of the resolution of an actual dispute between the attorney and the client, whether concerning the claim itself or a dispute concerning fees. The rule does not authorize the lawyer to solicit a blanket release from the client as a routine incident of the conclusion of the legal representation.

[15] Paragraph (h) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. Pursuant to the provisions of Rule 1.8(j), the disqualification stated in paragraph (h) is personal and is not imputed to members of firms with whom the lawyers are associated. Since each of the related lawyers is subject to paragraph (h), the effect is to require the informed consent of all materially affected clients. Romantic relationships between lawyers may create conflicts of interest under Rule 1.7(b)(4), likewise requiring informed consent of all materially affected clients.

[16] The substantive law of the District of Columbia has long permitted lawyers to assert and enforce liens against the property of clients. *See, e.g., Redevelopment Land Agency v. Dowdey*, 618 A.2d 153, 159-60 (D.C. 1992), and cases cited therein. Whether a lawyer has a lien on money or property belonging to a client is generally a matter of substantive law as to which the ethics rules take no position. Exceptions to what the common law might otherwise permit are made with respect to contingent fees and retaining liens. *See, respectively*, Rule 1.5(c) and Rule 1.8(i).

[17] Rule 1.16(d) requires a lawyer to surrender papers and property to which the client is entitled when representation of the client terminates. Paragraph (i) of this rule states a narrow exception to 1.16(d): a lawyer may retain anything the law permits – including property – except for files. As to files, a lawyer may retain only the lawyer's own work product, and then only if the client has not paid for the work. However, if the client has paid for the work product, the client is entitled to receive it, even if the client has not previously seen or received a copy of the work product. Furthermore, the lawyer may not retain the work product for which the client has not paid, if the client has become unable to pay or if withholding the work product might irreparably harm the client's interest.

[18] Under Rule 1.16(d), for example, a lawyer would be required to return all papers received from a client, such as birth certificates, wills, tax returns, or "green cards." Rule 1.8(i) does not permit retention of such papers to secure payment of any fee due. Only the lawyer's own work product – results of factual investigations, legal research and analysis, and similar

materials generated by the lawyer's own effort – could be retained. (The term “work product” as used in paragraph (i) is limited to materials falling within the “work product doctrine,” but includes any material generated by the lawyer that would be protected under that doctrine whether or not created in connection with pending or anticipated litigation.) And a lawyer could not withhold all the work product merely because a portion of the lawyer's fees had not been paid.

[19] There are situations in which withholding the work product would not be permissible because of irreparable harm to the client. The possibility of involuntary incarceration or criminal conviction constitutes one category of irreparable harm. The realistic possibility that a client might irretrievably lose a significant right or become subject to a significant liability because of the withholding of the work product constitutes another category of irreparable harm. On the other hand, the mere fact that the client might have to pay another lawyer to replicate the work product does not, standing alone, constitute irreparable harm. These examples are merely indicative of the meaning of the term “irreparable harm,” and are not exhaustive.

### **Attribution of Prohibitions**

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

### **Sexual Relationships with Clients**

[21] Concerns about personal relationships, including sexual relationships, between lawyers and clients are addressed in Comments [37]-[39] to Rule 1.7.

## Rule 1.9 – Conflict of Interest: Former Client

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.

### COMMENT

[1] After termination of client-lawyer relationship, a lawyer may not represent another client except in conformity with the 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. Similarly, a lawyer who has defended a client against charges brought by a regulatory agency concerning a transaction may not later represent another client in a private lawsuit against the client involving the same transaction, absent the first client's informed consent. For the definition of "informed consent," see Rule 1.0(e).

[2] 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. Rule 1.9 is intended to incorporate District of Columbia and federal case law defining the "substantial relationship" test. See, e.g., *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (en banc); *T.C. Theatre Corp. v. Warner Brothers Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953), and its progeny.

[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.

[4] Disqualification from subsequent representation is for the protection of 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. The question of whether a lawyer is personally disqualified from representation in any matter on account of successive government and private employment is governed by Rule 1.11 rather than by Rule 1.9.

[5] With regard to disqualification of a firm with which a lawyer is associated, *see* Rules 1.10; for former government lawyers, *see* Rule 1.11; for former judges and law clerks, *see* Rule 1.11.

### **Rule 1.10 – Imputed Disqualification: General Rule**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless:

(1) the prohibition of the individual lawyer's representation is based on an interest of the lawyer described in Rule 1.7(b)(4) and that interest does not present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm; or

(2) the representation is permitted by Rules 1.11, 1.12, or 1.18.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in a matter which is the same as, or substantially related to, a matter with respect to which the lawyer had previously represented a client whose interests are materially adverse to that person and about whom the lawyer has in fact acquired information protected by Rule 1.6 that is material to the matter. The firm is not disqualified if the lawyer participated in a previous representation or acquired information under the circumstances covered by Rule 1.6(h) or Rule 1.18.

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

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

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

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

(e) A lawyer who, while affiliated with a firm, is made available to assist the Office of the Attorney General of the District of Columbia in providing legal services to that agency is not considered to be associated in a firm for purposes of paragraph (a), provided, however, that no such lawyer shall represent the Office of the Attorney General with respect to a matter in which the lawyer's firm appears on behalf of an adversary.

### **COMMENT**

## **Definition of “Firm”**

[1] Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. *See* Rule 1.0(c). For purposes of this rule, the term “firm” includes lawyers in a private firm and lawyers employed in the legal department of a corporation, legal services organization, or other organization, but does not include a government agency or other government entity. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. 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 confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

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

[3] Similar questions can also arise with respect to lawyers in legal aid organizations. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular Rule that is involved, and on the specific facts of the situation.

## **Principles of Imputed Disqualification**

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

[5] Where an individual lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (j) of that Rule, and not this Rule, governs whether that prohibition applies also to other lawyers in a firm with which that lawyer is associated. For issues involving prospective clients, see Rule 1.18.

[6] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11.

[7] Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer from the government to a private firm. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 1.6 and 1.11. Nevertheless, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.

### **Exception for Personal Interest of the Disqualified Lawyer**

[8] The rule in paragraph (a) does not prohibit representation by the firm where neither questions of client loyalty nor protection of confidential information are presented. Where an individual lawyer could not effectively represent a given client because of an interest described in Rule 1.7(b)(4), but that lawyer will do no work on the matter and the disqualifying interest of the lawyer will not adversely affect the representation by others in the firm, the firm should not be disqualified. For example, a lawyer's strong political beliefs may disqualify the lawyer from representing a client, but the firm should not be disqualified if the lawyer's beliefs will not adversely affect the representation by others in the firm. Similarly, representation of a client by the firm would not be precluded merely because the client's adversary is a person with whom one of the firm's lawyers has longstanding personal or social ties or is represented by a lawyer in another firm who is closely related to one of the firm's lawyers. *See* Rule 1.7, Comment [12] and Rule 1.8(h), Comment [7], respectively. Nor would representation by the firm be precluded merely because one of its lawyers is seeking possible employment with an opponent (*e.g.*, U.S. Attorney's Office) or with a law firm representing the opponent of a firm client.

### **Lawyers Moving Between Firms**

[9] When lawyers move between firms or when lawyers have been associated in a firm but then end their association, the fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new

clients after having left a previous association, or unreasonably hamper the former firm from representing a client with interests adverse to those of a former client who was represented by a lawyer who has terminated an association with the firm. In this connection, it should be recognized that today many lawyers practice in firms, that many 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 imputed disqualification were defined 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.

[10] 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 is a presumption that all confidences known by a 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.

[11] The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the Code of Professional Responsibility. Applying this rubric presents two problems. 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 imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

[12] A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

### **Confidentiality**

[13] 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 discussion 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.

[14] Application of paragraphs (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[15] The provisions of paragraphs (b) and (c) which refer to possession of protected information operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rule 1.6. Thus, if a lawyer while with one firm acquired no knowledge of 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 substantially related matter even though the interests of the two clients conflict.

[16] 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* Rule 1.6.

### **Adverse Positions**

[17] 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 the same or substantially related matters. This obligation requires abstention from adverse representations by the individual lawyer involved, and may also entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by the principles of Rule 1.9. Thus, under paragraph (b), if a lawyer left one firm for another, the new affiliation would preclude the lawyer's new firm from continuing to represent clients with interests materially adverse to those of the lawyer's former clients in the same or substantially related matters. In this respect paragraph (b) is at odds with – and thus must be understood to reject – the dicta expressed in the “second” hypothetical in the second paragraph of footnote 5 of *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 42 n. 5 (D.C. 1984) (en banc), premised on *LaSalle National Bank v. County of Lake*, 703 F.2d 252, 257-59 (7th Cir. 1983).

[18] The concept of “former client” as used in paragraph (b) extends only to actual representation of the client by the newly affiliated lawyer while that lawyer was employed by the former firm. Thus, not all of the clients of the former firm during the newly affiliated lawyer's practice there are necessarily deemed former clients of the newly affiliated lawyer. Only those clients with whom the newly affiliated lawyer in fact personally had a lawyer-client relationship are former clients within the terms of paragraph (b).

[19] The last sentence of paragraph (b) limits the imputation rule in certain limited circumstances. Those circumstances involve situations in which any secrets or confidences obtained were received before the lawyer had become a member of the Bar, but during a time when such person was providing assistance to another lawyer. The typical situation is that of the part-time or summer law clerk, or so-called summer associate. Other types of assistance to a lawyer, such as working as a paralegal or legal assistant, could also fall within the scope of this sentence. The limitation on the imputation rule is similar to the provision dealing with judicial law clerks under Rule 1.11(b). Not applying the imputation rule reflects a policy choice that

imputation in such circumstances could unduly impair the mobility of persons employed in such nonlawyer positions once they become members of the Bar. The personal disqualification of the former non-lawyer is not affected, and the lawyer who previously held the non-legal job may not be involved in any representation with respect to which the firm would have been disqualified but for the last sentence of paragraph (b). Rule 1.6(h) provides that the former nonlawyer is subject to the requirements of Rule 1.6 (regarding protection of client confidences and secrets) just as if the person had been a member of the Bar when employed in the prior position.

[20] Under certain circumstances, paragraph (c) permits a law firm to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. The firm, however, may not represent a person in a matter adverse to a current client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same as, or substantially related to, that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rule 1.6.

### **Lawyers Assisting the Office of the Attorney General of the District of Columbia**

[21] The Office of the Attorney General of the District of Columbia may experience periods of peak need for legal services which cannot be met by normal hiring programs, or may experience problems in dealing with a large backlog of matters requiring legal services. In such circumstances, the public interest is served by permitting private firms to provide the services of lawyers affiliated with such private firms on a temporary basis to assist the Office of the Attorney General. Such arrangements do not fit within the classical pattern of situations involving the general imputation rule of paragraph (a). Provided that safeguards are in place which preclude the improper disclosure of client confidences or secrets, and the improper use of one client's confidences or secrets on behalf of another client, the public interest benefits of such arrangements justify an exception to the general imputation rule, just as Comment [1] excludes from the definition of "firm" lawyers employed by a government agency or other government entity. Lawyers assigned to assist the Office of the Attorney General pursuant to such temporary programs are, by virtue of paragraph (e), treated as if they were employed as government employees and as if their affiliation with the private firm did not exist during the period of temporary service with the Office of the Attorney General. *See* Rule 1.11(h) with respect to the procedures to be followed by lawyers participating in such temporary programs and by the firms with which such lawyers are affiliated after the participating lawyers have ended their participation in such temporary programs.

[22] The term "made available to assist the Office of the Attorney General in providing legal services" in paragraph (e) contemplates the temporary cessation of practice with the firm during the period legal services are being made available to the Office of the Attorney General, so that during that period the lawyer's activities which involve the practice of law are devoted fully to assisting the Office of the Attorney General.

[23] Rule 1.10(e) prohibits a lawyer who is assisting the Office of the Attorney General from representing that office in any matter in which the lawyer's firm represents an adversary.

Rule 1.10(e) does not, however, by its terms, prohibit lawyers assisting the Office of the Attorney General from participating in every matter in which the Attorney General is taking a position adverse to that of a current client of the firm with which the participating lawyer was affiliated prior to joining the program of assistance to the Office of the Attorney General. Such an unequivocal prohibition would be overly broad, difficult to administer in practice, and inconsistent with the purposes of Rule 1.10(e).

