

**REPORT OF THE SELECT COMMITTEE
APPOINTED BY THE COURT OF APPEALS OF
MARYLAND TO STUDY THE ETHICS 2000
AMENDMENTS TO THE ABA MODEL RULES OF
PROFESSIONAL CONDUCT**

December 16, 2003

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REPORT OF THE SELECT COMMITTEE APPOINTED BY THE COURT OF APPEALS OF MARYLAND TO STUDY THE ETHICS 2000 AMENDMENTS TO THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

I. Introduction

A. Background

In 1997, the American Bar Association convened “The Commission on Evaluation of the Rules of Professional Conduct,” better known as the “Ethics 2000 Commission.” This Commission issued recommendations, which were then debated and adopted in various forms by the ABA House of Delegates. In April 2002, the Maryland Court of Appeals appointed a Committee to examine the Ethics 2000 changes to the ABA Model Rules and recommend which changes, if any, would be appropriate for the Maryland Rules of Professional Conduct. This Report contains this Committee’s proposed changes.

B. The Committee’s Procedure

The Committee undertook an exhaustive examination of the Maryland Rules of Professional Conduct and the ABA Model Rules of Professional Conduct. After reaching consensus on changes the Committee believed were warranted, the Committee solicited public comment by sending its proposals to interested bar associations and posting its proposal on the Maryland Judiciary’s website. The Committee received a substantial number of comments. The Committee carefully reviewed these comments, and, in some cases, modified its proposal in light of them.

In most instances, the Committee chose either to retain existing Maryland language or to incorporate language from the Model Rules. Sometimes a proposed Rule contains both language from the ABA Model Rules while retaining some existing Maryland language. In addition, given that this review necessitated a wholesale examination of all the relevant rules and their associated comments, we have on rare occasions proposed changes different from ABA or existing Maryland language. A handful of these changes are based upon language not ultimately adopted by the ABA House of Delegates but that, in the judgment of the Committee, sets forth language appropriate for this State. On even more rare occasions, the Committee drafted its own language when existing language did not appear adequate.

The preparation of this proposal has been an exercise in building consensus within the Committee. Not all Committee members agree with all proposed changes. All members, however, believe that the proposal on balance achieves greater clarity and more

effective guidelines designed to promote conduct that will benefit both the legal profession and the public it serves. Individual Committee members have had the option to submit a separate report that reflects their views on individual points of this proposal, although the absence of such a report should not imply unanimity on the part of the Committee for any particular change.

C. The Format of this Report

This Report is in six sections. After this Introduction, the next section contains a “clean” or unmarked version of the Committee’s Proposed Maryland Rules of Professional Conduct. The third section contains a Concurring Minority Report regarding Rule 8.4(e). The fourth section contains the Committee’s Recommendations for Further Study. The fifth section contains a “redlined” version of the Committee’s Recommended Maryland Rules of Professional Conduct showing changes from existing Maryland language. The final section contains public comments and Committee responses to them.

As an aid to the Court, the Committee has included a “Model Rules Comparison” after the text and Comment for each proposed Rule. This “Model Rules Comparison” summarizes the origins of the language of the proposed Rule. Depending on the Court’s ultimate decisions as to which changes, if any, it chooses to adopt, it may wish to include this “Model Rules Comparison” as a permanent feature of the Maryland Rules of Professional Conduct.

II. RECOMMENDED MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT WITH MODEL RULES COMPARISON

PREAMBLE: A LAWYER'S RESPONSIBILITIES

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

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

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

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

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

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate

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

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

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

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

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

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain

the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

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

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

SCOPE

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

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

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

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

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

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

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

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

[22] In May 1997, the Maryland State Bar Association's Board of Governors approved an aspirational Code of Civility for all lawyers and judges in Maryland. All Maryland lawyers and judges should honor and voluntarily adhere to the standards set forth in this Code. Civility is a cornerstone of the legal profession. The principles in the Code of Civility are not intended to replace, but supplement all existing codes, rules and statutes concerning lawyers' and judges' professional conduct. The Code of Civility is reprinted as an Appendix to these Rules.

Model Rules Comparison.-With the exception of wording changes to Comment [20] and the substantial retention of Comment [22] from pre-existing language, the Scope and Preamble are substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct.

Rule 1.0. Terminology.

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

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

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

(d) "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, government or other organization.

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

(f) "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.

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

(h) "Law firm." See Rule 1.0(d).

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

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

(k) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(l) "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.

(m) “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.

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

(o) “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.

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

COMMENT

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

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

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be

uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

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

[5] *Fraud.*-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.

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

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client’s or

other person's silence. Consent may be inferred, however, from the conduct of the client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (p) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.5(c) and 1.8(a). For a definition of "signed," see paragraph (p).

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

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

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

Model Rules Comparison.-Rule 1.0 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct except for the retention of the definition of "consult" and "consultation," the addition of a cross-reference to "law firm," and the appropriate redesignation of subsections.

CLIENT-LAWYER RELATIONSHIP.

Rule 1.1. Competence.

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

COMMENT

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

[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.

[5] *Thoroughness and Preparation* – Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more

extensive treatment than matters of lesser complexity. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

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

Model Rules Comparison.-Rule 1.0 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct.

Rule 1.2. Scope of Representation and Allocation of Authority between Client and Lawyer.

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

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

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

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

COMMENT

[1] *Scope of Representation* – 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 those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing

and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

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

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

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

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

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

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

[9] *Criminal, Fraudulent and Prohibited Transactions* – Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about

the actual consequences that appear likely to result from a client's conduct. 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. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rules 1.6, 4.1.

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

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

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(4).

Model Rules Comparison.-Rule 1.2 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct except for wording changes in Rule 1.2(a) and the retention of existing Maryland language in Comment [1].

Rule 1.3. Diligence.

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

COMMENT

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

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

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

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

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. C.f. Md. Rule 16-777 (providing for appointment of a conservator to inventory the files of an attorney who is deceased or has abandoned the practice of law, and to take other appropriate action to protect the attorney's clients in the absence of a plan to protect clients' interests).

Model Rules Comparison.-Rule 1.3 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct except for Comment [5], which incorporates Maryland law.

Rule 1.4. Communication.

(a) A lawyer shall:

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

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

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

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

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

COMMENT

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

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

[3] Under Rule 1.2(a), a lawyer is required, when appropriate, to consult with the client about the means to be used to accomplish the client's objectives. In some situations – depending on both the importance of the action under consideration and the feasibility of consulting with the client – this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(2) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(3) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

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

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

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

Model Rules Comparison.-Rule 1.4 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct except for the deletion of Model Rule 1.4(a)(2) and the redesignation of subsections as appropriate, and wording changes to Comment [3].

Rule 1.5. Fees.

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

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

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

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

(4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent.

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

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

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

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or custody of a child or upon the amount of alimony or support or property settlement, or upon the amount of an award pursuant to Sections 8-201 through 213 of Md. Code Ann., Fam. Law; or

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

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

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

(2) the client agrees to the joint representation and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

COMMENT

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

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

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may

impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law may also apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

[4] *Terms of Payment* – A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.15(c); Comment [3] to Rule 1.15; Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

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

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

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

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

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

Cross references. — See Post v. Bregman, 349 Md. 142 (1998) and Son v. Margolius, 349 Md. 441 (1998).

Model Rules Comparison.—Rule 1.5 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct except that it retains existing Maryland language in Rule 1.5(d)(1) and adds wording changes to Rule 1.5(e)(2) and Comment [7].

Rule 1.6. Confidentiality of Information.

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

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

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

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

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

(4) to secure legal advice about the lawyer's compliance with these Rules, a court order or other law;

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

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

COMMENT

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

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(f) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with

the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

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

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

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

[6] *Disclosure Adverse to Client* – Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b), however, permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate

protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[7] Paragraph (b) permits, but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules regardless of whether the disclosure is permitted by Rule 1.6. See Rules 1.2(d), 3.3(a)(4), 4.1(b), 8.1 and 8.3. A lawyer representing an organization may in some circumstances be permitted to disclose information regardless of whether the disclosure is permitted by Rule 1.6(b). See Rule 1.13(c).

[8] Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably believed necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease, and the lawyer reasonably believes disclosure is necessary to eliminate the threat or reduce the number of victims.

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

[10] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of a client's criminal or fraudulent act in furtherance of which the lawyer's services were used until after the act has occurred. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain

losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

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

[12] *Withdrawal* – If the lawyer knows that the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16 (a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6 or in other Rules.

[13] If the lawyer knows that despite the withdrawal the client is continuing in conduct that is criminal or fraudulent, and is making use of the fact that the lawyer was involved in the matter, the lawyer may have to take positive steps to avoid being held to have assisted the conduct. See Rules 1.2(d) and 4.1(b). In other situations not involving such assistance, the lawyer has discretion to make disclosure of otherwise confidential information only in accordance with Rules 1.6 and 1.13(c). Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

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

[15] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[16] *Disclosures Otherwise Required or Authorized* – As noted in Comment 7, Rules 3.3(b) and 4.1(b) require disclosure in some circumstances regardless of whether the disclosure is permitted by Rule 1.6. Circumstances may be such that disclosure is required under other Rules, for example, Rule 1.2(d), in order to avoid assisting a client to perpetrate a crime or fraud.

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

[18] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

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

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

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

Model Rules Comparison.-Rule 1.6 retains elements of existing Md. Rule 1.6 language, incorporates some changes from the Ethics 2000 Amendments to the ABA Model Rules, and incorporates further revisions.

Rule 1.7. Conflict of Interest: General Rule.

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

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

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

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

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

(2) the representation is not prohibited by law;

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

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

COMMENT

[1] *General Principles.*- Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(f) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which

event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

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

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

[6] *Identifying Conflicts of Interest: Directly Adverse.*- Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

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

[8] *Identifying Conflicts of Interest: Material Limitation.* – Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

[9] *Lawyer's Responsibilities to Former Clients and Other Third Persons.* – In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

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

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may

not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A sexual relationship with a client, whether or not in violation of criminal law, will create an impermissible conflict between the interests of the client and those of the lawyer if (1) the representation of the client would be materially limited by the sexual relationship and (2) it is unreasonable for the lawyer to believe the lawyer can provide competent and diligent representation. Under those circumstances, informed consent by the client is ineffective. See also Rule 8.4.