[24] The absence of such a *per se* prohibition in Rule 1.10(e) does not diminish the importance of a thoughtful and restrained approach to defining those matters in which it is appropriate for a participating lawyer to be involved. An appearance of impropriety in programs of this kind can undermine the public's acceptance of the program and embarrass the Office of the Attorney General, the participating lawyer, that lawyer's law firm and clients of that firm. For example, it would not be appropriate for a participant lawyer to engage in a representation adverse to a party who is known to be a major client of the participating lawyer's firm, even though the subject matter of the representation of the Office of the Attorney General bears no substantial relationship to any representation of that party by the participating lawyer's firm. Similarly, it would be inappropriate for a participating lawyer to be involved in a representation adverse to a party that the participating lawyer has been personally involved in representing while at the firm, even if the client is not a major client of the firm. The appropriate test is that of conservative good judgment; if any reasonable doubts concerning the unrestrained vigor of the participating lawyer's representation on behalf of the Office of the Attorney General might be created, the lawyer should advise the appropriate officials of the Office of the Attorney General and decline to participate. Similarly, if participation on behalf of the Office of the Attorney General might reasonably give rise to a concern on the part of a participating lawyer's firm or a client of the firm that its secrets or confidences (as defined by Rule 1.6) might be compromised, participation should be declined. It is not anticipated that situations suggesting the appropriateness of a refusal to participate will occur so frequently as to significantly impair the usefulness of the program of participation by lawyers from private firms.

[25] The primary responsibility for identifying situations in which representation by the participating lawyer might raise reasonable doubts as to the lawyer's zealous representation on behalf of the Office of the Attorney General must rest on the participating lawyer, who will generally be privy to nonpublic information bearing on the appropriateness of the lawyer's participation in a matter on behalf of the Office of the Attorney General. Recognizing that many representations by law firms are nonpublic matters, the existence and nature of which may not be disclosed consistent with Rule 1.6, it is not anticipated that law firms from which participating lawyers have been drawn would be asked to perform formal "conflicts checks" with respect to matters in which participating lawyers may be involved. However, consultations between participating lawyers and their law firms to identify potential areas of concern, provided that such consultations honor the requirements of Rule 1.6, are appropriate to protect the interests of all involved – the Office of the Attorney General, the participating lawyer, that lawyer's law firm and any clients whose interests are potentially implicated.



### **Rule 1.11 – Successive Government and Private or Other Employment**

(a) A lawyer shall not accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee. Such participation includes acting on the merits of a matter in a judicial or other adjudicative capacity.

(b) If a lawyer is required to decline or to withdraw from employment under paragraph (a) on account of a personal and substantial participation in a matter, no partner or associate of that lawyer, or lawyer with an of counsel relationship to that lawyer, may knowingly accept or continue such employment except as provided in paragraphs (c) and (d) below. The disqualification of such other lawyers does not apply if the sole form of participation was as a judicial law clerk.

(c) The prohibition stated in paragraph (b) shall not apply if the personally disqualified lawyer is timely screened from any form of participation in the matter or representation as the case may be, and from sharing in any fees resulting therefrom, and if the requirements of paragraphs (d) and (e) are satisfied.

(d) Except as provided in paragraph (e), when any of counsel, lawyer, partner, or associate of a lawyer personally disqualified under paragraph (a) accepts employment in connection with a matter giving rise to the personal disqualification, the following notifications shall be required:

(1) The personally disqualified lawyer shall submit to the public department or agency by which the lawyer was formerly employed and serve on each other party to any pertinent proceeding a signed document attesting that during the period of disqualification the personally disqualified lawyer will not participate in any manner in the matter or the representation, will not discuss the matter or the representation with any partner, associate, or of counsel lawyer, and will not share in any fees for the matter or the representation.

(2) At least one affiliated lawyer shall submit to the same department or agency and serve on the same parties a signed document attesting that all affiliated lawyers are aware of the requirement that the personally disqualified lawyer be screened from participating in or discussing the matter or the representation and describing the procedures being taken to screen the personally disqualified lawyer.

(e) If a client requests in writing that the fact and subject matter of a representation subject to paragraph (d) not be disclosed by submitting the signed statements referred to in paragraph (d), such statements shall be prepared concurrently with undertaking the representation and filed with Bar Counsel under seal. If at any time thereafter the fact and subject matter of the representation are disclosed to the public or become a part of the public record, the signed statements previously prepared shall be promptly submitted as required by paragraph (d).

(f) Signed documents filed pursuant to paragraph (d) shall be available to the public,

except to the extent that a lawyer submitting a signed document demonstrates to the satisfaction of the public department or agency upon which such documents are served that public disclosure is inconsistent with Rule 1.6 or other applicable law.

(g) This rule applies to any matter involving a specific party or parties.

(h) A lawyer who participates in a program of temporary service to the Office of the District of Columbia Attorney General of the kind described in Rule 1.10(e) shall be treated as having served as a public officer or employee for purposes of paragraph (a), and the provisions of paragraphs (b)-(e) shall apply to the lawyer and to lawyers affiliated with the lawyer.

## COMMENT

[1] This rule deals with lawyers who leave public office and enter other employment. It applies to judges and their law clerks as well as to lawyers who act in other capacities. It is a counterpart of Rule 1.9, as applied to an individual former government lawyer, and of Rule 1.10, as applied to a law firm.

[2] A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to this Rule 1.11 and to statutes and government regulations concerning conflict of interest. In the District of Columbia, where there are many lawyers for the federal and D.C. governments and their agencies, a number of whom are constantly leaving government and accepting other employment, particular heed must be paid to the federal conflict-of-interest statutes. *See, e.g.*, 18 U.S.C. Chapter 11 and regulations and opinions thereunder.

[3] Rule 1.11, in paragraph (a), flatly forbids a lawyer to accept other employment in a matter in which the lawyer participated personally and substantially as a public officer or employee; participation specifically includes acting on a matter in a judicial capacity. Other than as noted in Comment [10] to this rule, there is no provision for waiver of the individual lawyer's disqualification. "Matter" is defined in paragraph (g) so as to encompass only matters that are particular to a specific party or parties. The making of rules of general applicability and the establishment of general policy will ordinarily not be a "matter" within the meaning of Rule 1.11. When a lawyer is forbidden by paragraph (a) to accept private employment in a matter, the partners and associates of that lawyer are likewise forbidden, by paragraph (b), to accept the employment unless the screening and disclosure procedures described in paragraphs (c) through (f) are followed.

[4] The rule forbids lawyers to accept other employment in connection with matters that are the same as or "substantially related" to matters in which they participated personally and substantially while serving as public officers or employees. The leading case defining "substantially related" matters in the context of former government employment is *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (en banc). There the D.C. Court of Appeals, *en banc*, held that in the "revolving door" context, a showing that a

reasonable person could infer that, through participation in one matter as a public officer or employee, the former government lawyer “may have had access to information legally relevant to, or otherwise useful in” a subsequent representation, is *prima facie* evidence that the two matters are substantially related. If this *prima facie* showing is made, the former government lawyer must disprove any ethical impropriety by showing that the lawyer “could not have gained access to information during the first representation that might be useful in the later representation.” *Id.* at 49-50. In *Brown*, the Court of Appeals announced the “substantially related” test after concluding that, under former DR 9-101(B), *see* “Revolving Door,” 445 A.2d 615 (D.C. 1982) (*en banc*) (*per curiam*), the term “matter” was intended to embrace all matters “substantially related” to one another – a test that originated in *Aside-switching@* litigation between private parties. *See* Rule 1.9, Comments [2] and [3]; *Brown*, 486 A.2d at 39-40 n. 1, 41-42 & n. 4. Accordingly, the words “or substantially related to” in paragraph (a) are an express statement of the judicial gloss in *Brown* interpreting “matter.”

[5] Paragraph (a)’s absolute disqualification of a lawyer from matters in which the lawyer participated personally and substantially carries forward a policy of avoiding both actual impropriety and the appearance of impropriety that is expressed in the federal conflict-of-interest statutes and was expressed in the former Code of Professional Responsibility. Paragraph (c) requires the screening of a disqualified lawyer from such a matter as a condition to allowing any lawyers in the disqualified lawyer’s firm to participate in it. This procedure is permitted in order to avoid imposing a serious deterrent to lawyers’ entering public service. Governments have found that they benefit from having in their service both younger and more experienced lawyers who do not intend to devote their entire careers to public service. Some lawyers might not enter into short-term public service if they thought that, as a result of their active governmental practice, a firm would hesitate to hire them because of a concern that the entire firm would be disqualified from matters as a result.

[6] There is no imputed disqualification and consequently no screening requirement in the case of a judicial law clerk. But such clerks are subject to a personal obligation not to participate in matters falling within paragraph (a), since participation by a law clerk is within the term “judicial or other adjudicative capacity.”

[7] Paragraph (d) imposes a further requirement that must be met before lawyers affiliated with a disqualified lawyer may participate in the representation. Except to the extent that the exception in paragraph (e) is satisfied, both the personally disqualified lawyer and at least one affiliated lawyer must submit to the agency signed documents basically stating that the personally disqualified lawyer will be screened from participation in the matter. The personally disqualified lawyer must also state that the lawyer will not share in any fees paid for the representation in question. And the affiliated lawyer must describe the procedures to be followed to ensure that the personally disqualified lawyer is effectively screened.

[8] Paragraph (e) makes it clear that the lawyer’s duty, under Rule 1.6, to maintain client confidences and secrets may preclude the submission of any notice required by paragraph (d). If the client requests in writing that the fact and subject matter of the representation not be disclosed, the lawyer must comply with that request. If the client makes such a request, the lawyer must abide by the client’s wishes until such time as the fact and subject matter of the

representation become public through some other means, such as a public filing. Filing a pleading or making an appearance in a proceeding before a tribunal constitutes a public filing. Once information concerning the representation is public, the notifications called for must be made promptly, and the lawyers involved may not honor a client request not to make the notifications. If a government agency has adopted rules governing practice before the agency by former government employees, members of the District of Columbia Bar are not exempted by Rule 1.11(e) from any additional or more restrictive notice requirements that the agency may impose. Thus the agency may require filing of notifications whether or not a client consents. While the lawyer cannot file a notification that the client has directed the lawyer not to file, the failure to file in accordance with agency rules may preclude the lawyer's representation of the client before the agency. Such issues are governed by the agency's rules, and Rule 1.11(e) is not intended to displace such agency requirements.

[9] Although paragraph (e) prohibits the lawyer from disclosing the fact and subject matter of the representation when the client has requested in writing that the information be kept confidential, the paragraph requires the lawyer to prepare the documents described in paragraph (d) as soon as the representation commences and to preserve the documents for possible submission to the agency and parties to any pertinent proceeding if and when the client does consent to their submission or the information becomes public.

[10] "Other employment," as used in paragraph (a) of this rule, includes the representation of a governmental body other than an agency of the government by which the lawyer was employed as a public officer or employee, but in the case of a move from one government agency to another the prohibition provided in paragraph (a) may be waived by the government agency with which the lawyer was previously employed. As used in paragraph (a), it would not be other employment for a lawyer who has left the employment of a particular government agency and taken employment with another government agency (*e.g.*, the Department of Justice) or with a private law firm to continue or accept representation of the same government agency with which the lawyer was previously employed.

[11] Paragraph (c) does not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. It prohibits directly relating the attorney's compensation in any way to the fee in the matter in which the lawyer is disqualified. *See* D.C. Bar Legal Ethics Committee Opinion 279.

[12] Rule 1.10(e) provides an exception to the general imputation imposed by Rule 1.10(a) for lawyers assisting the Office of the District of Columbia Attorney General on a temporary basis. Rule 1.10(e) provides that lawyers providing such temporary assistance are not considered to be affiliated with their law firm during such periods of temporary assistance. However, lawyers participating in such temporary assistance programs have a potential for conflicts of interest or the abuse of information obtained while participating in such programs. It is appropriate to subject lawyers participating in temporary assistance programs to the same rules which paragraphs (a)-(g) impose on former government employees. Paragraph (h) effects this result.

[13] In addition to ethical concerns, provisions of conflict of interest statutes or

regulations may impose limitations on the conduct of lawyers while they are providing assistance to the Office of the District of Columbia Attorney or after they return from such assignments. *See, e.g.*, 18 U.S.C. §' 207, 208. Compliance with the Rules of Professional Conduct does not necessarily constitute compliance with all of the obligations imposed by conflict of interest statutes or regulations.

### **Rule 1.12 – Third-Party Neutrals**

(a) Except as stated in paragraph (e), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as an arbitrator, mediator or other third-party neutral, unless all parties to the proceedings give their informed consent after disclosure.

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

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

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

(2) Written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) If a client requests in writing that the fact and subject matter of a representation subject to paragraph (a) not be disclosed by submitting the signed statements referred to in paragraph (c), such statements shall be prepared concurrently with undertaking the representation and filed with Bar Counsel under seal. If at any time thereafter the fact and subject matter of the representation are disclosed to the public or become a part of the public record, the signed statements previously prepared shall be promptly submitted as required by paragraph (c).

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

### **COMMENT**

[1] Lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This rule forbids such representation unless all of the parties to the proceedings give their informed consent. For the definition of “informed consent,” *see* Rule 1.0(e). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. *See* Rule 2.4.

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

[3] Requirements for screening procedures are stated in Rule 1.0(1). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified. *See* D.C. Bar Legal Ethics Committee Opinion 279.

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

[5] With respect to statements filed with Bar Counsel pursuant to paragraph (d), *see* Comments [8] and [9] to Rule 1.11.

### **Rule 1.13 – Organization as Client**

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

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) In dealing with an organization’s directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization’s interests may be adverse to those of the constituents with whom the lawyer is dealing.

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

### **COMMENT**

#### **The Entity as the Client**

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

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



[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] When it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, paragraph (b) requires the lawyer to refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

[6] Although Model Rule 1.13 contains a "reporting out" requirement that authorizes disclosure of confidential client information concerning an organizational client that would be prohibited with respect to other types of clients, D.C. Rule 1.13 does not expand the kinds of disclosures that are permitted for organizational clients. Under the D.C. Rules, client confidences are protected to the same degree whether the client is an organization or an individual. If a lawyer has reported a matter to the highest appropriate authority in the organization, and that authority has determined not to take any action recommended by the lawyer, the lawyer should accept that authority's decision, just as the lawyer is required to abide

by the decision of an individual client to maintain confidences and secrets – unless disclosure is authorized under Rule 1.6. If a binding judicial determination is made that the disclosure limitations under D.C. Rule 1.13 are preempted by federal law conferring broader authority to disclose client confidences or secrets of certain types of organizational clients, a lawyer may exercise the broader authority granted by federal law. The strictures of the D.C. Rules, however, would continue to apply to protection of confidences and secrets of other types of organizational clients.

### **Relation to Other Rules**

[7] This rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, 1.16, 3.3, and 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.2(e) and 1.6 (d) can be applicable.

### **Government Agency**

[8] The duty defined in this rule encompasses the representation of governmental organizations. *See* Rule 1.6 comments [37] through [40].

### **Clarifying the Lawyer's Role**

[9] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization, of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

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

### **Dual Representation**

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

### **Derivative Actions**

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

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

### **Rule 1.14 – Client with Diminished Capacity**

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

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

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

#### **COMMENT**

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

[2] The fact that a client suffers a disability does not diminish the lawyer’s obligation to treat the client with attention and respect. Even if the person has a surrogate decision-maker, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication. “Surrogate decision-maker” denotes an individual or entity appointed by a court or otherwise authorized by law to make important decisions on behalf of an individual who lacks capacity to make decisions in one or more significant areas of his or her life. The term “surrogate decision-maker” includes, but is not limited to, guardian ad litem, plenary or limited guardian or conservator, proxy decision-maker, or other legal representative.

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

[4] If a surrogate decision-maker has already been appointed for the client, the lawyer should ordinarily look to that person for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. In either case, the lawyer should consult with the represented person to the maximum extent possible, as indicated in comment [2] above.

### **Taking Protective Action**

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

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind, ability to appreciate the consequences of a decision, the substantive fairness of a decision, the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If the client does not have a surrogate decision-maker, the lawyer should consider whether the appointment of a surrogate decision-maker is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a surrogate decision-maker. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, the appointment of at least some types of surrogate decision-makers may be more expensive, intrusive, or traumatic for

the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should advocate on behalf of the client the least restrictive form of intervention in the client's decision-making.

### **Disclosure of the Client's Condition**

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

### **Emergency Legal Assistance**

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

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

### **Rule 1.15 – Safekeeping Property**

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution which is authorized by federal, District of Columbia, or state law to do business in the jurisdiction where the account is maintained and which is a member of the Federal Deposit Insurance Corporation, or the Federal Savings and Loan Insurance Corporation, or successor agencies. Other property shall be identified as such and appropriately safeguarded; provided, however, that funds need not be held in an account in a financial institution if such funds (1) are permitted to be held elsewhere or in a different manner by law or court order, or (2) are held by a lawyer under an escrow or similar agreement in connection with a commercial transaction. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

(c) When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a).

(d) Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

(e) Nothing in this rule shall prohibit a lawyer or law firm from placing clients' funds which are nominal in amount or to be held for a short period of time in one or more interest-bearing accounts for the benefit of the charitable purposes of a court-approved "Interest on Lawyers Trust Account (IOLTA)" program. The IOLTA program rules are set forth in Appendix – to Rule X of the Court's Rules Governing the Bar of the District of Columbia, and are hereby incorporated into these rules.

(f) Nothing in this rule shall prohibit a lawyer from placing a small amount of the lawyer's funds into a trust account for the sole purpose of defraying bank charges that may be

made against that account.

## COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of paragraph (a). Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. This rule, among other things, sets forth the longstanding prohibitions of the misappropriation of entrusted funds and the commingling of entrusted funds with the lawyer's property. This rule also requires that a lawyer safeguard "other property" of clients, which may include client files. For guidance concerning the disposition of closed client files, *see* D.C. Bar Legal Ethics Committee Opinion No. 283.

[2] Paragraph (d) of Rule 1.15 permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," *see* Rule 1.0(e).

[3] The District of Columbia Court of Appeals has promulgated specific rules allowing lawyers to place clients' funds that are nominal in amount, or that are to be held for a short period of time, into interest-bearing accounts for the benefit of the charitable purposes of a court-approved "Interest on Lawyers Trust Account (IOLTA)" program.

[4] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

[5] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. *See* D.C. Bar Legal Ethics Committee Opinion 293.

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



render legal services in the transaction.

[7] A “clients’ security fund” provides a means through the collective efforts of the Bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

[8] With respect to property that constitutes evidence, such as the instruments or proceeds of crime, *see* Rule 3.4(a).

### **Rule 1.16 – Declining or Terminating Representation**

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

- (1) The representation will result in violation of the Rules of Professional Conduct or other law;
- (2) The lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or
- (3) The lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

- (1) The client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;
- (2) The client has used the lawyer’s services to perpetrate a crime or fraud;
- (3) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (4) The representation will result in an unreasonable financial burden on the lawyer or obdurate or vexatious conduct on the part of the client has rendered the representation unreasonably difficult;
- (5) The lawyer believes in good faith, in a proceeding before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

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

(d) In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by Rule 1.8(i).

### **COMMENT**

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion.

### **Mandatory Withdrawal**

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

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. *See also* Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that irreconcilable differences between the lawyer and client require termination of the representation ordinarily should be accepted as sufficient.

### **Discharge**

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

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

[6] If the client has diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make a special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for the appointment of a surrogate decision-maker or similar protection of the client. *See* Rule 1.14.

### **Optional Withdrawal**

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

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning the timely payment of the lawyer's fees, court costs or other out-of-pocket expenses of the representation, or an agreement limiting the objectives of the representation.

### **Assisting the Client Upon Withdrawal**

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by Rule 1.8(i).

### **Compliance With Requirements of a Tribunal**

[10] Paragraph (c) reflects the possibility that a lawyer may, by appearing before a tribunal, become subject to the tribunal's power in some circumstances to prevent a withdrawal that would otherwise be proper. Paragraph (c) requires the lawyer who is ordered to continue a representation before a tribunal to do so. However, paragraph (c) is not intended to prevent the lawyer from challenging the tribunal's order as beyond its jurisdiction, arbitrary, or otherwise improper while, in the interim, continuing the representation.

### **Return of Client's Property or Money**

[11] Paragraph (d) requires a lawyer to make timely return to the client of any property or money "to which the client is entitled." Where a lawyer holds property or money of a client at the termination of a representation and there is a dispute concerning the distribution of such property or money – whether such dispute is between the lawyer and a client, the lawyer and another lawyer who is owed a fee in the matter, or between either the lawyer or the client and a third party – the lawyer must segregate the disputed portion of such property or money, hold that property or money in trust as required by Rule 1.15, and promptly distribute any undisputed amounts. *See* Rule 1.15 and Comments [4] and [5] thereto; *see In re Haar*, 667 A.2d 1350 (D.C. 1995), 698 A.2d 412 (D.C. 1997). Notwithstanding the foregoing, where a lawyer has a valid lien covering undisputed amounts of property or money, the lawyer may continue to hold such property or money to the extent permitted by the substantive law governing the lien asserted. *See generally* Rules 1.8, 1.15(b).

### **Rule 1.17 – Sale of Law Practice**

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

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the jurisdiction in which the practice has been conducted;

(b) The entire practice is sold to one or more lawyers or law firms or an entire area of practice is sold to one purchaser (either a solo practitioner or a single law firm);

(c) The seller gives a written notice to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel, to take possession of the file or of any funds or property to which the client is entitled; and

(3) the fact that the client's consent to the transfer to the purchasing lawyer or law firm of the client's files, of the representation and of any client funds held by the selling lawyer or law firm will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court *in camera* information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

Once a client has consented to the transfer to the purchasing lawyer or law firm of the client's files, funds and representation or the client fails to take action or otherwise object within ninety (90) days of the notice, then the purchasing lawyer is responsible for the client's matter(s).

(d) The fees charged clients shall not be increased by reason of the sale.

#### **COMMENT**

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

#### **Termination of Practice by the Seller**

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice on the occasion of moving to another state.

[5] This rule also permits a lawyer or law firm to sell an area of practice, although, in contrast to the ABA Model Rule and to the provisions of this rule with respect to the sale of an entire practice, a sale of an area of practice can only be made to a single purchaser. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves the jurisdiction typically would sell the entire practice, this rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

### **Sale of Entire Practice or Entire Area of Practice**

[6] The rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

## **Client Confidences, Consent and Notice**

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or merger between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The rule provides that before such information may be disclosed by the seller to the purchaser, the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed, and the purchasing attorney is thereafter responsible for all aspects of the client representation for which the selling lawyer or law firm previously had responsibility. So long as the client does not object or instruct otherwise, the transfer of the representation includes the transfer of client funds or property held by the selling lawyer or law firm directly to the purchasing lawyer or law firm; the contrary guidance contained on the issue of client funds or property in D.C. Legal Ethics Committee Opinion 294 is not adopted. The provision concerning transfer of the representation is added to the ABA Model Rule to ensure that clients are fully aware and fully protected when a lawyer or law firm sells a law practice.

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files and of the representation generally, the rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file and representation so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered *in camera*.

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

## **Fee Arrangements Between Client and Purchaser**

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser. The purchasing lawyer must comply with all existing rules concerning fee arrangements, such as Rule 1.5.

## **Other Applicable Ethical Standards**

[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (*see* Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (*see* Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (*see* Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter may be included in the sale (*see* Rule 1.16).

## **Applicability of the Rule**

[13] This rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this rule, the representatives of the seller as well as the purchasing lawyer may be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement, plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this rule.

[15] This rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

## **Other**

[16] This rule generally follows the discussion and views concerning the sale of a law practice expressed in D.C. Bar Legal Ethics Committee Opinion 294. The provisions of that Opinion not inconsistent with this rule and Comments remain as appropriate guidance.



### **Rule 1.18 – Duties to Prospective Client**

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

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as permitted by Rule 1.6.

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

(d) When the lawyer has received a confidence or secret from the prospective client, representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, or

(2) the disqualified lawyer is timely screened from any participation in the matter.

#### **COMMENT**

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. The principle of loyalty diminishes in importance if the sole reason for an individual lawyer's disqualification is the lawyer's initial consultation with a prospective new client with whom no client-lawyer relationship was ever formed, either because the lawyer detected a conflict of interest as a result of an initial consultation, or for some other reason (*e.g.*, the prospective client decided not to retain the firm). Hence, prospective clients should receive some but not all of the protection afforded clients.

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

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The client may disclose such information as part of the process of determining

whether the client wishes to form a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Such information is generally protected by Rule 1.6, even if the client or lawyer decides not to proceed with the representation. *See* Rule 1.6, Comment [9]. Paragraph (b) of Rule 1.18 prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.6. The duty to protect confidences and secrets exists regardless of how brief the initial conference may be. The prohibition against use or disclosure of information received from the prospective client may in turn cause the individual lawyer to be disqualified pursuant to Rule 1.7(b)(4) from representing a current or future client of the firm adverse to the prospective client because that lawyer's inability to use or disclose information from the prospective client may adversely affect that lawyer's professional judgment on behalf of the current or future client of the firm whose interests are adverse to the interests of the prospective client.