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

[14] *Prohibited Representations.* – Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

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

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

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

[18] *Informed Consent.* – Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(f) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

[20] *Consent Confirmed in Writing.* – Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(p) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

[21] *Revoking Consent.* – A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any

time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

[22] *Consent to Future Conflict.* – Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

[23] *Conflicts in Litigation.* – Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of

the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

[26] *Nonlitigation Conflicts.* – Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

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

the clients may prefer that the lawyer act for all of them.

[29] *Special Considerations in Common Representation.* – In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

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

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater

responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

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

[34] *Organizational Clients.* – A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

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

Model Rules Comparison.-Rule 1.7 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct except for omitting the word “concurrent” in Rule 1.7(a) and (b) and Comment [1], and retaining most of existing Maryland language in Comment [12].

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules.

(a) A lawyer shall not enter into a business transaction with a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

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

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

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

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

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

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional

judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client or confirmed on the record before a tribunal. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

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

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

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

(2) subject to Rule 1.5, contract with a client for a reasonable contingent fee in a civil case.

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

COMMENT

[1] *Business Transactions Between Client and Lawyer.* – 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. Paragraph (a) also

applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable. For restrictions regarding lawyers engaged in the sale of goods or services related to the practice of law, see Rule 5.7.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(f) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

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

[5] *Use of Information Related to Representation.* – Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third

person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

[6] *Gifts to Lawyers.* – A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

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

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

[9] *Literary Rights.* – An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

[10] *Financial Assistance.* – Lawyers may not subsidize lawsuits or

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

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

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

[13] *Aggregate Settlements.* – Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will

receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(f) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

[14] *Limiting Liability and Settling Malpractice Claims.* – Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

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

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

the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

[17] *Imputation of Prohibitions.* – Under paragraph (i), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client.

Model Rules Comparison.-Rule 1.8 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, except for wording changes to Rule 1.8(a), (g), (i)(2) and Comments [1] and [17], and the omission of Model Rule 1.8(j) with appropriate redesignation of subsections.

Rule 1.9. Duties to Former Clients.

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

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

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

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

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

COMMENT

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

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that

transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded for that reason alone from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

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

[4] *Lawyers Moving Between Firms.* – When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their

careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof ordinarily rests upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

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

Model Rules Comparison.-Rule 1.9 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct except for wording changes to Comments [2] and [6].

Rule 1.10. Imputation of Conflicts of Interest: 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 the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) 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 represented by the formerly associated lawyer and 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 Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which the newly associated lawyer is disqualified under Rule 1.9 unless the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

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

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

COMMENT

[1] *Definition of "firm."* – A “firm” is defined in Rule 1.0(d). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4]. A lawyer is deemed associated with a firm if held out to be a partner, principal, associate, of counsel, or similar designation. A lawyer ordinarily is not deemed associated with a firm if the lawyer no longer practices law and is held out as retired or emeritus. A lawyer employed for short periods as a contract attorney ordinarily is deemed associated with the firm only regarding matters to which the lawyer gives substantive attention.

[2] *Principles of Imputed Disqualification* . – 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 Rules 1.9(b), 1.10(b) and 1.10(c).

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

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(m) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, 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. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Where the conditions of paragraph (c) are met, imputation is removed, and consent to the new representation is not required. Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.

[7] Requirements for screening procedures are stated in Rule 1.0(m). Paragraph (c) 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.

[8] Rule 1.10(d) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule

1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(f).

[9] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[10] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (j) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

Model Rules Comparison.-Rule 1.10 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct except for changes to Comment [1] and to provide for screening in Rule 1.10(c) and Comments [6] and [7], with the appropriate redesignation of paragraphs. These screening provisions, along with Rule 1.0(m) and Comments [8]-[10] under Rule 1.0 are substantially the same as current Maryland Rule 1.10(b) (adopted January 1, 2000) with additional guidance on how to make screening effective.

Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees.

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

(1) is subject to Rule 1.9(c); and

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

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

(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 appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

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

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

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

consent, confirmed in writing; or

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

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

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

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

COMMENT

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

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

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

the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

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

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [8].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(m) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] 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.

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

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

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

Model Rules Comparison.-Rule 1.11 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct.

Rule 1.12. Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral.

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

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

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

COMMENT

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11.

[2] The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. See Md. Code of Conduct for Judicial Appointees, Md. Rule 16-814.

[3] Like former judges, lawyers who have served as arbitrators, mediators or other

third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(f) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[4] 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.

[5] Requirements for screening procedures are stated in Rule 1.0(m). 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.

[6] 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.

Model Rules Comparison.-Apart from redesignating the paragraphs of the Comments to this Rule, Rule 1.12 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct.

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 to the organization, or a violation of law that 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) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is reasonably certain to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by Rule 1.6 only if the lawyer reasonably believes that:

(1) the highest authority in the organization has acted to further the personal or financial interests of members of the authority which are in conflict with the interests of the organization; and

(2) revealing the information is necessary in the best interest of the organization.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) 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

[1] *The Entity as the Client* - An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.

[2] Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties created by this Rule 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.

[3] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, for example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews 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.

[4] 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. However, different considerations arise when the lawyer knows that the organization is likely to be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[5] 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] If a lawyer can take remedial action without a disclosure of information that

might adversely affect the organization, the lawyer as a matter of professional discretion may take such action as the lawyer reasonably believes to be in the best interest of the organization. For example, a lawyer for a close corporation may find it reasonably necessary to disclose misconduct by the Board to the shareholders. However, taking such action could entail disclosure of information relating to the representation with consequent risk of injury to the client; when such is the case, the organization is threatened by alternative injuries; the injury that may result from the governing Board's action or refusal to act, and the injury that may result if the lawyer's remedial efforts entail disclosure of confidential information. The lawyer may pursue remedial efforts even at the risk of disclosure in the circumstances stated in paragraphs (c)(1) and (c)(2).

[7] *Relation to Other Rules* – The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1)-(6). Under Paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation as it is under Rules 1.6(b)(2) and 1.6(b)(3), but it is required that the matter be related to the lawyer's representation of the organization. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose information otherwise protected by Rule 1.6(a). In such circumstances, Rule 1.2(d) may also be applicable.

[8] *Government Agency* — The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

[9] *Clarifying the Lawyer's Role.* - 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.

[11] *Dual Representation* – Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

[12] *Derivative Actions* - 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 who may represent the directors and the organization.

Model Rules Comparison.-Rule 1.13 retains elements of existing Md Rule 1.13, incorporates further revisions, and incorporates language in Rule 1.13(d) and Comments [5] and [8] from the Ethics 2000 Amendments to the ABA Model Rules.

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 normal 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 guardian ad litem, conservator, or guardian.

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

COMMENT

[1] The normal 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, to an increasing extent the law recognizes intermediate degrees of competence. Indeed, 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, 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. In addition, 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. Consideration of and, when appropriate, deference to these opinions are especially important in cases involving children in Child In Need of Assistance (CINA) and related Termination of Parental Rights (TPR) and adoption proceedings. With respect to these categories of cases, the Maryland Foster Care Court Improvement Project has prepared Guidelines of Advocacy for Attorneys Representing Children in CINA and Related TPR and Adoption Proceedings. The Guidelines are included in an appendix to the Maryland Rules.

[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 legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

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

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

[5] *Taking Protective Action.*- 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 normal 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, delaying action if feasible to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking 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 and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[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 and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that 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, appointment of a legal representative may be

more expensive 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 be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

[8] *Disclosure of the Client's Condition..*- 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 legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

[9] *Emergency Legal Assistance.*- 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.

Model Rules Comparison.- Rule 1.14 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, with the exception of retaining elements of existing Md. language in Comment [1] and further revising Comments [5] and [10].

Rule 1.15. Safekeeping Property.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained pursuant to Title 16, Chapter 600 of the Maryland Rules. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and of other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for the purpose.

(c) Unless the client gives informed consent, confirmed in writing, to a different arrangement, a lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) 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.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order.

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

service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Paragraph (c) 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. Unless the client gives informed consent, confirmed in writing, 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).

[4] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit 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 must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[5] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[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 only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

Model Rules Comparison.- Rule 1.15 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, with the exception of changes to Rule 1.15(c), the addition of Comment [3], and the omission of ABA Comment [6].

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:

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

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

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

(4) the client insists upon action or inaction that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

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

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or

expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

COMMENT

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

[2] *Mandatory Withdrawal* – 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. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligation to both clients and the court under Rules 1.6 and 3.3.

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

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

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

[7] *Optional Withdrawal* – A lawyer may withdraw from representation in some

circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer 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. The lawyer may also withdraw where the client insists on taking action or inaction that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[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 fees or court costs or an agreement limiting the objectives of the representation.

[9] *Assisting the Client Upon Withdrawal* – 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 law, subject to the limitations in paragraph (d) of this Rule. See Rule 1.15.

Model Rules Comparison.- Rule 1.16 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct with the exception of the addition of “or inaction” to Rule 1.16(b)(4) and Comment [7], and the addition of “subject to the limitations in paragraph (d) of this Rule” to Comment [9].

Rule 1.17. Sale of Law Practice.

(a) Subject to paragraph (b), a law practice, including goodwill, may be sold if the following conditions are satisfied:

(1) Except in the case of death, disability, or appointment of the seller to judicial office, the entire practice that is the subject of the sale has been in existence at least five years prior to the date of sale;

(2) The practice is sold as an entirety to another lawyer or law firm; and

(3) Written notice has been mailed to the last known address of the seller's current clients regarding:

(A) the proposed sale;

(B) the terms of any proposed change in the fee arrangement;

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

(D) the fact that the client's consent to the new representation will be presumed if the client does not take any action or does not otherwise object within sixty (60) days of mailing of the notice.