[4] In order to avoid acquiring confidences and secrets from a prospective client, a lawyer considering whether or not to undertake a new matter may limit the initial interview only to information that does not constitute a confidence or secret, if the lawyer can do so and still determine whether a conflict of interest or other reason for non-representation exists. An individual lawyer of the firm who obtains information from a prospective client is permitted by Rule 1.6(a) to disclose that information to other persons in the lawyer's firm, but any such dissemination may cause additional individual lawyers of the firm to be personally disqualified. If a firm wishes to keep open the screening option under paragraph (d)(2) which permits lawyers who are not personally disqualified to represent clients in the same or substantially related matters, the firm must limit and control dissemination of information obtained from the prospective client. Where the information from the prospective client indicates that any reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then informed consent from all affected present or former clients must be obtained before accepting the representation.

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

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received confidences and secrets from the prospective client. ABA Model Rule 1.18 provides for personal disqualification only if the information received by the lawyer could be significantly harmful if used in the matter, but the trigger in D.C. Rule 1.18 is receipt of any confidence or secret because of the interest in more broadly protecting the prospective client and the difficulty of determining whether use of the information would be significantly harmful to the prospective client.

[7] Under paragraph (c), the prohibition in this rule is imputed to other lawyers as

provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent of both the prospective and affected clients. In the alternative, imputation may be avoided under paragraph (d)(2) if all disqualified lawyers are timely screened. *See* Rule 1.0(1) (requirements for screening procedures). When a firm may wish to rely on paragraph (d)(2) to avoid imputed disqualification of the firm as a whole, it should take affirmative steps – as soon as an actual or potential conflict is suspected – to prevent a personally disqualified lawyer from disseminating any information about the potential client that is protected by Rule 1.6, except as necessary to investigate potential conflicts of interest, to any other person in the firm, including non-lawyer staff. Any lawyer in the firm who actually receives, directly or indirectly, protected information provided by a prospective client is disqualified. Unlike ABA Model Rule 1.18, this rule does not condition use of screening on the taking of reasonable measures by the personally disqualified lawyer to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; that is because the screen protects the prospective client regardless of the amount of information received by the personally disqualified lawyer, and this standard may be difficult to apply in practice. This rule does not prohibit the screened lawyer from receiving any part of the fee, in contrast to ABA Model Rule 1.18, because the substantial administrative burden of complying with such a prohibition exceeds any marginal benefit.

[8] This rule, unlike ABA Model Rule 1.18, does not require notice to the prospective client that lawyers in the firm who are not personally disqualified are representing a client adverse to the prospective client in the same or substantially related matters subject to the screening requirement, because the lack of such a notice requirement under the prior D.C. Rule concerning prospective clients (Rule 1.10(a)) did not prove problematic and it is not clear that the notice requirement materially advances any significant interest of the prospective client.

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

### **Rule 1.19 – Trust Account Overdraft Notification**

(a) Funds coming into the possession of a lawyer that are required by these Rules to be segregated from the lawyer's own funds (such segregated funds hereinafter being referred to as "trust funds") shall be deposited in one or more specially designated accounts at a financial institution. The title of each such account shall contain the words "Trust Account" or "Escrow Account," as well as the lawyer's or the lawyer's law firm's identity.

(b) The accounts required pursuant to paragraph (a) shall be maintained only in institutions that are listed as "D.C. Bar approved depositories" on a list maintained for this purpose by the Board on Professional Responsibility, unless (1) the account is permitted to be held elsewhere or in a different manner by law or court order, or (2) a lawyer holds trust funds under an escrow or similar agreement in connection with a commercial transaction. If a lawyer is a member of the District of Columbia Bar and practices law outside the District of Columbia, D.C. Bar approved depositories shall be used for deposit of any: (1) trust funds received by the lawyer in the District of Columbia; (2) trust funds received by the lawyer from, or for the benefit of, parties or persons located in the District of Columbia; and/or (3) trust funds received by the lawyer that arise from transactions negotiated or consummated in the District of Columbia.

To be listed as an approved depository, a financial institution shall file an undertaking with the Board on Professional Responsibility, on a form to be provided by the board's office, agreeing promptly to report to the Office of Bar Counsel each instance in which an instrument that would properly be payable if sufficient funds were available has been presented against a lawyer's or law firm's specially designated account at such institution at a time when such account contained insufficient funds to pay such instrument, whether or not the instrument was honored and irrespective of any overdraft privileges that may attach to such account. In addition to undertaking to make the above-specified reports, approved depositories, wherever they are located, shall also undertake to respond promptly and fully to subpoenas from the Office of Bar Counsel that seek a lawyer's or law firm's specially designated account records, notwithstanding any objections that might be raised based upon the territorial limits on the effectiveness of such subpoenas or upon the jurisdiction of the District of Columbia Court of Appeals to enforce them. Such undertaking shall apply to all branches of the financial institution and shall not be canceled by the institution except upon thirty (30) days written notice to the Office of Bar Counsel. The failure of an approved depository to comply with its undertaking hereunder shall be grounds for immediate removal of such institution from the list of D.C. Bar approved depositories.

(c) Reports to Bar Counsel by approved depositories pursuant to paragraph (b) above shall contain the following information:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the institution's other regular account holders.

(2) In the case of an instrument that was presented against insufficient funds but was honored, the report shall identify the depository, the lawyer or law firm maintaining the account, the account number, the date of presentation for payment and the payment date of the instrument, as well as the amount of overdraft created thereby.

The report to the Office of Bar Counsel shall be made simultaneously with, and within the time period, if any, provided by law for notice of dishonor. If an instrument presented against insufficient funds was honored, the institution's report shall be mailed to Bar Counsel within five (5) business days of payment of the instrument.

(d) The establishment of a specially designated account at an approved depository shall be conclusively deemed to be consent by the lawyer or law firm maintaining such account to that institution's furnishings to the Office of Bar Counsel all reports and information required hereunder. No approved depository shall incur any liability by virtue of its compliance with the requirements of this rule, except as might otherwise arise from bad faith, intentional misconduct, or any other acts by the approved depository or its employees which, unrelated to this rule, would create liability.

(e) The designation of a financial institution as an approved depository pursuant to this rule shall not be deemed to be a warranty, representation, or guaranty by the District of Columbia Court of Appeals, the District of Columbia Bar, the Board on Professional Responsibility, or the Office of Bar Counsel as to the financial soundness, business practices, or other attributes of such institution. Approval of an institution under this rule means only that the institution has undertaken to meet the reporting requirements enumerated above.

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

(g) Definitions:

"Law Firm" – Includes a partnership of lawyers, a professional or non-profit corporation of lawyers, and combination thereof engaged in the practice of law.

"Financial Institution" – Includes banks, savings and loan associations, credit unions, savings banks and any other business that accepts for deposit funds held in trust by lawyers which is authorized by federal, District of Columbia, or state law to do business in the District of Columbia or the state in which the financial institution is situated and that maintains accounts which are insured by an agency or instrumentality of the United States.

## **Rule 2.1 – Advisor**

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

### **COMMENT**

#### **Scope of Advice**

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

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

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

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

#### **Offering Advice**

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation.

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

### **Rule 2.3 – Evaluation for Use by Third Persons**

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

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

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

#### **COMMENT**

##### **Definition**

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

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

##### **Duties Owed to Third Person and Client**

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



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

### **Access to and Disclosure of Information**

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

### **Obtaining Client's Informed Consent**

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

### **Financial Auditors' Requests for Information**

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

## **Rule 2.4 – Lawyer Serving as Third Party Neutral**

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

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

### **COMMENT**

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

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

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

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

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

### **Rule 3.1 – Meritorious Claims and Contentions**

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or for the respondent in a proceeding that could result in involuntary institutionalization, shall, if the client elects to go to trial or to a contested fact-finding hearing, nevertheless so defend the proceeding as to require that the government carry its burden of proof.

#### **COMMENT**

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

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

[3] In criminal cases or proceedings in which the respondent can be involuntarily institutionalized, such as juvenile delinquency and civil commitment cases, the lawyer is not only permitted, but is indeed required, to put the government to its proof whenever the client elects to contest adjudication. The lawyer's obligations under this rule are subordinate to federal or state law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this rule.

### **Rule 3.2 – Expediting Litigation**

(a) In representing a client, a lawyer shall not delay a proceeding when the lawyer knows or when it is obvious that such action would serve solely to harass or maliciously injure another.

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

#### **COMMENT**

[1] Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good-faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

### **Rule 3.3 – Candor to Tribunal**

(a) A lawyer shall not knowingly:

(1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, unless correction would require disclosure of information that is prohibited by Rule 1.6;

(2) Counsel or assist a client to engage 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;

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction not disclosed by opposing counsel and known to the lawyer to be dispositive of a question at issue and directly adverse to the position of the client; or

(4) Offer evidence that the lawyer knows to be false, except as provided in paragraph (b). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) When the witness who intends to give evidence that the lawyer knows to be false is the lawyer's client and is the accused in a criminal case, the lawyer shall first make a good-faith effort to dissuade the client from presenting the false evidence; if the lawyer is unable to dissuade the client, the lawyer shall seek leave of the tribunal to withdraw. If the lawyer is unable to dissuade the client or to withdraw without seriously harming the client, the lawyer may put the client on the stand to testify in a narrative fashion, but the lawyer shall not examine the client in such manner as to elicit testimony which the lawyer knows to be false, and shall not argue the probative value of the client's testimony in closing argument.

(c) The duties stated in paragraph (a) continue to the conclusion of the proceeding.

(d) A lawyer who receives information clearly establishing that a fraud has been perpetrated upon the tribunal shall promptly take reasonable remedial measures, including disclosure to the tribunal to the extent disclosure is permitted by Rule 1.6(d).

#### **COMMENT**

[1] This rule defines the duty of candor to the tribunal. *See* Rule 1.0(1) for the definition of "tribunal." The rule also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. In dealing with a tribunal the lawyer is also required to comply with the general requirements of Rule 1.2(e) and (f). However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

#### **Representations by a Lawyer**

[2] An assertion purported to be made by the lawyer, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There may be circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. If the lawyer comes to know that a statement of material fact or law that the lawyer previously made to the tribunal is false, the lawyer has a duty to correct the statement, unless correction would require a disclosure of information that is prohibited by Rule 1.6. This provision in paragraph (a)(1) differs from ABA Model Rule 3.3(a)(1), which requires a lawyer to disclose information otherwise protected by Rule 1.6 if necessary to correct the lawyer's false statement. If Rule 1.6 permits a lawyer to disclose a client confidence or secret, D.C. Rule 3.3(a)(1) requires the lawyer to disclose that information to the extent reasonably necessary to correct a false statement of material fact or law. Nothing in D.C. Rule 3.3(a)(1) limits any disclosure duty under Rule 4.1(b) when substantive law requires a lawyer to disclose client information to avoid being deemed to have assisted the client's crime or fraud. The obligation prescribed in Rule 1.2(e) not to counsel a client to commit or assist the client in committing a fraud applies in litigation but is subject to Rule 3.3(b) and (d). Regarding compliance with Rule 1.2(e), see the Comment to that Rule. *See also* Rule 8.4.

### **Misleading Legal Argument**

[3] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in subparagraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party and that is dispositive of a question at issue. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

### **Offering Evidence**

[4] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[5] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. Regardless of the client's wishes, however, a lawyer may not offer evidence of a client if the evidence is known by the lawyer to be false, except to the extent permitted by paragraph (b) where the client is a defendant in a criminal case. The lawyer is obligated not only to refuse to offer false evidence under subparagraph (a)(4) but also to take reasonable remedial measures under paragraph (d) if the false evidence has been offered.

[6] The prohibition against offering false evidence applies only if the lawyer knows that the evidence is false. A lawyer's knowledge that evidence is false can be inferred from the circumstances. *See* Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[7] Although paragraph (a)(4) prohibits a lawyer from offering evidence only if the lawyer knows it to be false, it also permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

### **Remedial Measures**

[8] Paragraph (d) provides that if a lawyer learns that a fraud has been perpetrated on the tribunal, the lawyer must take reasonable remedial measures. If the lawyer's client is implicated in the fraud, the lawyer should ordinarily first call upon the client to rectify the fraud. If the client is unwilling to do so, the lawyer should consider other remedial measures. The lawyer may not, however, disclose information otherwise protected by Rule 1.6, unless the client has used the lawyer's services to further a crime or fraud and disclosure is permitted by Rule 1.6(d). In other cases, the lawyer may learn of the client's intention to present false evidence before the client has had a chance to do so. In this situation, paragraphs (a)(4) and (b) forbid the lawyer to present the false evidence, except in rare instances where the witness is the accused in a criminal case, the lawyer is unsuccessful in dissuading the client from going forward, and the lawyer is unable to withdraw without causing serious harm to the client. In addition, Rule 1.6(c) may permit disclosure of client confidences and secrets when the lawyer learns of a prospective fraud on the tribunal involving, for example, bribery or intimidation of witnesses. The terms "criminal case" and "criminal defendant" as used in Rule 3.3 and its Comment include juvenile delinquency proceedings and the person who is the subject of such proceedings.

### **Perjury by a Criminal Defendant**

[9] Paragraph (b) allows the lawyer to permit a client who is the accused in a criminal case to present false testimony in very narrowly circumscribed circumstances and in a very limited manner. Even in a criminal case the lawyer must seek to persuade the defendant-client to refrain from perjurious testimony. There has been dispute concerning the lawyer's duty when that persuasion fails. Paragraph (b) requires the lawyer to withdraw rather than offer the client's false testimony, if this can be done without seriously harming the client.

[10] Serious harm to the client sufficient to prevent the lawyer's withdrawal entails more than the usual inconveniences that necessarily result from withdrawal, such as delay in concluding the client's case or an increase in the costs of concluding the case. The term should



be construed narrowly to preclude withdrawal only where the special circumstances of the case are such that the client would be significantly prejudiced, such as by express or implied divulgence of information otherwise protected by Rule 1.6. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available. In those rare circumstances in which withdrawal without such serious harm to the client is impossible, the lawyer may go forward with examination of the client and closing argument subject to the limitations of paragraph (b).

### **Refusing to Offer Proof of a Non-client Known to Be False**

[11] Generally speaking, a lawyer may not offer testimony or other proof, through a non-client, that the lawyer knows to be false. Furthermore, a lawyer may not offer evidence of a client if the evidence is known by the lawyer to be false, except to the extent permitted by paragraph (b) where the client is a defendant in a criminal case.

### **Duration of Obligation**

[12] A practical time limit on the obligation to take reasonable remedial measures concerning criminal and fraudulent conduct related to the proceeding is needed. The conclusion of the proceeding is an appropriate and reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. If the lawyer withdraws before the conclusion of the proceeding, the lawyer's obligation ends at the time of withdrawal.

### **Withdrawal**

[13] A lawyer's compliance with the duty of candor imposed by this rule might require that the lawyer withdraw from the representation of a client. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this rule's duty of candor, or with the requirements of Rule 1.6(c), results in the lawyer's inability to represent the client in accordance with these Rules. *See also* Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent permitted by Rule 1.6.

### **Rule 3.4 – Fairness to Opposing Party and Counsel**

A lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy, or conceal evidence, or counsel or assist another person to do so, if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding. Unless prohibited by law, a lawyer may receive physical evidence of any kind from the client or from another person. If the evidence received by the lawyer belongs to anyone other than the client, the lawyer shall make a good-faith effort to preserve it and to return it to the owner, subject to Rule 1.6;

(b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party;

(e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused;

(f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) The person is a relative or an employee or other agent of a client; and

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

(g) Peremptorily strike jurors for any reason prohibited by law.

#### **COMMENT**

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

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right.

The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. To the extent clients are involved in the effort to comply with discovery requests, the lawyer's obligations are to pursue reasonable efforts to assure that documents and other information subject to proper discovery requests are produced. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or a proceeding whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] Paragraph (a) permits, but does not require, the lawyer to accept physical evidence (including the instruments or proceeds of crime) from the client or any other person. Such receipt is, as stated in paragraph (a), subject to other provisions of law and the limitations imposed by paragraph (a) with respect to obstruction of access, alteration, destruction, or concealment, and subject also to the requirements of paragraph (a) with respect to return of property to its rightful owner, and to the obligation to comply with subpoenas and discovery requests. The term "evidence" includes any document or physical object that the lawyer reasonably should know may be the subject of discovery or subpoena in any pending or imminent litigation. *See* D.C. Bar Legal Ethics Committee Opinion No. 119 (test is whether destruction of document is directed at concrete litigation that is either pending or almost certain to be filed).

[4] A lawyer should ascertain that the lawyer's handling of documents or other physical objects does not violate any other law. Federal criminal law may forbid the destruction of documents or other physical objects in circumstances not covered by the ethical rule set forth in paragraph (a). *See, e.g.*, 18 U.S.C. § 1503 (obstruction of justice); 18 U.S.C. § 1505 (obstruction of proceedings before departments, agencies, and committees); 18 U.S.C. § 1510 (obstruction of criminal investigations). And it is a crime in the District of Columbia for one who knows or has reason to know that an official proceeding has begun or is likely to be instituted to alter, destroy, or conceal a document with intent to impair its integrity or availability for use in the proceeding. D.C. Code § 22-723 (2001). Finally, some discovery rules having the force of law may prohibit the destruction of documents and other material even if litigation is not pending or imminent. This rule does not set forth the scope of a lawyer's responsibilities under all applicable laws. It merely imposes on the lawyer an ethical duty to make reasonable efforts to comply fully with those laws. The provisions of paragraph (a) prohibit a lawyer from obstructing another party's access to evidence, and from altering, destroying, or concealing evidence. These prohibitions may overlap with criminal obstruction provisions and civil discovery rules, but they apply whether or not the prohibited conduct violates criminal provisions or court rules. Thus, the alteration of evidence by a lawyer, whether or not such conduct violates criminal law or court rules, constitutes a violation of paragraph (a).

[5] Because of the duty of confidentiality under Rule 1.6, the lawyer is generally forbidden to volunteer information about physical evidence received from a client without the client's informed consent. In some cases, the Office of Bar Counsel will accept physical evidence from a lawyer and then turn it over to the appropriate persons; in those cases this procedure is usually the best means of delivering evidence to the proper authorities without disclosing the client's confidences. However, Bar Counsel may refuse to accept evidence; thus

lawyers should keep the following in mind before accepting evidence from a client, and should discuss with Bar Counsel's office the procedures that may be employed in particular circumstances.

[6] First, if the evidence received from the client is subpoenaed or otherwise requested through the discovery process while held by the lawyer, the lawyer will be obligated to deliver the evidence directly to the appropriate persons, unless there is a basis for objecting to the discovery request or moving to quash the subpoena. A lawyer should therefore advise the client of the risk that evidence may be subject to subpoena or discovery, and of the lawyer's duty to turn the evidence over in that event, before accepting it from the client.

[7] Second, if the lawyer has received physical evidence belonging to the client, for purposes of examination or testing, the lawyer may later return the property to the client pursuant to Rule 1.15, provided that the evidence has not been subpoenaed. The lawyer may not be justified in returning to a client physical evidence the possession of which by the client would be *per se* illegal, such as certain drugs and weapons. And if it is reasonably apparent that the evidence is not the client's property, the lawyer may not retain the evidence or return it to the client. Instead, the lawyer must, under paragraph (a), make a good-faith effort to return the evidence to its owner. Rule 3.4(a) makes this duty subject to Rule 1.6. Rules 1.6(c), (d) and (e) describe circumstances in which a lawyer may reveal information otherwise protected by Rule 1.6. If such circumstances exist, the lawyer may, but is not required to, reveal information otherwise protected by Rule 1.6 as part of a good-faith effort to preserve the evidence and return it to the owner pursuant to Rule 3.4(a).

[8] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate a witness for loss of time in preparing to testify, in attending, or in testifying. A fee for the services of a witness who will be proffered as an expert may be made contingent on the outcome of the litigation, provided, however, that the fee, while conditioned on recovery, shall not be a percentage of the recovery.

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

[10] Paragraph (g) prohibits any lawyer from exercising peremptory challenges to prospective jurors on any impermissible ground. Impermissible grounds include race, sex, and other factors that have been determined in binding judicial decisions to be discriminatory in jury selection.

### **Rule 3.5 – Impartiality and Decorum of the Tribunal**

A lawyer shall not:

- (a) Seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
- (b) Communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) Communicate, either ex parte or with opposing counsel, with a juror or prospective juror after discharge of the jury if:
  - (1) The communication is prohibited by law or court order;
  - (2) The juror or prospective juror has made known to the lawyer a desire not to communicate; or
  - (3) The communication involves misrepresentation, coercion, duress, or harassment; or
- (d) Engage in conduct intended to disrupt any proceeding of a tribunal, including a deposition.

#### **COMMENT**

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

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged, even though the proceeding has not ended. The lawyer may do so, either ex parte or with opposing counsel, unless the communication is prohibited by law or a court order. The lawyer, however, must respect the desire of the juror or prospective juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a

judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

### **Rule 3.6 – Trial Publicity**

A lawyer engaged in a case being tried to a judge or jury shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of mass public communication and will create a serious and imminent threat of material prejudice to the proceeding.

#### **COMMENT**

[1] It is difficult to strike a proper balance between protecting the right to a fair trial and safeguarding the right of free expression, which are both guaranteed by the Constitution. On one hand, publicity should not be allowed to influence the fair administration of justice. On the other hand, litigants have a right to present their side of a dispute to the public, and the public has an interest in receiving information about matters that are in litigation. Often a lawyer involved in the litigation is in the best position to assist in furthering these legitimate objectives. No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression.

[2] The special obligations of prosecutors to limit comment on criminal matters involve considerations in addition to those implicated in this rule, and are dealt with in Rule 3.8(f). Furthermore, this rule is not intended to abrogate special court rules of confidentiality in juvenile or other cases. Lawyers are bound by Rule 3.4(c) to adhere to any such rules that have not been found invalid.

[3] Because administrative agencies should have the prerogative to determine the ethical rules for prehearing publicity, this rule does not purport to apply to matters before administrative agencies.

### **Rule 3.7 – Lawyer as Witness**

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

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

(b) A lawyer may not act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness if the other lawyer would be precluded from acting as advocate in the trial by Rule 1.7 or Rule 1.9. The provisions of this paragraph (b) do not apply if the lawyer who is appearing as an advocate is employed by, and appears on behalf of, a government agency.

#### **COMMENT**

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

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

[3] Subparagraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Subparagraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, subparagraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.



[5] If the only reason for not permitting a lawyer to combine the roles of advocate and witness is possible prejudice to the opposing party, there is no reason to disqualify other lawyers in the testifying lawyer's firm from acting as advocates in that trial. In short, there is no general rule of imputed disqualification applicable to Rule 3.7. However, the combination of roles of advocate and witness may involve an improper conflict of interest between the lawyer and the client in addition to or apart from possible prejudice to the opposing party. Whether there is such a client conflict is determined by Rule 1.7 or 1.9. For example, if there is likely to be a significant conflict between the testimony of the client and that of the lawyer, the representation is improper by the standard of Rule 1.7(b) without regard to Rule 3.7(a). The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether such a conflict exists is, in the first instance, the responsibility of the lawyer involved. *See* Comment to Rule 1.7. Rule 3.7(b) states that other lawyers in the testifying lawyer's firm are disqualified only when there is such a client conflict and the testifying lawyer therefore could not represent the client under Rule 1.7 or 1.9. The principles of client consent, embodied in Rules 1.7 and 1.9, also apply to paragraph (b). Thus, the reference to Rules 1.7 and 1.9 incorporates the client consent aspects of those Rules. Paragraph (b) is designed to provide protection for the client, not rights of disqualification to the adversary. Subject to the disclosure and consultation requirements of Rules 1.7 and 1.9, the client may consent to the firm's continuing representation, despite the potential problems created by the nature of the testimony to be provided by a lawyer in the firm.

[6] Even though a lawyer's testimony does not involve a conflict with the client's interests under Rule 1.7 or 1.9 and would not be precluded under Rule 3.7, the client's interests might nevertheless be harmed by the appearance as a witness of a lawyer in the firm that represents the client. For example, the lawyer's testimony would be vulnerable to impeachment on the grounds that the lawyer-witness is testifying to support the position of the lawyer's own firm. Similarly, a lawyer whose firm colleague is testifying in the case should recognize the possibility that the lawyer might not scrutinize the testimony of the colleague carefully enough and that this could prejudice the client's interests, whether the colleague is testifying for or against the client. In such instances, the lawyer should inform the client of any possible adverse effects on the client's interests that might result from the lawyer's relationship with the colleague-witness, so that the client may make a meaningful choice whether to retain the lawyer for the representation in question.