(b) If a notice required by subparagraph (a)(3) is returned and the client cannot be located, the representation of that client may be transferred to the purchaser only by an order of a court of competent jurisdiction authorizing the transfer. 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.

COMMENT

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice and another lawyer or firm takes 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

[2] *Termination of Practice by the Seller.* — The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the purchaser. The fact that a number of the seller's clients decide not to be represented by the purchaser but take their matters elsewhere does not therefore result in a violation. The purchase agreement for the sale of a law practice may allow for restrictions on the scope and time of the seller's reentry into practice.

[3] *Single Purchaser.* — The Rule requires a single purchaser. The prohibition against piecemeal sale of a practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchaser is required to undertake all client matters in the practice, subject to client consent. If, however, the purchaser is unable to undertake all client matters because of a conflict of interest in a specific matter respecting which the purchaser is not permitted by Rule 1.7 or another rule to represent the client, the requirement that there be a single purchaser is nevertheless satisfied.

[4] *Client Confidences, Consent and Notice.* — 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 Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers 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 can be disclosed by the seller to the purchaser, written notice of the contemplated sale must be mailed to the client. The notice must include the identity of the purchaser and any proposed change in the terms of future representation, and must tell the client that the decision to consent or make other arrangements must be made within 60 days. If nothing is heard from the client within that time, consent to the new representation is presumed.

[5] 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 new representation or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in *camera*.

[6] All the 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. Additionally, the transfer of the practice does not operate to change the attorney-client privilege.

[7] *Other Applicable Ethical Standards.* — Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to the involvement of 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 which can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(f)

for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[8] If approval of the substitution of the purchasing attorney for the selling attorney is required by the rules of any tribunal in which a matter is pending, that approval must be obtained before the matter can be included in the sale (see Rule 1.16).

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

[10] Admission to or retirement from 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.

[11] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice. This Rule does not prohibit an attorney from selling his or her interest in a law practice.

Committee note. – The sale of a practice does not mean that the appearance of a lawyer who is in a case will be stricken.

Model Rules Comparison. - This Rule substantially retains Maryland language as it existed prior to the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct except for incorporating ABA changes to Comments [2] and [3].

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 Rule 1.9 would permit with respect to information of a former client.

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

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

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. 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. For example, 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 lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

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

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

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if, under paragraph (d), all disqualified lawyers are timely screened. See Rule 1.0(m) (requirements for screening procedures). Paragraph (d) 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.

[8] 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.

Model Rules Comparison.- This Rule, newly added to the Model Rules by the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, is substantially similar to the ABA Rule, with the exception of omitting portions of ABA Model Rule 1.18(d) and Comment [7], and omitting ABA Comment [8] with appropriate redesignation of the Comment paragraph thereafter.

COUNSELOR.

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

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

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's 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.

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

client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be 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.

Model Rules Comparison.- Rule 2.1 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct.

Rule 2.2. [DELETED]

Model Rules Comparison.- This Rule has been deleted in conformity with the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct.

Rule 2.3. Evaluation for Use by Third Parties.

(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

[1] *Definition.* – 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.

[3] *Duties Owed to Third Person and Client.* – 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 in 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.

[4] *Access to and Disclosure of Information.* – 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 which 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.

[5] *Obtaining Client's Informed Consent.* – 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(f).

[6] *Financial Auditors' Requests for Information.* – 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.

Model Rules Comparison.- Rule 2.3 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct.

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 decisionmaker 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 apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. See Md. Rules 17-101-17-109. Lawyer-neutrals may also be subject to various codes of ethics, such as the Maryland Standards of Conduct for Mediators, Arbitrators and Other ADR Practitioners adopted by the Maryland Court of Appeals or the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information may 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 proceeding, 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(o)), 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.

Model Rules Comparison.- This Rule, newly added to the Model Rules by the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, is substantially similar to the ABA Rule, with the exception of changing “will” to “may” in the fifth sentence of Comment [3].

ADVOCATE.

Rule 3.1. Meritorious Claims and Contentions.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes, for example, a good faith argument for an extension, modification or reversal of existing law. A lawyer may nevertheless so defend the proceeding as to require that every element of the moving party's case be established.

COMMENT

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of 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. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim that otherwise would be prohibited by this Rule.

Model Rules Comparison.- This Rule substantially retains Maryland language as it existed prior to the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct except for: 1) adding "for example" to the text of the Rule; and 2) incorporating ABA changes to Comments [2] and [3].

Rule 3.2. Expediting Litigation.

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

COMMENT

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Model Rules Comparison.- Rule 3.3 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct.

Rule 3.3. Candor Toward the Tribunal.

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

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

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) Notwithstanding paragraphs (a) through (d), a lawyer for an accused in a criminal case need not disclose that the accused intends to testify falsely or has testified falsely if the lawyer reasonably believes that the disclosure would jeopardize any constitutional right of the accused.

COMMENT

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(o) for the definition of “tribunal.” It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(4) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an

advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

[3] *Representations by a Lawyer.* – An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

[4] *Misleading Legal Argument.* – 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 paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

[5] *False Evidence.* – 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.

[6] 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. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

[7] Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary

system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

[8] *Perjury by a Criminal Defendant.* – Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. 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.

[9] The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

[10] Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

[11] The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

[12] *Remedial Measures.* – If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done--making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the

court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

[13] *Constitutional Requirements.* – The general rule--that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client--applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. Paragraph (e) is intended to protect from discipline the lawyer who does not make disclosures mandated by paragraphs (a) through (d) only when the lawyer acts in the "reasonable belief" that disclosure would jeopardize a constitutional right of the client. For a definition of "reasonable belief," see Rule 1.0(k).

[14] *Duration of Obligation.* – A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. After that point, however, the lawyer may be permitted to take certain actions pursuant to Rule 1.6(b)(3).

[15] *Refusing to Offer Proof Believed to Be False.* – Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. 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. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

[16] *Ex Parte Proceedings.* – Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Model Rules Comparison.-Rule 3.3 has been rewritten to retain elements of existing Maryland language and to incorporate some changes from the Ethics 2000 Amendments to the ABA Model Rules.

Rule 3.4. Fairness to Opposing Party and Counsel.

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(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 effort 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; or

(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.

COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled 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. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose

commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses, including lost earnings, or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] 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.

Model Rules Comparison.- Rule 3.4 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct except that “including lost earnings” has been added to Comment [3] and the last two sentences of Comment [2] have been deleted.

Rule 3.5. Impartiality and Decorum of the Tribunal.

(a) A lawyer shall not:

(1) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;

(2) before the trial of a case with which the lawyer is connected, communicate outside the course of official proceedings with anyone known to the lawyer to be on the list from which the jurors will be selected for the trial of the case;

(3) during the trial of a case with which the lawyer is connected, communicate outside the course of official proceedings with any member of the jury;

(4) during the trial of a case with which the lawyer is not connected, communicate outside the course of official proceedings with any member of the jury about the case;

(5) after discharge of a jury from further consideration of a case with which the lawyer is connected, ask questions of or make comments to a member of that jury that are calculated to harass or embarrass the juror or to influence the juror's actions in future jury service;

(6) conduct a vexatious or harassing investigation of any juror or prospective juror;

(7) communicate ex parte about an adversary proceeding with the judge or other official before whom the proceeding is pending, except as permitted by law;

(8) discuss with a judge potential employment of the judge if the lawyer or a firm with which the lawyer is associated has a matter that is pending before the judge; or

(9) engage in conduct intended to disrupt a tribunal.

(b) A lawyer who has knowledge of any violation of section (a) of this Rule, any improper conduct by a juror or prospective juror, or any improper conduct by another towards a juror or prospective juror, shall report it promptly to the court or other appropriate authority.

COMMENT

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in Rules 16-813, the Maryland 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] 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.

[3] With regard to the prohibition in subsection (a)(2) of this Rule against communications with anyone on "the list from which the jurors will be selected," see Md. Rules 2-512(c) and 4-312(c).

Maryland Ethics 2002 Committee Note.-The language reproduced above incorporates changes recommended by the Rules Committee. These changes, however, have not been formally adopted by the Court of Appeals.

Rule 3.6. Trial Publicity.

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

COMMENT

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession,

admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(e) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Model Rules Comparison.- Rule 3.6 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct.

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 unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

COMMENT

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

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

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the

lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

[6] *Conflict of Interest.* – In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(f) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

Model Rules Comparison.- Rule 3.7 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct.

Rule 3.8. Special Responsibilities of a Prosecutor.

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent an employee or other person under the control of the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

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. See also Rule 3.3(d), governing *ex parte* proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] Paragraph (c) does not apply to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[5] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (e) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (e) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

Model Rules Comparison.-Rule 3.8 has been rewritten to retain elements of existing Maryland language and to incorporate some changes from the Ethics 2000 Amendments to the ABA Model Rules. ABA Model Rule 3.8(e) has not been adopted.

Rule 3.9. Advocate in Nonadjudicative Proceedings.

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

COMMENT

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers engage in activities that are comparable to those of an advocate appearing before a tribunal. For example, 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] Given these policies, this Rule requires that a lawyer who appears before legislative bodies or administrative agencies in such nonadjudicative proceedings must adhere to Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5. Lawyers appearing under these circumstances must also adhere to all other applicable Rules, including Rules 4.1 through 4.4.

[3] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers.

[4] Not all appearances before a legislative body or administrative agency are nonadjudicative within the meaning of this Rule. This Rule only applies when a lawyer represents a client in connection with an official or formal hearing or meeting to which the lawyer or the lawyer's client is presenting evidence or argument. Thus, this Rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

[5] When a lawyer appears before a legislative body or administrative agency acting in an adjudicative capacity, the legislative body or administrative agency is considered a "Tribunal" for purposes of these Rules, and all Rules relating to representation by a lawyer before a Tribunal apply. See Rule 1.0(o) for the definition of "Tribunal."

Model Rules Comparison.-Rule 3.9 has been rewritten to retain elements of existing Maryland language, to incorporate some changes from the Ethics 2000 Amendments to the ABA Model Rules, and to incorporate further revisions.