### **Rule 3.8 – Special Responsibilities of a Prosecutor**

The prosecutor in a criminal case shall not:

- (a) In exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person;
- (b) File in court or maintain a charge that the prosecutor knows is not supported by probable cause;
- (c) Prosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a *prima facie* showing of guilt;
- (d) Intentionally avoid pursuit of evidence or information because it may damage the prosecution's case or aid the defense;
- (e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (f) Except for statements which are necessary to inform the public of the nature and extent of the prosecutor's action and which serve a legitimate law enforcement purpose, make extrajudicial comments which serve to heighten condemnation of the accused; or
- (g) In presenting a case to a grand jury, intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, abuse the processes of the grand jury, or fail to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause.

#### **COMMENT**

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. This rule is intended to be a distillation of some, but not all, of the professional obligations imposed on prosecutors by applicable law. The rule, however, is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.

[2] Apart from the special responsibilities of a prosecutor under this rule, prosecutors are subject to the same obligations imposed upon all lawyers by these Rules of Professional Conduct, including Rule 3.4 prohibiting the discriminatory use of peremptory strikes, and Rule 5.3, relating to responsibilities regarding nonlawyers who work for or in association with the lawyer's office. Indeed, because of the power and visibility of a prosecutor, the prosecutor's compliance with these Rules, and recognition of the need to refrain even from some actions technically allowed to other lawyers under the Rules, may, in certain instances, be of special importance. For example, Rule 3.6 prohibits extrajudicial statements that will have a substantial likelihood of destroying the impartiality of the judge or jury. In the context of a criminal prosecution, pretrial publicity can present the further problem of giving the public the incorrect impression that the accused is guilty before having been proven guilty through the due processes of the law. It is unavoidable, of course, that the publication of an indictment may itself have severe consequences for an accused. What is avoidable, however, is extrajudicial comment by a prosecutor that serves unnecessarily to heighten public condemnation of the accused without a legitimate law enforcement purpose before the criminal process has taken its course. When that occurs, even if the ultimate trial is not prejudiced, the accused may be subjected to unfair and unnecessary condemnation before the trial takes place. Accordingly, a prosecutor should use special care to avoid publicity, such as through televised press conferences, which would unnecessarily heighten condemnation of the accused.

[3] Nothing in this Comment, however, is intended to suggest that a prosecutor may not inform the public of such matters as whether an official investigation has ended or is continuing, or who participated in it, and the prosecutor may respond to press inquiries to clarify such things as technicalities of the indictment, the status of the matter, or the legal procedures that will follow. Also, a prosecutor should be free to respond, insofar as necessary, to any extrajudicial allegations by the defense of unprofessional or unlawful conduct on the part of the prosecutor's office.

### **Rule 3.9 – Advocate in Non-adjudicative Proceedings**

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

#### **COMMENT**

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

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

[3] This rule does not apply to representation of a client in a negotiation or other bilateral transaction with a government agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

[4] This rule is closely related to Rules 3.3 through 3.5, which deal with conduct regarding tribunals. The term “tribunal,” as defined Rule 1.0(n), refers to adjudicative or quasi-adjudicative bodies.

## **Rule 4.1 – Truthfulness in Statements to Others**

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

- (a) Make a false statement of material fact or law to a third person; or
- (b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

### **COMMENT**

#### **Misrepresentation**

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

#### **Statements of Fact**

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

#### **Fraud by Client**

[3] Under Rule 1.2(e), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(e) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose client information to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing such client information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6. If, in the particular circumstances in which the lawyer finds himself or

herself, the lawyer has discretion to disclose a client confidence or secret under Rule 1.6(c), (d), or (e), disclosure is not prohibited by Rule 1.6, and the lawyer must disclose the information if otherwise required by this rule.

## **Rule 4.2 - Communication Between Lawyer and Person Represented by Counsel**

(a) During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a person known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other person or is authorized by law or a court order to do so.

(b) During the course of representing a client, a lawyer may communicate about the subject of the representation with a nonparty employee of an organization without obtaining the consent of that organization's lawyer. If the organization is an adverse party, however, prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party that is adverse to the employee's employer.

(c) For purposes of this rule, the term "party" or "person" includes any person or organization, including an employee of an organization, who has the authority to bind an organization as to the representation to which the communication relates.

(d) This rule does not prohibit communication by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client, whether or not those grievances or the lawyer's communications relate to matters that are the subject of the representation, provided that in the event of such communications the disclosures specified in (b) are made to the government official to whom the communication is made.

### **COMMENT**

[1] This rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

[2] This rule does not prohibit communication with a person or party, or an employee or agent of an organization, concerning matters outside the representation. For example, the existence of a controversy between two organizations does not prohibit a lawyer for either from communicating with representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. In addition, a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided that the client communication is not solely for the purpose of evading restrictions imposed on the lawyer by this rule.

[3] In the case of an organization, and other than as noted in Comment [5], this rule prohibits communication by a lawyer for one party concerning the matter in representation with persons having the power to bind the organization as to the particular representation to which the communication relates. If an agent or employee of the organization with authority to make binding decisions regarding the representation is represented in the matter by separate counsel, the consent by that agent's or employee's counsel to a communication will be sufficient for purposes of this rule.

[4] The rule does not prohibit a lawyer from communicating with employees of an organization who have the authority to bind the organization with respect to the matters underlying the representation if they do not also have authority to make binding decisions regarding the representation itself. A lawyer may therefore communicate with such persons without first notifying the organization's lawyer. *See* D.C. Bar Legal Ethics Committee Opinion No. 129. But before communicating with such a "nonparty employee," the lawyer must disclose to the employee the lawyer's identity and the fact that the lawyer represents a party with a claim against the employer. It is preferable that this disclosure be made in writing. The notification requirements of Rule 4.2(b) apply to contacts with government employees who do not have the authority to make binding decisions regarding the representation.

[5] Because this rule is primarily focused on protecting represented persons unschooled in the law from direct communications from counsel for an adverse person, consent of the organization's lawyer is not required where a lawyer seeks to communicate with in-house counsel of an organization. If individual in-house counsel is represented separately from the organization, however, consent of that individual's personal counsel is required before communicating with that individual in-house counsel.

[6] Consent of the organization's lawyer is not required where a lawyer seeks to communicate with a former constituent of an organization. In making such contact, however, the lawyer may not seek to obtain information that is otherwise protected.

[7] This rule also does not preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.

[8] This rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.

[9] This rule does not apply to the situation in which a lawyer contacts employees of an organization for the purpose of obtaining information generally available to the public, or obtainable under the Freedom of Information Act, even if the information in question is related to the representation. For example, a lawyer for a plaintiff who has filed suit against an organization represented by a lawyer may telephone the organization to request a copy of a press release regarding the representation, without disclosing the lawyer's identity, obtaining the consent of the organization's lawyer, or otherwise acting as paragraphs (a) and (b) of this rule require.

[10] Paragraph (d) recognizes that special considerations come into play when a lawyer is seeking to redress grievances involving the government. It permits communications with those in government having the authority to redress such grievances (but not with any other government personnel) without the prior consent of the lawyer representing the government in such cases. However, a lawyer making such a communication without the prior consent of the lawyer representing the government must make the kinds of disclosures that are required by paragraph (b) in the case of communications with non-party employees.



[11] Paragraph (d) does not permit a lawyer to bypass counsel representing the government on every issue that may arise in the course of disputes with the government. It is intended to provide lawyers access to decision makers in government with respect to genuine grievances, such as to present the view that the government's basic policy position with respect to a dispute is faulty, or that government personnel are conducting themselves improperly with respect to aspects of the dispute. It is not intended to provide direct access on routine disputes such as ordinary discovery disputes, extensions of time or other scheduling matters, or similar routine aspects of the resolution of disputes.

[12] This rule is not intended to enlarge or restrict the law enforcement activities of the United States or the District of Columbia which are authorized and permissible under the Constitution and law of the United States or the District of Columbia. The "authorized by law" proviso to Rule 4.2(a) is intended to permit government conduct that is valid under this law. The proviso is not intended to freeze any particular substantive law, but is meant to accommodate substantive law as it may develop over time.

### **Rule 4.3 – Dealing with Unrepresented Person**

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

(1) Give advice to the unrepresented person other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client; or

(2) State or imply to unrepresented persons whose interests are not in conflict with the interests of the lawyer's client that the lawyer is disinterested.

(b) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

#### **COMMENT**

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer will provide disinterested advice concerning the law even when the lawyer represents a client. In dealing personally with any unrepresented third party on behalf of the lawyer's client, a lawyer must take great care not to exploit these assumptions. *See* D.C. Bar Legal Ethics Committee Opinion 321.

[2] The rule distinguishes between situations involving unrepresented third parties whose interests may be adverse to those of the lawyer's client and those in which the third party's interests are not in conflict with the client's. In the former situation, the possibility of the lawyer's compromising the unrepresented person's interests is so great that the rule prohibits the giving of any advice, apart from the advice that the unrepresented person obtain counsel. A lawyer is free to give advice to unrepresented persons whose interests are not in conflict with those of the lawyer's client, but only if it is made clear that the lawyer is acting in the interests of the client. Thus the lawyer should not represent to such persons, either expressly or implicitly, that the lawyer is disinterested. Furthermore, if it becomes apparent that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer must take whatever reasonable, affirmative steps are necessary to correct the misunderstanding.

[3] This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

[4] This rule is not intended to restrict in any way law enforcement efforts by government lawyers that are consistent with constitutional requirements and applicable federal law.

### **Rule 4.4 – Respect for Rights of Third Persons**

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

(b) A lawyer who receives a writing relating to the representation of a client and knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.

#### **COMMENT**

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

[2] Paragraph (b) addresses the obligations of a lawyer who receives writings containing client secrets or confidences in material delivered by an adversary lawyer and who knows that the sending lawyer inadvertently included these writings. As the D.C. Legal Ethics Committee noted in Opinion 256, this problem is “an unfortunate (but not uncommon) consequence of an increasingly electronic world, as when a facsimile or electronic mail transmission is mistakenly made to an unintended recipient.” Consistent with Opinion 256, paragraph (b) requires the receiving lawyer to comply with the sending party’s instruction about disposition of the writing in this circumstances, and also prohibits the receiving lawyer from reading or using the material. ABA Model Rule 4.4 requires the receiving lawyer only to notify the sender in order to permit the sender to take protective measures, but Paragraph (b) of the D.C. Rule 4.4 requires the receiving lawyer to do more.

[3] On the other hand, where writings containing client secrets or confidences are inadvertently delivered to an adversary lawyer, and the receiving lawyer in good faith reviews the materials before the lawyer knows that they were inadvertently sent, the receiving lawyer commits no ethical violation by retaining and using those materials. *See* D.C. Legal Ethics Committee Opinion 256. Whether the privileged status of a writing has been waived is a matter of law beyond the scope of these Rules. Similarly, this rule does not address the legal duties of a lawyer who receives a writing that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. *See* D.C. Bar Legal Ethics Committee Opinion 318.

### **Rule 5.1 - Responsibilities of Partners, Managers, and Supervisory Lawyers**

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

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

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

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

### **COMMENT**

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

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

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a), and measures that may be required to fulfill the responsibility prescribed in paragraph (b), can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior

partner or special committee. *See* Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

[4] Paragraph (c) sets forth general principles of imputed responsibility for the misconduct of others. Subparagraph (c)(1) makes any lawyer who orders or, with knowledge, ratifies misconduct responsible for that misconduct. *See also* Rule 8.4(a). Subparagraph (c)(2) extends that responsibility to any lawyer who is a partner or person in comparable managerial authority in the firm in which the misconduct takes place, or who has direct supervisory authority over the lawyer who engages in misconduct, when the lawyer knows or should reasonably know of the conduct and could intervene to ameliorate its consequences. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. A lawyer with direct supervisory authority is a lawyer who has an actual supervisory role with respect to directing the conduct of other lawyers in a particular representation. A lawyer who is technically a “supervisor” in organizational terms, but is not involved in directing the effort of other lawyers in a particular representation, is not a supervising lawyer with respect to that representation.

[5] The existence of actual knowledge is also a question of fact; whether a lawyer should reasonably have known of misconduct by another lawyer in the same firm is an objective standard based on evaluation of all the facts, including the size and organizational structure of the firm, the lawyer’s position and responsibilities within the firm, the type and frequency of contacts between the various lawyers involved, the nature of the misconduct at issue, and the nature of the supervision or other direct responsibility (if any) actually exercised. The mere fact of partnership or a position as a principal in a firm is not sufficient, without more, to satisfy this standard. Similarly, the fact that a lawyer holds a position on the management committee of a firm, or heads a department of the firm, or has comparable management authority in some other form of organization or a government agency is not sufficient, standing alone, to satisfy this standard.

[6] Appropriate remedial action would depend on the immediacy of the involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in a negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

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

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

[9] The duties imposed by this rule on managing and supervisory lawyers do not alter the

personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. *See* Rule 5.2(a).

## **Rule 5.2 – Subordinate Lawyers**

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

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

### **COMMENT**

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

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

### **Rule 5.3 – Responsibilities Regarding Nonlawyer Assistants**

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

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

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

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

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

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

#### **COMMENT**

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

[2] Just as lawyers in private practice may direct the conduct of investigators who may be independent contractors, prosecutors and other government lawyers may effectively direct the conduct of police or other governmental investigative personnel, even though they may not have, strictly speaking, formal authority to order actions by such personnel, who report to the chief of police or the head of another enforcement agency. Such prosecutors or other government lawyers have a responsibility with respect to police or investigative personnel, whose conduct they effectively direct, equivalent to that of private lawyers with respect to investigators whom they retain. *See also* Comments [4], [5], and [6] to Rule 5.1, in particular, the concept of what constitutes direct supervisory authority, and the significance of holding certain positions in a firm. Comments [4], [5], and [6] of Rule 5.1 apply as well to Rule 5.3.



## **Rule 5.4 – Professional Independence of a Lawyer**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) An agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer. A lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.

(3) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement;

(4) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b); and

(5) A lawyer may share legal fees, whether awarded by a tribunal or received in settlement of a matter, with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter and that qualifies under Section 501(c)(3) of the Internal Revenue Code.

(b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

(1) The partnership or organization has as its sole purpose providing legal services to clients;

(2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;

(3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;

(4) The foregoing conditions are set forth in writing.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

## COMMENT

[1] The provisions of this rule express traditional limitations on sharing fees with nonlawyers. (On sharing fees among lawyers not in the same firm, *see* Rule 1.5(e).) These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] Traditionally, the canons of legal ethics and disciplinary rules prohibited lawyers from practicing law in a partnership that includes nonlawyers or in any other organization where a nonlawyer is a shareholder, director, or officer. Notwithstanding these strictures, the profession implicitly recognized exceptions for lawyers who work for corporate law departments, insurance companies, and legal service organizations.

[3] As the demand increased for a broad range of professional services from a single source, lawyers employed professionals from other disciplines to work for them. So long as the nonlawyers remained employees of the lawyers, these relationships did not violate the disciplinary rules. However, when lawyers and nonlawyers considered forming partnerships and professional corporations to provide a combination of legal and other services to the public, they faced serious obstacles under the former rules.

[4] This rule rejects an absolute prohibition against lawyers and nonlawyers joining together to provide collaborative services, but continues to impose traditional ethical requirements with respect to the organization thus created. Thus, a lawyer may practice law in an organization where nonlawyers hold a financial interest or exercise managerial authority, but only if the conditions set forth in subparagraphs (b)(1), (b)(2), and (b)(3) are satisfied, and pursuant to subparagraph (b)(4), satisfaction of these conditions is set forth in a written instrument. The requirement of a writing helps ensure that these important conditions are not overlooked in establishing the organizational structure of entities in which nonlawyers enjoy an ownership or managerial role equivalent to that of a partner in a traditional law firm.

[5] Nonlawyer participants under Rule 5.4 ought not be confused with nonlawyer assistants under Rule 5.3. Nonlawyer participants are persons having managerial authority or financial interests in organizations that provide legal services. Within such organizations, lawyers with financial interests or managerial authority are held responsible for ethical misconduct by nonlawyer participants about which the lawyers know or reasonably should know. This is the same standard of liability contemplated by Rule 5.1, regarding the responsibilities of lawyers with direct supervisory authority over other lawyers.

[6] Nonlawyer assistants under Rule 5.3 do not have managerial authority or financial interests in the organization. Lawyers having direct supervisory authority over nonlawyer assistants are held responsible only for ethical misconduct by assistants about which the lawyers actually know.

[7] As the introductory portion of paragraph (b) makes clear, the purpose of liberalizing

the Rules regarding the possession of a financial interest or the exercise of management authority by a nonlawyer is to permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee. For example, the rule permits economists to work in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers to work with family law practitioners to assist in counseling clients, nonlawyer lobbyists to work with lawyers who perform legislative services, certified public accountants to work in conjunction with tax lawyers or others who use accountants' services in performing legal services, and professional managers to serve as office managers, executive directors, or in similar positions. In all of these situations, the professionals may be given financial interests or managerial responsibility, so long as all of the requirements of paragraph (c) are met.

[8] Paragraph (b) does not permit an individual or entity to acquire all or any part of the ownership of a law partnership or other form of law practice organization for investment or other purposes. It thus does not permit a corporation, an investment banking firm, an investor, or any other person or entity to entitle itself to all or any portion of the income or profits of a law firm or other similar organization. Since such an investor would not be an individual performing professional services within the law firm or other organization, the requirements of paragraph (b) would not be met.

[9] The term "individual" in subparagraph (b) is not intended to preclude the participation in a law firm or other organization by an individual professional corporation in the same manner as lawyers who have incorporated as a professional corporation currently participate in partnerships that include professional corporations.

[10] Some sharing of fees is likely to occur in the kinds of organizations permitted by paragraph (b). Subparagraph (a)(4) makes it clear that such fee sharing is not prohibited.

[11] Subparagraph (a)(5) permits a lawyer to share legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter. A lawyer may decide to contribute all or part of legal fees recovered from the opposing party to a nonprofit organization. Such a contribution may or may not involve fee-splitting, but when it does, the prospect that the organization will obtain all or part of the lawyer's fees does not inherently compromise the lawyer's professional independence, whether the lawyer is employed by the organization or was only retained or recommended by it. A lawyer who has agreed to share legal fees with such an organization remains obligated to exercise professional judgment solely in the client's best interests. Moreover, fee-splitting in these circumstances may promote the financial viability of such nonprofit organizations and facilitate their public interest mission. Unlike the corresponding provision of Model Rule 5.4(a)(5), this provision is not limited to sharing of fees awarded by a court because that restriction would significantly interfere with settlement of cases, without significantly advancing the purpose of the exception. To prevent abuse of this broader exception, it applies only if the nonprofit organization qualifies under Section 501(c)(3) of the Internal Revenue Code.

## Rule 5.5 – Unauthorized Practice

A lawyer shall not:

- (a) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (b) Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

### COMMENT

[1] This rule concerns the unauthorized practice of law by District of Columbia Bar members in other jurisdictions and assistance by District of Columbia Bar members in the unauthorized practice of law by lawyers not admitted in this jurisdiction or by non-lawyers. The provisions concerning the unauthorized practice of law in the District of Columbia, including those activities in which a lawyer not admitted in the District of Columbia may and may not engage, are set forth in Rule 49 of the Rules of the District of Columbia Court of Appeals.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) 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 government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.

## Rule 5.6 – Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) A partnership, shareholders, operating, employment, or other similar type of agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) An agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between parties.

### COMMENT

[1] An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm. Whether provisions limiting benefits are retirement provisions, excepted by this rule, will depend on a number of factors. *See Neuman v. Akman*, 715 A.2d 127 (D.C. 1998).

[2] Restrictions, other than those concerning retirement benefits, that impose a substantial financial penalty on a lawyer who competes after leaving the firm may violate paragraph (a).

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

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

## **Rule 5.7 – Responsibilities Regarding Law-Related Services**

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

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

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

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

### **COMMENT**

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

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

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

protections of the client-lawyer relationship do not apply.

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

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

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

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

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

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

and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(b)(2)-(4) and 1.8(a) and (e)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure and use of confidential information. *See also* Comment [26] to Rule 1.7. The promotion of the law-related services must also in all respects comply with Rule 7.1, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction decisional law. Rule 1.8 addresses a lawyer's provision of non-law-related services to a client.

[11] When the full protections of all the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. Rule 5.7 does not limit the protection provided by any other Rule, including but not limited to Rule 8.4, which prohibits, among other things, conduct involving dishonesty or fraud whether or not the lawyer engages in such conduct in connection with the rendering of law-related services.



## Rule 6.1 – *Pro Bono Publico Service*

A lawyer should participate in serving those persons, or groups of persons, who are unable to pay all or a portion of reasonable attorney’s fees or who are otherwise unable to obtain counsel. A lawyer may discharge this responsibility by providing professional services at no fee, or at a substantially reduced fee, to persons and groups who are unable to afford or obtain counsel, or by active participation in the work of organizations that provide legal services to them. When personal representation is not feasible, a lawyer may discharge this responsibility by providing financial support for organizations that provide legal representation to those unable to obtain counsel.

### COMMENT

[1] This rule reflects the long-standing ethical principle underlying Canon 2 of the previous Code of Professional Responsibility that “A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.” The rule incorporates the legal profession’s historical commitment to the principle that all persons in our society should be able to obtain necessary legal services. The rule also recognizes that the rights and responsibilities of individuals and groups in the United States are increasingly defined in legal terms and that, as a consequence, legal assistance in coping with the web of statutes, rules, and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do. The rule also recognizes that a lawyer’s *pro bono* services are sometimes needed to assert or defend public rights belonging to the public generally where no individual or group can afford to pay for the services.

[2] This rule carries forward the ethical precepts set forth in the Code. Specifically, the rule recognizes that the basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and that every lawyer, regardless of professional prominence or professional work load, should find time to participate in or otherwise support the provision of legal services to the disadvantaged.

[3] The rule also acknowledges that while the provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services. A lawyer also should not refuse a request from a court or bar association to undertake representation of a person unable to obtain counsel except for compelling reasons such as those listed in Rule 6.2.

[4] This rule expresses the profession’s traditional commitment to make legal counsel available, but it is not intended that the rule be enforced through disciplinary process. Neither is it intended to place any obligation on a government lawyer that is inconsistent with laws such as 18 U.S.C. §' 203 and 205 limiting the scope of permissible employment or representational activities.

[5] In determining their responsibilities under this rule, lawyers admitted to practice in the District of Columbia should be guided by the Resolutions on Pro Bono Services passed by the Judicial Conferences of the District of Columbia and the D.C. Circuit as amended from time to time. Those resolutions as adopted in 1997 and 1998, respectively, call on members of the D.C. Bar, at a minimum, each year to (1) accept one court appointment, (2) provide 50 hours of *pro bono* legal service, or (3) when personal representation is not feasible, contribute the lesser of \$400 or 1 percent of earned income to a legal assistance organization that services the community's economically disadvantaged, including *pro bono* referral and appointment offices sponsored by the Bar and the courts.

[6] Law firms and other organizations employing lawyers should act reasonably to enable and encourage all lawyers in the organization to provide the *pro bono* legal services called for by this rule.

## Rule 6.2 – Accepting Appointments

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

(a) Representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) Representing the client is likely to result in a substantial and unreasonable burden on the lawyer; or

(c) The client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

### COMMENT

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

### Appointed Counsel

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

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

### **Rule 6.3 – Membership in Legal Services Organization**

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

(a) If participating in the decision would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) Where the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

#### **COMMENT**

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

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

## **Rule 6.4 – Law Reform Activities Affecting Client Interests**

(a) A lawyer should assist in improving the administration of justice. A lawyer may discharge this requirement by rendering services in activities for improving the law, the legal system, or the legal profession.

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

### **COMMENT**

[1] Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus, they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients. Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, the lawyer should endeavor by lawful means to obtain appropriate changes in the law. This rule expresses the policy underlying Canon 8 of the previous Code of Professional Responsibility that “A lawyer should assist in improving the legal system,” but it is not intended that it be enforced through disciplinary process.

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

## **Rule 6.5 – Nonprofit and Court-Annexed Limited Legal Services Programs**

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9 only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9 with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this rule.

### **COMMENT**

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

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

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

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that

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

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

[6] This rule serves the public interest by making it easier for lawyers affiliated with firms to provide *pro bono* legal services. Rule 1.10(e) contains a similarly-motivated exception from imputation for attorneys who, while affiliated with a firm, assist the District of Columbia Attorney General with certain matters.