**TRANSACTIONS WITH PERSONS
OTHER THAN CLIENTS.**

Rule 4.1. Truthfulness in Statements to Others.

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

- (1) make a false statement of material fact or law to a third person; or
- (2) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

COMMENT

[1] *Misrepresentation.* – 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.

[2] *Statements of Fact.* – This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, 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 or tortious misrepresentation.

[3] *Fraud by Client.* – Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (a)(2) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Sometimes a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. It also 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, however, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the

client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, even though the disclosure otherwise would be prohibited by Rule 1.6.

[4] *Disclosure.* – As noted in the comment to Rule 1.6, the duty imposed by Rule 4.1 may require a lawyer to disclose information that otherwise is confidential and to correct or withdraw a statement. However, the constitutional rights of defendants in criminal cases may limit the extent to which counsel for a defendant may correct a misrepresentation that is based on information provided by the client. See comment to Rule 3.3.

Model Rules Comparison.-Rule 4.1 has been rewritten to retain elements of existing Maryland language, to incorporate some changes from the Ethics 2000 Amendments to the ABA Model Rules, and to incorporate further revisions.

Rule 4.2. Communication with Person Represented by Counsel.

(a) Except as provided in paragraph (c), in representing a client, a lawyer shall not communicate about the subject of the representation with a person who the lawyer knows is represented in the matter by another lawyer unless the lawyer has the consent of the other lawyer or is authorized by law or court order to do so.

(b) If the person represented by another lawyer is an organization, the prohibition extends to each of the organization's (1) current officers, directors, and managing agents and (2) current agents or employees who supervise, direct, or regularly communicate with the organization's lawyers concerning the matter or whose acts or omissions in the matter may bind the organization for civil or criminal liability. The lawyer may not communicate with a current agent or employee of the organization unless the lawyer first has made inquiry to ensure that the agent or employee is not an individual with whom communication is prohibited by this paragraph and has disclosed to the individual the lawyer's identity and the fact that the lawyer represents a client who has an interest adverse to the organization.

(c) A lawyer may communicate with a government official about matters that are the subject of the representation if the government official has the authority to redress the grievances of the lawyer's client and the lawyer first makes the disclosures specified in paragraph (b).

Committee note. — The use of the word “person” for “party” in paragraph (a) is not intended to enlarge or restrict the extent of permissible law enforcement activities of government lawyers under applicable judicial precedent.

COMMENT

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the lawyer-client relationship, and the uncounseled disclosure of information relating to the representation.

[2] This Rule does not prohibit communication with a person, or an employee or agent of the person, 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 nonlawyer 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 or legal authorization for communicating with a represented person is permitted to do so.

[3] Communications authorized by law include communications in the course of investigative activities of lawyers representing governmental entities, directly or through investigative agents, before the commencement of criminal or civil enforcement

proceedings if there is applicable judicial precedent holding either that the activity is permissible or that the Rule does not apply to the activity. The term "civil enforcement proceedings" includes administrative enforcement proceedings. Except to the extent applicable judicial precedent holds otherwise, a government lawyer who communicates with a represented criminal defendant must comply with this Rule.

[4] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order in exceptional circumstances. For example, when a represented criminal defendant expresses a desire to speak to the prosecutor without the knowledge of the defendant's lawyer, the prosecutor may seek a court order appointing substitute counsel to represent the defendant with respect to the communication.

[5] This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by counsel concerning the matter to which the communication relates. The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[6] If an agent or employee of a represented person that is an organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4 (f). In communicating with a current agent or employee of an organization, a lawyer must not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of the organization. Regarding communications with former employees, see Rule 4.4(b).

[7] The prohibition on communications with a represented person applies only if the lawyer has actual knowledge that the person in fact is represented in the matter to be discussed. Actual knowledge may be inferred from the circumstances. The lawyer cannot evade the requirement of obtaining the consent of counsel by ignoring the obvious.

[8] Rule 4.3 applies to a communication by a lawyer with a person not known to be represented by counsel.

[9] Paragraph (c) recognizes that special considerations come into play when a lawyer is seeking to redress grievances involving the government. Subject to certain conditions, it permits communications with those in government having the authority to redress the grievances (but not with any other government personnel) without the prior consent of the lawyer representing the government in the matter. Paragraph (c) does not, however, permit a lawyer to bypass counsel representing the government on every issue that may arise in the course of disputes with the government. Rather, the paragraph provides lawyers with 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 does not provide direct access on routine disputes, such as ordinary discovery disputes or extensions of time.

Model Rules Comparison.- This Rule substantially retains Maryland language as it existed prior to the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct except for dividing Rule 4.2(b) into Rule 4.2(b) and (c) with no change in wording.

Rule 4.3. Dealing with Unrepresented Person.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

COMMENT

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] A lawyer should not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client. This distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the lawyer should not give any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has 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.

Model Rules Comparison.-Rule 4.3 has been rewritten to retain elements of existing Maryland language, to incorporate some changes from the Ethics 2000 Amendments to the ABA Model Rules, and to incorporate further revisions.

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 use methods of obtaining evidence that the lawyer knows violate the legal rights of such a person.

(b) In communicating with third persons, a lawyer representing a client in a matter shall not seek information relating to the matter that the lawyer knows or reasonably should know is protected from disclosure by statute or by an established evidentiary privilege, unless the protection has been waived. The lawyer who receives information that is protected from disclosure shall (1) terminate the communication immediately and (2) give notice of the disclosure to any tribunal in which the matter is pending and to the person entitled to enforce the protection against disclosure.

Committee note: If the person entitled to enforce the protection against disclosure is represented by counsel, the notice required by this Rule shall be given to the person's counsel. See Md. Rule 1-331 and Maryland Rule of Professional Conduct 4.2.

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.

[2] Third persons may possess information that is confidential to another person under an evidentiary privilege or under a law providing specific confidentiality protection, such as trademark, copyright, or patent law. For example, present or former organizational employees or agents may have information that is protected as a privileged attorney-client communication or as work product. A lawyer may not knowingly seek to obtain confidential information from a person who has no authority to waive the privilege. Regarding current employees of a represented organization, see also Rule 4.2.

Model Rules Comparison.- This Rule substantially retains Maryland language as amended November 1, 2001 and does not adopt Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct.

LAW FIRMS AND ASSOCIATIONS

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, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

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

COMMENT

[1] Paragraphs (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(d). 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 a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[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) can depend on the firm's structure and the nature of its practice. In a small

firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent 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 negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] 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.

[7] 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.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

Model Rules Comparison.- Rule 5.1 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct.

Rule 5.2. Responsibilities of a Subordinate Lawyer.

(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.

Model Rules Comparison.- Given that the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct made no changes to this Rule, Rule 5.2 has not been amended and remains substantially similar to Model Rule 5.2.

Rule 5.3. Responsibilities regarding Nonlawyer Assistants.

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

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

(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 orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

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

COMMENT

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision 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 nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Model Rules Comparison.- Rule 5.3 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct.

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 purchases the practice of a lawyer who is deceased or disabled or who has disappeared may, pursuant to the provisions of Rule 1.17, pay the purchase price to the estate or representative of the lawyer.

(3) a lawyer who undertakes to complete unfinished legal business of a deceased, retired, disabled, or suspended lawyer may pay to that lawyer or that lawyer's estate the proportion of the total compensation which fairly represents the services rendered by the former lawyer;

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

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) 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.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Cross references.-Maryland Rule 16-760(d)(6).

COMMENT

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

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

Model Rules Comparison.- Rule 5.4 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct with the exception of: 1) retaining existing Maryland language in Rule 5.4(a)(2); 2) retaining existing Maryland language in Rule 5.4(a)(3) with appropriate redesignation of the subparagraphs of Rule 5.4(a).

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law.

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

COMMENT

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer's assisting another person.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word “admitted” in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. A lawyer who is not admitted to practice in this jurisdiction must obtain admission *pro hac vice* before appearing before a tribunal or administrative agency, as provided by Rule 14 of the Rules Governing Admission to the Bar. See also Md. Code Bus. Occ. & Prof. § 10-215.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted *pro hac vice*. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain permission *pro hac*

vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require. See Rule 14 of the Rules Governing Admission to the Bar regarding admission to appear in arbitrations.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that non-lawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraph (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer is governed by Md. Code Bus. Occ. & Prof. § 1-206(d). In general, the employed lawyer is

subject to disciplinary proceedings under the Maryland Rules and must comply with Md. Code Bus. Occ. & Prof. § 10-215 (and Rules Governing Admission to the Bar 14) for authorization to appear before a tribunal. See also Rules Governing Admission to the Bar Rule 15 (as to legal services attorneys).

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a) and Md. Rules 16-701, 16-731.

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Rules 7.1 to 7.5 govern whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction.

Model Rules Comparison.- Rule 5.5 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct.

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 right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

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

COMMENT

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreement except for restrictions incident to provisions concerning retirement benefits for service with the firm.

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

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

Model Rules Comparison.- Rule 5.5 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct.

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 of 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] A lawyer is not required to comply with Rule 1.8(a) when referring a person to a separate law-related entity owned or controlled by the lawyer for the purpose of providing services to the person. If the lawyer also is providing legal services to the person, the lawyer must exercise independent professional judgment in making the referral. See Rule 2.1. Moreover, the lawyer must explain the matter to the person to the extent necessary for the person to make an informed decision to accept the lawyer's recommendation. See Rule 1.4(b).

[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 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(a)(2) and 1.8(b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, 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's decisional law.

[11] When the full protections of all of 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. See also Rule 8.4 (Misconduct).

[12] Regarding a lawyer's referrals of clients to non-lawyer professionals, see Rule 7.2(c) and related Comment.

Model Rules Comparison.- This Rule, newly added to the Model Rules by the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, is substantially similar to the ABA Rule, with the exception of changes to Comment [5] and the addition of Comment [12].

PUBLIC SERVICE

Rule 6.1. Pro Bono Publico Service.

(a) Professional Responsibility. A lawyer has a professional responsibility to render pro bono publico legal service.

(b) Discharge of Professional Responsibility. A lawyer in the full-time practice of law should aspire to render at least 50 hours per year of pro bono publico legal service, and a lawyer in part-time practice should aspire to render at least a pro rata number of hours.

(1) Unless a lawyer is prohibited by law from rendering the legal services described below, a substantial portion of the applicable hours should be devoted to rendering legal service, without fee or expectation of fee, or at a substantially reduced fee, to:

(A) people of limited means;

(B) charitable, religious, civic, community, governmental, or educational organizations in matters designed primarily to address the needs of people of limited means;

(C) individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties, or public rights; or

(D) charitable, religious, civic, community, governmental, or educational organizations in matters in furtherance of their organizational purposes when the payment of the standard legal fees would significantly deplete the organization's economic resources or would otherwise be inappropriate.

(2) The remainder of the applicable hours may be devoted to activities for improving the law, the legal system, or the legal profession.

(3) A lawyer also may discharge the professional responsibility set forth in this Rule by contributing financial support to organizations that provide legal services to persons of limited means.

(c) Effect of Noncompliance. This Rule is aspirational, not mandatory. Noncompliance with this Rule shall not be grounds for disciplinary action or other sanctions.

Cross references – For requirements regarding reporting pro bono legal service, see Md. Rule 16-903.

COMMENT

[1] The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation, and the administration of justice. This Rule expresses that policy but is not intended to be enforced through the disciplinary process.

[2] The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. 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.

[3] The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. 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, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession, the government, and the courts to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and more will be developed by the profession, the government, and the courts. Every lawyer should support all proper efforts to meet this need for legal services.

[4] The goal of 50 hours per year for pro bono legal service established in paragraph (b) of this Rule is aspirational; it is a goal, not a requirement. The number used is intended as an average yearly amount over the course of the lawyer's career.

[5] A lawyer in government service who is prohibited by constitutional, statutory, or regulatory restrictions from performing the pro bono legal services described in paragraph (b)(1) of the Rule may discharge the lawyer's responsibility by participating in activities described in paragraph (b)(2).

Model Rules Comparison.-This Rule substantially retains Maryland language as amended April 9, 2002 and does not adopt Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct.

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 an unreasonable financial 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 publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

[2] *Appointed Counsel.* – 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 unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

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

Model Rules Comparison.- Given that the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct made no changes to this Rule, Rule 6.2 has not been amended and remains substantially similar to Model Rule 6.2.

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.

Model Rules Comparison.- Given that the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct made no changes to this Rule, Rule 6.3 has not been amended and remains substantially similar to Model Rule 6.3.

Rule 6.4. Law Reform Activities Affecting Client Interests.

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

COMMENT

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. 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.

Model Rules Comparison.- Given that the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct made no changes to this Rule, Rule 6.2 has not been amended and remains substantially similar to Model Rule 6.2.

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(a) 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(a) 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, pro se counseling programs, or programs in which lawyers represent clients on a pro bono basis for the purposes of mediation only, 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.

[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 Rules 1.6 and 1.9(c), are applicable to the limited representation.

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

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not 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(a) and 1.10 become applicable.

Model Rules Comparison.- This Rule, newly added to the Model Rules by the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, is substantially similar to the ABA Rule, with the exception of changes to Comment [1].

INFORMATION ABOUT LEGAL SERVICES

Rule 7.1. Communications Concerning a Lawyer's Services.

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

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

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

COMMENT

[1] This Rule governs all communications about a lawyer's services, including advertising and direct personal contact with potential clients permitted by Rules 7.2 and 7.3. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

[2] A communication will be regarded as false or misleading if it (1) asserts the lawyer's record in obtaining favorable awards, verdicts, judgments, or settlements in prior cases, unless it also expressly and conspicuously states that each case is different and that the past record is no assurance that the lawyer will be successful in reaching a favorable result in any future case, or (2) contains an endorsement or testimonial as to the lawyer's legal services or abilities by a person who is not a bona fide pre-existing client of the lawyer and has not in fact benefited as such from those services or abilities.

[3] See also Rule 8.4(f) for the prohibition against stating or implying an ability to influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Model Rules Comparison.- This Rule substantially retains existing Maryland language and does not adopt Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct.

Rule 7.2. Advertising.

(a) Subject to the requirements of Rules 7.1 and 7.3(b), a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television advertising, or through communications not involving in person contact.

(b) A copy or recording of an advertisement or such other communication shall be kept for at least three years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may

(1) pay the reasonable cost of advertising or written communication permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service;

(3) pay for a law practice purchased in accordance with Rule 1.17; and

(4) refer clients to a non-lawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(d) Any communication made pursuant to this Rule shall include the name of at least one lawyer responsible for its content.

(e) An advertisement or communication indicating that no fee will be charged in the absence of a recovery shall also disclose whether the client will be liable for any expenses.

Cross references. — Maryland Rule of Professional Conduct 1.8(e).

(f) A lawyer, including a participant in an advertising group or lawyer referral service or other program involving communications concerning the lawyer's services, shall be personally responsible for compliance with the provisions of Rules 7.1, 7.2, 7.3, 7.4, and 7.5 and shall be prepared to substantiate such compliance.

COMMENT

[1] 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 moderate 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. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or over-reaching.

[2] 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.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

[5] Paragraph (a) permits communication by mail to a specific individual as well as general mailings, but does not permit contact by telephone or in person delivery of written material except through the postal service or other delivery service.

[6] *Record of advertising.* — Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

[7] *Paying others to recommend a lawyer.* — A lawyer is allowed to pay for advertising permitted by this Rule and for the purchase of a law practice in accordance with the provisions of Rule 1.17, but otherwise is not permitted to pay another person for

channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

[8] *Assignments or Referrals from a Legal Services Plan or Lawyer Referral Service.* – A lawyer who accepts assignments or referrals from a legal services plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communications must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[9] *Reciprocal Referral Agreements with Non-lawyer Professionals.* – A lawyer may agree to refer clients to a non-lawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer to provide them with legal services. Such reciprocal referral arrangements must not be exclusive or otherwise interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). The client must also be informed of the existence and nature of the referral agreement. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. Conflicts of interest created by such arrangements are governed by Rule 1.7. Referral agreements between lawyers who are not in the same firm are governed by Rule 1.5(e).

[10] *Responsibility for compliance.* — Every lawyer who participates in communications concerning the lawyer's services is responsible for assuring that the specified Rules are complied with and must be prepared to substantiate compliance with those Rules. That may require retaining records for more than the three years specified in paragraph (b) of this Rule.

Model Rules Comparison.- This Rule substantially retains Maryland language as amended November 1, 2001 and does not adopt Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, with the exception of: 1) adding in substantial part ABA Rule 7.2(c)(4) as adopted by the ABA House of Delegates on August 13, 2002; 2) adding ABA Comment [7] (Comment [8] above); 3) adding ABA Comment [8] (Comment [9] above).

Rule 7.3. Direct Contact with Prospective Clients.

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone, or real-time electronic contract even when not otherwise prohibited by paragraph (a), if:

(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the prospective client is such that the prospective client could not exercise reasonable judgment in employing a lawyer;

(2) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(3) the solicitation involves coercion, duress, or harassment.

(c) Every written, recorded, or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular in matter covered by the plan.

Cross References. – For additional restrictions and requirements for certain communications, see Md. Code Bus. Occ. & Prof. § 10-605.1, 10-605.1.

COMMENT

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the

circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(2) is

prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[7] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

Model Rules Comparison.- Rule 5.5 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, with the exception of retaining existing Maryland language in 7.3(b)(1) and accordingly redesignating the subsections of Rule 7.3(b).

Rule 7.4. Communication of Fields of Practice.

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law, subject to the requirements of Rule 7.1. A lawyer shall not hold himself or herself out publicly as a specialist.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation.

COMMENT

[1] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services; for example, in a telephone directory or other advertising. If a lawyer practices only in such fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office.

Model Rules Comparison.- This Rule substantially retains existing Maryland language and does not adopt Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, with the exception of: 1) adding ABA Rule 7.4(c) (incorporated as Rule 7.4(b) above); 2) the first sentence of ABA Comment [2] (included as Comment [2] above).

Rule 7.5. Firm Names and Letterheads.

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

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those 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 or retired 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 firm may not be designated by the names of non-lawyers. See Rule 5.4. 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. 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, or the name of a nonlawyer.

[2] A lawyer in private practice may not practice under a name which implies any connection with the government or any agency of the federal government, any state or any political subdivision, or with a public or charitable legal services organization. This is to prevent a situation where nonlawyers might conclude that they are dealing with an agency established or sanctioned by the government, or one funded by either the government or public contributions and thus charging lower fees. The use of any of the following ordinarily would violate this Rule:

1. The proper name of a government unit, whether or not identified with the type of unit. Thus, a name could be the basis of a disciplinary proceeding if it included the designation "Annapolis" or "City of Annapolis," "Baltimore," or "Baltimore County," "Maryland," or "Maryland State" (which could be a violation as a confusing although mistaken reference to the state or under the third application of this instruction below).

2. The generic name of any form of government unit found in the same area where the firm practices, e.g. national, state, county, or municipal.

3. The name of or a reference to a college, university, or other institution of higher learning, regardless of whether it has a law school, unless the provider of legal higher learning. For example, the names "Georgetown Legal Clinic (or "Law Office," etc.)" and "U.B. Legal Clinic (or "Law Office," etc.)" could both violate this Rule if used by unaffiliated organizations.

4. The words "public," "government," "civic," "legal aid," "community," "neighborhood," or other words of similar import suggesting that the legal services offered are at least in part publicly funded. Although names such as "Neighborhood Legal Clinic of John Doe" might otherwise appear unobjectionable, the terms "legal aid," "community" and "neighborhood" have become so associated with public or charitable legal services organizations as to form the basis of disciplinary proceedings.