## **Rule 7.1 – Communications Concerning a Lawyer’s Services**

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it:

(1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or

(2) Contains an assertion about the lawyer or the lawyer’s services that cannot be substantiated.

(b) (1) A lawyer shall not seek by in-person contact, employment (or employment of a partner or associate) by a nonlawyer who has not sought the lawyer’s advice regarding employment of a lawyer, if:

(A) The solicitation involves use of a statement or claim that is false or misleading, within the meaning of paragraph (a);

(B) The solicitation involves the use of coercion, duress or harassment; or

(C) The potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer.

(2) A lawyer shall not give anything of value to a person (other than the lawyer’s partner or employee) for recommending the lawyer’s services through in-person contact.

(c) A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer’s services or those of the lawyer’s partner or associate, or any other lawyer affiliated with the lawyer or the lawyer’s firm, as a private practitioner, if the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

(d) No lawyer or any person acting on behalf of a lawyer shall solicit or invite or seek to solicit any person for purposes of representing that person for a fee paid by or on behalf of a client or under the Criminal Justice Act, D.C. Code Ann. §11-2601 (2001) *et seq.*, in any present or future case in the District of Columbia Courthouse, on the sidewalks on the north, south, and west sides of the courthouse, or within 50 feet of the building on the east side.

(e) Any lawyer or person acting on behalf of a lawyer who solicits or invites or seeks to solicit any person incarcerated at the District of Columbia Jail, the Correctional Treatment Facility or any District of Columbia juvenile detention facility for the purpose of representing that person for a fee paid by or on behalf of that person or under the Criminal Justice Act, D.C. Code Ann. §11-2601 (2001) *et seq.*, in any then-pending criminal case in which that person is represented, must provide timely and adequate notice to the person’s then-current lawyer prior to accepting any fee from or on behalf of the incarcerated person.



## COMMENT

[1] This rule governs all communications about a lawyer's services, including advertising. It is especially important that statements about a lawyer or the lawyer's services be accurate, since many members of the public lack detailed knowledge of legal matters. Certain advertisements such as those that describe the amount of a damage award, the lawyer's record in obtaining favorable verdicts, or those containing client endorsements, unless suitably qualified, have a capacity to mislead by creating an unjustified expectation that similar results can be obtained for others. Advertisements comparing the lawyer's services with those of other lawyers are false or misleading if the claims made cannot be substantiated.

### Advertising

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

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

[4] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have rules regulating the type and content of advertising by lawyers that go beyond prohibitions against false or misleading statements. Such regulations create unneeded barriers to the flow of information about lawyers' services to persons needing such services, and so this rule subjects advertising by lawyers only to the requirement that it not be false or misleading.

[5] There is no significant distinction between disseminating information and soliciting clients through mass media or through individual personal contact. In-person solicitation (which would include telephone contact but not electronic mail) can, however, create problems because of the particular circumstances in which the solicitation takes place. This rule prohibits in-person solicitation in circumstances or through means that are not conducive to intelligent, rational decisions. Such circumstances and means could be the harassment of early morning or late night telephone calls to a prospective client to solicit legal work, or repeated calls at any time of day, and solicitation of an accident victim or the victim's family shortly after the accident or while the victim is still in medical distress. A lawyer is no longer permitted to conduct in-person solicitation through the use of a paid intermediary, *i.e.*, a person who is neither

the lawyer's partner (as defined in Rule 1.0(i)) nor employee (*see* Rule 5.3) and who is compensated for such services. This prohibition represents a change in Rule 7.1(b), which had previously authorized payments to intermediaries for recommending a lawyer. Experience under the former provision showed it to be unnecessary and subject to abuse. *See* Rules 5.3, 8.4(a), and 8.4(c) regarding a lawyer's responsibility for abusive or deceptive solicitation of a client by the lawyer's employee.

### **Payments for Advertising**

[6] A lawyer is allowed to pay for advertising or marketing permitted by this rule. Likewise, a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs.

### **Solicitations in the Vicinity of the District of Columbia Courthouse**

[7] Paragraph (d) is designed to prohibit unseemly solicitations of prospective clients in and around the District of Columbia Courthouse. The words "for a fee paid by or on behalf of a client or under the Criminal Justice Act" have been added to paragraph (d) as it was originally promulgated by the District of Columbia Court of Appeals in 1982. The purpose of the addition is to permit solicitation in the District of Columbia Courthouse for the purposes of *pro bono* representation. For the purposes of this rule, *pro bono* representation, whether by individual lawyers or nonprofit organizations, is representation undertaken primarily for purposes other than a fee. That representation includes providing services free of charge for individuals who may be in need of legal assistance and may lack the financial means and sophistication necessary to have alternative sources of aid. Cases where fees are awarded under the Criminal Justice Act do not constitute *pro bono* representation for the purposes of this rule. However, the possibility that fees may be awarded under the Equal Access to Justice Act and Civil Rights Attorneys' Fees Awards Act of 1976, as amended, or other statutory attorney fee statutes, does not prevent representation from constituting *pro bono* representation.

### **Solicitations of Inmates**

[8] Paragraph (e) is designed to address the vulnerability of incarcerated persons to lawyers seeking fee-paying representations. It applies only to situations where the incarcerated person has not initiated contact with the lawyer. In such situations, the lawyer may have contact with the individual but may not accept a fee unless and until timely notice is provided to current counsel for such incarcerated person.

### **Rule 7.5 – Firm Names and Letterheads**

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

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

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

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

#### **COMMENT**

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity, or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm. It is also misleading to continue to use the name of a lawyer formerly associated with the firm who currently is practicing elsewhere. *See D.C. Bar Legal Ethics Committee Opinion 277.*

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

## **Rule 8.1 – Bar Admission and Disciplinary Matters**

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

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

### **COMMENT**

[1] The duty imposed by this rule extends to persons seeking admission to the Bar as well as to lawyers. Hence, if a person knowingly makes a false statement of fact in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. Lack of materiality does not excuse a knowingly false statement of fact. The duty imposed by this rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer knowingly to make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this rule also requires correction of any prior factual misstatement in the matter that the lawyer or applicant may have made, including affirmative clarification of any factual misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

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

[3] A lawyer representing an applicant for admission to the Bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the Rules applicable to the client-lawyer relationship. For example, Rule 1.6 may prohibit disclosures, which would otherwise be required, by a lawyer serving in such representative capacity. Information that is a client confidence or secret under Rule 1.6 is "protected by Rule 1.6" within the meaning of Rule 8.1(b), even if a permissive disclosure option applies. Rule 1.6(c), (d), and (e) describe circumstances in which a lawyer may reveal information otherwise protected by 1.6. In such circumstances, a lawyer acting in a representative capacity may, but is not required to, make disclosures otherwise required by this rule. This rule refers to demands for information from an admissions or disciplinary authority. If a lawyer appears in an adjudicative proceeding regarding admission or bar discipline as a witness or client representative, the lawyer's conduct is governed by Rule 3.3.

### **Rule 8.3 – Reporting Professional Misconduct**

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

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

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6 or other law.

#### **COMMENT**

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

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client’s interests. Information that is a client confidence or secret under Rule 1.6 is “otherwise protected by Rule 1.6” within the meaning of Rule 8.3(c). Rule 1.6(c), (d), and (e) describe circumstances in which a lawyer may reveal information otherwise protected by Rule 1.6. In such circumstances, a lawyer may, but is not required to, make disclosures otherwise required by this rule.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term “substantial” refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the Office of Bar Counsel. A lawyer who believes that another lawyer has a significant problem of alcohol or other substance abuse which does not require reporting to Bar Counsel under this rule, may nonetheless wish to report the perceived situation to the Lawyer Counseling Committee, operated by the D.C. Bar, which assists lawyers having such problems.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship. Rule 1.6(c), (d), and (e) give a lawyer discretion to reveal information otherwise protected by Rule 1.6 in some circumstances, despite a client-lawyer relationship. If such circumstances exist, the lawyer may, but is not required, to reveal the information as part of a report of misconduct under this rule. The duty to report may also be limited by other law, including court rules or orders, protective orders, and laws restricting disclosure of grand jury or tax information.

[5] Rule 1.6(h) brings within the protections of Rule 1.6 certain types of information gained by lawyers participating in lawyer counseling programs of the D.C. Bar Lawyer Counseling Committee. To the extent information concerning violations of the Rules of Professional Conduct falls within the scope of Rule 1.6(h), a lawyer-counselor would not be required or permitted to inform the “appropriate professional authority” referred to in Rule 8.3. Where disclosure is permissive under Rule 1.6 (*see* paragraph 1.6(c), (d), and (e) for cases of permitted disclosures), discretion to disclose to the “appropriate professional authority” would also exist pursuant to paragraph 8.3(c). *See also* Comment to Rule 1.6, paragraphs [29], [30], and [31].

## **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 seriously interferes with the administration of justice;
- (e) State or imply an ability to influence improperly a government agency or official;
- (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) Seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter.

### **COMMENT**

[1] 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.

[2] Paragraph (d)'s prohibition of conduct that "seriously interferes with the administration of justice" includes conduct proscribed by the previous Code of Professional Responsibility under DR 1-102(A)(5) as "prejudicial to the administration of justice." The cases under paragraph (d) include acts by a lawyer such as: failure to cooperate with Bar Counsel; failure to respond to Bar Counsel's inquiries or subpoenas; failure to abide by agreements made with Bar Counsel; failure to appear in court for a scheduled hearing; failure to obey court orders; failure to turn over the assets of a conservatorship to the court or to the successor conservator; failure to keep the Bar advised of respondent's changes of address, after being warned to do so; and tendering a check known to be worthless in settlement of a claim against the lawyer or against the lawyer's client. Paragraph (d) is to be interpreted flexibly and includes any improper behavior of an analogous nature to these examples.

[3] A lawyer violates paragraph (d) by offensive, abusive, or harassing conduct that seriously interferes with the administration of justice. Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.



## **Rule 8.5 – Disciplinary Authority; Choice of Law**

(a) **Disciplinary Authority.** A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.

(b) **Choice of Law.** In any exercise of the disciplinary authority of this jurisdiction, the Rules of Professional Conduct to be applied shall be as follows:

(1) For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise, and

(2) For any other conduct,

(i) If the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

(ii) If the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

### **COMMENT**

#### **Disciplinary Authority**

[1] Paragraph (a) restates long-standing law.

#### **Choice of Law**

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. In the past, decisions have not developed clear or consistent guidance as to which rules apply in such circumstances.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of an attorney shall be subject to only one set of rules of professional conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible,

consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

[4] Paragraph (b) provides that as to a lawyer's conduct relating to a matter pending before a tribunal the lawyer shall be subject only to the rules of professional conduct of that tribunal. As to all other conduct, paragraph (b) provides that a lawyer licensed to practice only in this jurisdiction shall be subject to the rules of professional conduct of this jurisdiction, and that a lawyer licensed in multiple jurisdictions shall be subject only to the rules of the jurisdiction where he or she (as an individual, not his or her firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.

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

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

## **Rule 9.1 – Nondiscrimination**

A lawyer shall not discriminate against any individual in conditions of employment because of the individual's race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap.

### **COMMENT**

[1] This provision is modeled after the D.C. Human Rights Act, D.C. Code § 2-1402.11 (2001), though in some respects is more limited in scope. There are also provisions of federal law that contain certain prohibitions on discrimination in employment. The Rule is not intended to create ethical obligations that exceed those imposed on a lawyer by applicable law.

[2] The investigation and adjudication of discrimination claims may involve particular expertise of the kind found within the D.C. Office of Human Rights and the federal Equal Employment Opportunity Commission. Such experience may involve, among other things, methods of analysis of statistical data regarding discrimination claims. These agencies also have, in appropriate circumstances, the power to award remedies to the victims of discrimination, such as reinstatement or back pay, which extend beyond the remedies that are available through the disciplinary process. Remedies available through the disciplinary process include such sanctions as disbarment, suspension, censure, and admonition, but do not extend to monetary awards or other remedies that could alter the employment status to take into account the impact of prior acts of discrimination.

[3] If proceedings are pending before other organizations, such as the D.C. Office of Human Rights or the Equal Employment Opportunity Commission, the processing of complaints by Bar Counsel may be deferred or abated where there is substantial similarity between the complaint filed with Bar Counsel and material allegations involved in such other proceedings. *See* §19(d) of Rule XI of the Rules Governing the District of Columbia Bar.