[3] Firm names which include geographical names which are not also government units, or adjectives merely suggesting the context of the practice (e.g., "urban," "rural") ordinarily would not violate Rule 7.5. The acceptability of the use of a proper or generic name of a government unit when coupled with an adjective or further description (beyond mere reference to the provision of legal services) should be judged by the general policy underlying Rule 7.5, and any doubt regarding the misleading connotations of a name may be resolved against use of the name.

[4] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

Model Rules Comparison.- This Rule substantially retains existing Maryland language and does not adopt Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, with the exception of changes to Comment [1].

Rule 7.6.

Maryland Ethics 2000 Committee Note.- After due consideration, the Committee recommends against the adoption of ABA Rule 7.6 dealing with “pay-to-play,” the text of which is as follows:

Rule 7.6: Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

Although Model Rule 7.6 was adopted by the ABA nearly four (4) years ago, to the best of our knowledge no jurisdiction has adopted it. The application of the Rule would be very limited, and the Committee does not believe it is desirable that Maryland have such a Rule.

MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.1. Bar Admission and Disciplinary Matters.

An applicant for admission or reinstatement 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 material fact; or
- (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

COMMENT

[1] The duty imposed by this Rule extends to persons seeking admission or reinstatement to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission or for reinstatement, it may be the basis for subsequent disciplinary action if the person is admitted or reinstated, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] The Court of Appeals has considered this Rule applicable when information is sought by the Attorney Grievance Commission from any lawyer on any matter, whether or not the lawyer is personally involved. See Attorney Grievance Commission v. Oswinkle, 364 Md. 182 (2001).

[3] 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.

[4] 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.

Cross references. – Md. Rule 16-701(j) (defining “Reinstatement”).

Model Rules Comparison.- This Rule substantially retains existing Maryland language with some further revisions and does not adopt Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct.

Rule 8.2. Judicial and Legal Officials.

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) Canon 5C (4) of Rule 16-813, Maryland Code of Judicial Conduct, provides that a lawyer becomes a candidate for judicial office when the lawyer files a certificate of candidacy in accordance with Maryland election laws, but no earlier than two years prior to the general election for that office. A candidate for judicial office:

(1) shall maintain the dignity appropriate to the judicial office that the lawyer seeks and act in a manner consistent with the independence and integrity of the judiciary;

(2) shall not make a pledge or promise of conduct in office other than the faithful and impartial performance of the duties of the office;

Committee note: Rule 8.2 (b)(2) does not prohibit a candidate from making a pledge or promise respecting improvements in court administration.

(3) shall not misrepresent his or her identity or qualifications, the identity or qualifications of an opponent, or any other fact;

(4) shall not allow any other person to do for the candidate what the candidate is prohibited from doing; and

(5) may respond to a personal attack or attack on the candidate's record as long as the response does not otherwise violate this Rule.

COMMENT

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Maryland Ethics 2002 Committee Note.-The language reproduced above incorporates changes recommended by the Rules Committee. These changes, however, have not been formally adopted and further amendments to this Rule are currently being

considered by the Judicial Ethics Committee.

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 information gained by a lawyer or judge while participating in a lawyer or judge assistance or professional guidance program.

COMMENT

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense. For the definition of "knows" under these Rules, see Rule 1.0(g).

[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.

[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 bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyer or judge

assistance or professional guidance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek assistance through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in harm to their professional careers and injury to the welfare of client and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in such programs; such an obligation, however, may be imposed by the rules of the program or other law.

Model Rules Comparison.- Rule 8.3 is substantially similar to the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, with the exception of wording changes to Rule 8.3(c) and Comment [5].

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of this paragraph;
- (f) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (g) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

COMMENT

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

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense 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, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when

considered separately, can indicate indifference to legal obligation.

[3] Sexual misconduct or sexual harassment involving colleagues, clients, or co-workers may violate paragraph (d) or (e). This could occur, for example, where coercion or undue influence is used to obtain sexual favor in exploitation of these relationships. See Attorney Grievance Commission v. Goldsborough, 330 Md. 342 (1993). See also Rule 1.7.

[4] Paragraph (e) reflects the premise that a commitment to equal justice under the law lies at the very heart of the legal system. As a result, even when not otherwise unlawful, a lawyer who, while acting in a professional capacity, engages in the conduct described in paragraph (e) and by so doing prejudices the administration of justice commits a particularly egregious type of discrimination. Such conduct manifests a lack of character required of members of the legal profession. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. A judge, however, must require lawyers to refrain from the conduct described in Paragraph (e). See Md. Code of Judicial Conduct, Canon 3 A (10).

[5] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[6] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Model Rules Comparison.- Rule 8.4 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, with the exception of adding Rule 8.4(e) and redesignating the subsections of Rule 8.4 as appropriate, adding Comment [4] above, and retaining Comment [3] above from existing Maryland language.

Rule 8.5. Disciplinary Authority; Choice of Law

(a) **Disciplinary Authority.** A lawyer admitted by the Court of Appeals to practice in this State is subject to the disciplinary authority of this State, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this State is also subject to the disciplinary authority of this State if the lawyer provides or offers to provide any legal services in this State. A lawyer may be subject to the disciplinary authority of both this State and another jurisdiction for the same conduct.

(b) **Choice of Law.** In any exercise of the disciplinary authority of this State, the rule of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

COMMENT

[1] *Disciplinary authority.* – It is longstanding law that the conduct of a lawyer admitted to practice in this State is subject to the disciplinary authority of this State. Extension of the disciplinary authority of this State to other lawyers who provide or offer to provide legal services in this State is for the protection of the citizens of this State. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. A lawyer who is subject to the disciplinary authority of this State under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this State.

[2] *Choice of Law.* – 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. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of 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 a lawyer shall be subject to only one set of rules

of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of professional conduct of that tribunal. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

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

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

Model Rules Comparison.- Rule 8.4 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, with the exception of omitting the final sentence of ABA Comment [1].

APPENDIX

MARYLAND STATE BAR ASSOCIATION CODE OF CIVILITY

Lawyer's Duties

1. We will treat all participants in the legal process, in a civil, professional, and courteous manner and with respect at all times and in all communications, whether oral or written. These principles are intended to apply to all attorneys who practice law in the State of Maryland regardless of the nature of their practice. We will refrain from acting upon or manifesting racial, gender, or other bias or prejudice toward any participant in the legal process. We will treat all participants in the legal process with respect.

2. We will abstain from disparaging personal remarks or acrimony toward any participants in the legal process and treat everyone with fair consideration. We will advise our clients and witnesses to act civilly and respectfully to all participants in the legal process. We will, in all communications, speak and write civilly and respectfully to the Court, staff, and other court or agency personnel with an awareness that they, too, are an integral part of the judicial system.

3. We will not encourage any person under our control to engage in conduct that would be inappropriate under these standards if we were to engage in such conduct.

4. We will not bring the profession into disrepute by making unfounded accusations of impropriety or attacking counsel, and absent good cause, we will not attribute bad motives or improper conduct to other counsel.

5. We will strive for orderly, efficient, ethical and fair disposition of litigation, as well as disputed matters that are not yet the subject of litigation, and for the efficient, ethical, and fair negotiation and consummation of business transactions.

6. We will not engage in conduct that offends the dignity and decorum of judicial and administrative proceedings, brings disorder to the tribunal or undermines the image of the legal profession, nor will we allow clients or witnesses to engage in such conduct. We will educate clients and witnesses about proper courtroom decorum and to the best of our ability, prevent them from creating disorder or disruption in the courtroom.

7. We will not knowingly misrepresent, mischaracterize, or misquote fact or authorities cited.

8. We will be punctual and prepared for all scheduled appearances so that all matters may begin on time and proceed efficiently. Furthermore, we will also educate everyone involved concerning the need to be punctual and prepared, and if delayed, we will notify everyone involved, if at all possible.

9. We will attempt to verify the availability of necessary participants and witnesses so we can promptly reschedule appearances if necessary.

10. We will avoid ex parte communications with the court, including the judge's staff, on pending matters in person (whether in social, professional, or other contexts), by telephone, and in letters and other forms of written communication, unless authorized.

Judges' Responsibilities

1. We will not use hostile, demeaning or humiliating words in opinions or in written or oral communications with lawyers, parties or witnesses.

2. We will be courteous, respectful and civil to lawyers, parties, witnesses, and court personnel. We will maintain control of all court proceedings, recognizing that judges have both the obligation and the authority to ensure that judicial proceedings are conducted with dignity, decorum and courtesy to all.

3. Within the practical limits of time, we will afford lawyers appropriate time to present proper arguments and to make a complete and accurate record.

4. We will make reasonable efforts to decide promptly all matters presented for decision.

5. We will be considerate of professional and personal time schedules of lawyers, parties, witnesses and court staff in scheduling hearings, meetings, and conferences, consistent with the efficient administration of justice.

6. We will be punctual in convening trials, hearings, meetings, and conferences; if they are not begun when scheduled, proper and prompt notification will be given.

7. We will inform counsel promptly of any rescheduling, postponement, or cancellation of hearings, meetings, or conferences.

8. We will work cooperatively with all other judges and other jurisdictions with respect to availability of lawyers, witnesses, parties, and court resources.

9. We will treat each other with courtesy and respect.

10. We will conscientiously assist and cooperate with other jurists to assure the efficient and expeditious processing of cases, while, when possible, accommodating the trial schedule of all lawyers, parties and witnesses.

**III. CONCURRING MINORITY REPORT RE:
NEWLY PROPOSED RULE 8.4(E)
AND COMMENT [5] – LAWYER
MANIFESTING BIAS OR PREJUDICE**

Filed by M. Peter Moser

(1) Committee Recommendation.

The Committee proposes to add a new paragraph (e) to the text of Rule 8.4, and a new Comment [5] explaining the text:

“It is professional misconduct for a lawyer to:

“(e) When acting in a professional capacity, knowingly manifest by words or conduct bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of this paragraph;...

“[5] Paragraph (e) reflects the premise that a commitment to equal justice under the law lies at the very heart of the legal system. As a result, even when not otherwise unlawful, a lawyer who, while acting in a professional capacity, engages in the conduct described in paragraph (e) and by so doing prejudices the administration of justice commits a particularly egregious type of discrimination. Such conduct manifests a lack of character required of members of the legal profession. A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. A judge, however, must require lawyers to refrain from the conduct described in Paragraph (e). See Md Code of Judicial Conduct, Canon 3A (10).”

I strongly support reminding lawyers that manifesting bias or prejudice for these reasons and in the circumstances provided above amounts to professional misconduct if the action amounts to “conduct that is prejudicial to the administration of justice.” The standard is the same as appears in Md. Code of Judicial Conduct Canon 3A(10) that expresses a judge’s responsibility to assure that lawyers in proceedings before the judge do not manifest bias or prejudice.

I recommend, however, that the reminder should appear *solely* in comment under

Rule 8.4 and *not* in the black letter text. My reasons are in Part (2) of this Report. The proposed Comment is in Part (3). Proposed Comment [4] regarding the *Goldsborough* case also would remain under Rule 8.4.

(2). Reasons.

(i) Only when the manifestation of bias or prejudice is “prejudicial to the administration of justice” is it professional misconduct under Rule 8.4. Because paragraph (d) already says that it is professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice,” a separate prohibition under that standard *in text* is redundant and confusing.

(ii) There is a possibility of misconstruing the provision if it is placed in the text, as being intended to make an action misconduct that is not encompassed within the standard of paragraph (d). The gloss in proposed Comment [5] increases the possibility of misconstruction. I agree with one critic who urged the provision be in comment rather than in a separate paragraph in text (Abramowitz at page 3).

(iii) The ABA in its Model Rules provides this in a comment under Rule 8.4 after having considered and rejected text provisions on multiple occasions; greater uniformity can therefore be expected.

(iv) Comment language is desirable that parallels a judge’s responsibility under MD Code of Judicial Conduct Canon 3A(10), providing:

(10) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses counsel or others. This Section 3B(10) (*sic*) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

(3) Proposed Draft.

(i) No change from current text of MD RPC Rules 8.4(a) through 8.4(f).

(ii) Include proposed new Comment [4], which is based on the current comment and the *Goldsborough* case, omitting “or (e)” in the second line.

(iii) Omit proposed new Comment [5] and insert in its place:

“[5] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not

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

IV. RECOMMENDATIONS FOR FURTHER STUDY

After this Committee was appointed, the ABA Commission on Multijurisdictional Practice (MJP Commission) issued its Report to the ABA House of Delegates. The MJP Commission made several recommendations in addition to the Model Rules changes (see our recommended Maryland Rules 5.5 and 8.5) that our Committee did not review in detail. Because the MJP Commission's recommendations noted below were approved by the ABA House and merit further study for possible adoption in Maryland, we call them to the Court's attention for such action as the Court believes warranted. The recommendations relate to the following subjects:

- 1. Admission on Motion.**
- 2. *Pro Hac Vice* Rule.**
- 3. Model Rule for Licensing Foreign Legal Consultants.**
- 4. Temporary Practice for Foreign Lawyers.**

(1) Admission on Motion.

In certain regions of the United States, State Supreme Courts and their committees are considering means by which lawyers in other states may be admitted to practice in several states. In some regions, the solution being explored includes development of a single bar examination made available to lawyers in all participating jurisdictions entitling them to practice in any of the jurisdictions. More simply, however, the arrangement involves admission on motion without examination. For example, regional reciprocal admission to the bar is under consideration by the courts in Maine, New Hampshire and Vermont. Maine's draft rule is attached as Exhibit A to these Recommendations for Further Study.

The ABA MJP Commission in its Report to the House of Delegates (Report 201C), August 2002) provides a sample Rule for Admission on Motion that omits any additional bar exam, such as Maryland's Attorney's Exam, as a requirement. Attached Exhibit A substitutes mandatory CLE for an admitted attorney's exam.

This Committee takes no position on this issue other than to suggest that some relaxation in the admission of out-of-state lawyers may be desirable so long as it is not likely to reduce the quality of legal services in Maryland and is done on a reciprocal basis to make it easier for Maryland lawyers to practice in other jurisdictions. The Board of State Bar Examiners might be requested to study the issues along with the State Bar Association.

(2) Pro Hac Vice Rule.

We suggest that the Rules Committee be asked to review the administration of the current *Pro Hac Vice* Admission Rule by the Circuit Courts and determine if problems have arisen by reason of the lack of standards or other guidance in the existing Rule. A model adopted by the ABA House of Delegates can be found in Report 201F (August 2002) and might be used as a starting point.

Once again, the Committee advocates no more than that a review be conducted.

(3) Non-U.S. Lawyers Licensing as Consultants.

In 1993, the ABA House of Delegates approved a Model Rule for licensing foreign lawyers as "legal consultants" similar to a rule that has been adopted in New York and about 24 other states. The ABA MJP Commission urged in Report 201H (August 2002) adoption of such a licensing arrangement in all U.S. jurisdictions. A copy of the Model Rule is Exhibit B to these Recommendations for Further Study.

As may be seen, permanent presence and limited scope of practice are provided. Reasons for adopting such a rule include using it as a means to encourage reciprocity among foreign governments to allow U.S. lawyers to practice there on a limited basis.

The Rules Committee and State Bar International Law Section might be asked to explore this and Item (4) below.

(4) Temporary Practice for Foreign Lawyers.

In Report 201J (August 2002), the ABA MJP Commission recommended a Temporary Practice Rule for non-U.S. lawyers that a state might adopt. A copy is Exhibit C to these Recommendations for Further Study. The scope of permissible practice is more limited than it is under Rule 5.5 for non-admitted U.S. attorneys.

Exhibit A

Portions of Maine's proposed rule applicable to NH Bar members are as follows:

Rule 11a.

Reciprocal Admission By Motion

(a) An applicant who is domiciled in the United States, is of the age of 18 years, and meets the following requirements may, upon motion, be admitted to the practice of law without taking and passing the bar examination required by Rule 10, provided that the state of New Hampshire ...allows admission without examination of persons admitted to practice law in the state of Maine under circumstances comparable to those set forth in this rule. The applicant shall:

1. (A) Be licensed to practice law in the state of New Hampshire and be an active member of the New Hampshire bar;
2. (A) Have been engaged in the active practice of law in the state of New Hampshire for no less than three years immediately preceding the date upon which the motion is filed;

For the purposes of this rule, the "active practice of law" shall include the following activities:

- (i) Representation of one or more clients in the private practice of law;
- (ii) Service as a lawyer with a local, state, or federal agency, including military service;
- (iii) Teaching law at a law school approved by the American Bar Association;
- (iv) Service as a judge in a federal, state, or local court of record;
- (v) Service as a judicial law clerk; or
- (vi) Service as corporate counsel.

The "active practice of law" shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.

3. Establish that the applicant is currently a member in good standing in all jurisdictions where admitted;
4. Establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any jurisdiction;
5. Establish that the applicant possesses the good moral character to practice law in the state of Maine; and

6. Have completed at least 15 hours of continuing legal education in Maine practice and procedure in courses approved by the Maine Board of Overseers of the Bar within one year immediately preceding the date upon which the motion is filed and be certified by the Maine Board of Overseers of the Bar as satisfying this requirement.

(b) An applicant who has failed the Maine bar examination within five years of the date of filing a motion for admission without examination shall not be eligible for admission on motion. An applicant who has resigned or who has been disbarred or suspended from the Maine bar shall not be eligible for admission under this rule.

(c) Any applicant for admission by motion shall comply with the application and good moral character requirements of Rules 5, 6 and 9 of the Maine Bar Admission Rules.

(d) Any applicant admitted to practice in accordance with this rule shall register as required by Rule 6 of the Maine Bar Rules and pay the annual fees required by Rule 10 of the Maine Bar Rules, and shall otherwise comply with the requirements of the Maine Bar Rules in the same manner as any other attorney admitted to active practice in the state of Maine.

Exhibit B

**ABA MODEL RULE FOR THE LICENSING OF LEGAL FOREIGN
CONSULTANTS**

§ 1. General Regulation as to Licensing

In its discretion, the [name of court] may license to practice in this State as a legal consultant, without examination, an applicant who:

- (a) is a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;
- (b) for at least five of the seven years immediately preceding his or her application has been a member in good standing of such legal profession and has actually been engaged in the practice of law in the said foreign country or elsewhere substantially involving or relating to the rendering of advice or the provision of legal services concerning the law of the said foreign country;¹
- (c) possesses the good moral character and general fitness requisite for a member of the bar of this State;
- (d) is at least twenty-six years of age;² and
- (e) intends to practice as a legal consultant in this State and to maintain an office in this State for that purpose.

§ 2. Proof Required

An applicant under this Rule shall file with the clerk of the [name of court]:

- (a) a certificate from the professional body or public authority in such foreign country having final jurisdiction over professional discipline, certifying as to the applicant's admission to practice and the date thereof, and as to his or her good standing as such attorney or counselor at law or the equivalent;
- (b) a letter of recommendation from one of the members of the executive body of such professional body or public authority or from one of the judges of the highest law court or court of original jurisdiction of such foreign country;
- (c) a duly authenticated English translation of such certificate and such letter if, in either case, it is not in English; and

¹ Section 1(b) is optional; it may be included as written, modified through the substitution of shorter periods than five and seven years, respectively, or omitted entirely.

² Section 1(d) is optional; it may be included as written, modified through the substitution of a lesser age than twenty-six years, or omitted entirely.

- (d) such other evidence as to the applicant's educational and professional qualifications, good moral character and general fitness, and compliance with the requirements of Section 1 of this Rule as the [name of court] may require.

§ 3. Reciprocal Treatment of Members of the Bar of this State

In considering whether to license an applicant to practice as a legal consultant, the [name of court] may in its discretion take into account whether a member of the bar of this State would have a reasonable and practical opportunity to establish an office for the giving of legal advice to clients in the applicant's country of admission. Any member of the bar who is seeking or has sought to establish an office in that country may request the court to consider the matter, or the [name of court] may do so *sua sponte*.

§ 4. Scope of Practice

A person licensed to practice as a legal consultant under this Rule may render legal services in this State subject, however, to the limitations that he or she shall not:

- (a) appear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this State (other than upon admission *pro hac vice* pursuant to [citation of applicable rule]);
- (b) prepare any instrument effecting the transfer or registration of title to real estate located in the United States of America;
- (c) prepare:
 - (i) any will or trust instrument effecting the disposition on death of any property located in the United States of America and owned by a resident thereof, or
 - (ii) any instrument relating to the administration of a decedent's estate in the United States of America;
- (d) prepare any instrument in respect of the marital or parental relations, rights or duties of a resident of the United States of America, or the custody or care of the children of such a resident;
- (e) render professional legal advice on the law of this State or of the United States of America (whether rendered incident to the preparation of legal instruments or otherwise) except on the basis of advice from a person duly qualified and entitled (otherwise than by virtue of having been licensed under this Rule) to render professional legal advice in this State;
- (f) be, or in any way hold himself or herself out as, a member of the bar of this State;
or

- (g) carry on his or her practice under, or utilize in connection with such practice, any name, title or designation other than one or more of the following:
 - (i) his or her own name;
 - (ii) the name of the law firm with which he or she is affiliated;
 - (iii) his or her authorized title in the foreign country of his or her admission to practice, which may be used in conjunction with the name of such country; and
 - (iv) the title “legal consultant,” which may be used in conjunction with the words “admitted to the practice of law in [name of the foreign country of his or her admission to practice]”.

§ 5. Rights and Obligations

Subject to the limitations set forth in Section 4 of this Rule, a person licensed as a legal consultant under this Rule shall be considered a lawyer affiliated with the bar of this State and shall be entitled and subject to:

- (a) the rights and obligations set forth in the [Rules] [Code] of Professional [Conduct] [Responsibility] of [citation] or arising from the other conditions and requirements that apply to a member of the bar of this State under the [rules of court governing members of the bar]; and
- (b) the rights and obligations of a member of the bar of this State with respect to:
 - (i) affiliation in the same law firm with one or more members of the bar of this State, including by:
 - (A) employing one or more members of the bar of this State;
 - (B) being employed by one or more members of the bar of this State or by any partnership [or professional corporation] which includes members of the bar of this State or which maintains an office in this State; and
 - (C) being a partner in any partnership [or shareholder in any professional corporation] which includes members of the bar of this State or which maintains an office in this State; and
 - (ii) attorney-client privilege, work-product privilege and similar professional privileges.

§ 6. Disciplinary Provisions

A person licensed to practice as a legal consultant under this Rule shall be subject to professional discipline in the same manner and to the same extent as members of the bar of this State and to this end:

- (a) Every person licensed to practice as a legal consultant under these Rules:
 - (i) shall be subject to control by the [name of court] and to censure, suspension, removal or revocation of his or her license to practice by the [name of court] and shall otherwise be governed by [citation of applicable statutory provisions]; and
 - (ii) shall execute and file with the [name of court], in such form and manner as such court may prescribe:
 - (A) his or her commitment to observe the [Rules] [Code] of Professional [Conduct] [Responsibility] of [citation] and the [rules of court governing members of the bar] to the extent applicable to the legal services authorized under Section 4 of this Rule;
 - (B) an undertaking or appropriate evidence of professional liability insurance, in such amount as the court may prescribe, to assure his or her proper professional conduct and responsibility;
 - (C) a written undertaking to notify the court of any change in such person's good standing as a member of the foreign legal profession referred to in Section 1(a) of this Rule and of any final action of the professional body or public authority referred to in Section 2(a) of this Rule imposing any disciplinary censure, suspension, or other sanction upon such person; and
 - (D) a duly acknowledged instrument, in writing, setting forth his or her address in this State and designating the clerk of such court as his or her agent upon whom process may be served, with like effect as if served personally upon him or her, in any action or proceeding thereafter brought against him or her and arising out of or based upon any legal services rendered or offered to be rendered by him or her within or to residents of this State, whenever after due diligence service cannot be made upon him or her at such address or at such new address in this State as he or she shall have filed in the office of such clerk by means of a duly acknowledged supplemental instrument in writing.
- (b) Service of process on such clerk, pursuant to the designation filed as aforesaid, shall be made by personally delivering to and leaving with such clerk, or with a deputy or assistant authorized by him or her to receive such service, at his or her office, duplicate copies of such process together with a fee of \$10. Service of

process shall be complete when such clerk has been so served. Such clerk shall promptly send one of such copies to the legal consultant to whom the process is directed, by certified mail, return receipt requested, addressed to such legal consultant at the address specified by him or her as aforesaid.

§ 7. Application and Renewal Fees

An applicant for a license as a legal consultant under this Rule shall pay an application fee which shall be equal to the fee required to be paid by a person applying for admission as a member of the bar of this State under [rules of court governing admission without examination of persons admitted to practice in other States]. A person licensed as a legal consultant shall pay renewal fees which shall be equal to the fees required to be paid by a member of the bar of this State for renewal of his or her license to engage in the practice of law in this State.

§ 8. Revocation of License

In the event that the [name of court] determines that a person licensed as a legal consultant under this Rule no longer meets the requirements for licensure set forth in Section 1(a) or Section 1(c) of this Rule, it shall revoke the license granted to such person hereunder.

§ 9. Admission to Bar

In the event that a person licensed as a legal consultant under this Rule is subsequently admitted as a member of the bar of this State under the provisions of the Rules governing such admission, the license granted to such person hereunder shall be deemed superseded by the license granted to such person to practice law as a member of the bar of this State.

§ 10. Application for Waiver of Provisions

The [name of court], upon application, may in its discretion vary the application or waive any provision of this Rule where strict compliance will cause undue hardship to the applicant. Such application shall be in the form of a verified petition setting forth the applicant's name, age and residence address, the facts relied upon and a prayer for relief.

Exhibit C

Temporary Practice By Foreign Lawyers

Model Rule for Temporary Practice by Foreign Lawyers

(a) A lawyer who is admitted only in a non-United States jurisdiction shall not, except as authorized by this Rule or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law, or hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. Such a lawyer does not engage in the unauthorized practice of law in this jurisdiction when on a temporary basis the lawyer performs services in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal held or to be held in a jurisdiction outside the United States if the lawyer, or a person the lawyer is assisting, is authorized by law or by order of the tribunal to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding held or to be held in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice;

(4) are not within paragraphs (2) or (3) and

(i) are performed for a client who resides or has an office in a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization; or

(ii) arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization.

(5) are governed primarily by international law or the law of a non-United States jurisdiction.

(b) For purposes of this grant of authority, the lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority.

V. COMPARISON OF RECOMMENDED RULES TO CURRENT MARYLAND RULES OF PROFESSIONAL CONDUCT

RECOMMENDED MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

PREAMBLE: A LAWYER'S RESPONSIBILITIES

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

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

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

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

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

duty to uphold legal process.

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

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

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

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

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this

respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

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

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

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

SCOPE

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

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

[16] Compliance with the Rules, as with all law in an open society, depends

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

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

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

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

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

structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. ~~Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.~~ Nevertheless, in some circumstances, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

~~Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.~~

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

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative. ~~The Code comparison following each Rule has not been adopted, does not constitute part of the Rules, and is not intended to affect the application or interpretation of the Rules and Comments.~~

[22] In May 1997, the Maryland State Bar Association's Board of Governors approved an aspirational Code of Civility for all lawyers and judges in Maryland. All Maryland lawyers and judges should honor and voluntarily adhere to the standards set forth in this Code. Civility is a cornerstone of the legal profession. The principles in the Code of Civility are not intended to replace, but supplement all existing codes, rules and statutes concerning lawyers' and judges' professional conduct. The Code of Civility is reprinted as an Appendix to these Rules.

TERMINOLOGY

Rule 1.0. Terminology.

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

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

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

(d) "Firm" or "~~Law~~law firm" denotes a lawyer or lawyers in a ~~private firm, lawyers employed in the legal department of a~~law partnership, professional corporation, sole proprietorship or other organization and association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation, government or other organization. ~~See Comment, Rule 1.10.~~

(e) "Fraud" or "~~Fraudulent~~fraudulent" denotes conduct ~~having~~that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive ~~and not merely negligent misrepresentation or failure to apprise another of relevant information.~~

(f) "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.

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

(h) "Law firm." See Rule 1.0(d).

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

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

(k) "Reasonable belief" or "~~Reasonably~~reasonably believes" when used in

reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(l) "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.

(m) "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.

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

(o) "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.

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

COMMENT

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

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

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

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

[5] *Fraud.*-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.

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

independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of the client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (p) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.5(c) and 1.8(a). For a definition of "signed," see paragraph (p).

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

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

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

CLIENT-LAWYER RELATIONSHIP

~~RULE 1.1. COMPETENCE~~

Rule 1.1. Competence.

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

Comment

COMMENT

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

[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.

[5] *Thoroughness and Preparation*—*Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in*

part by what is at stake; major litigation and complex transactions ordinarily require more ~~elaborate~~extensive treatment than matters of lesser ~~consequence~~complexity. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

[6] Maintaining Competence — To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education. ~~If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.~~ and comply with all continuing legal education requirements to which the lawyer is subject.

~~RULE 1.2. SCOPE OF REPRESENTATION~~

Rule 1.2. Scope of representation and allocation of authority between client and lawyer.

(a) ~~A Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of the representation, ~~subject to paragraphs (e), (d) and (e)~~, and, when appropriate, 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~~ settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.~~

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

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

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

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

Comment

COMMENT

[1] Scope of Representation.— 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 those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. ~~Law defining the lawyer's scope of authority in litigation varies among jurisdictions.~~

[2] On occasion, however, a lawyer and a client may disagree about the means to

be used to accomplish the client's objectives. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

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

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

[5] ~~Independence from client~~ Client's ~~views~~ Views or ~~activities.~~ ~~Activities~~ – Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.
Services Limited in Objectives or Means

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

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

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the

client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

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

[9] Criminal, Fraudulent and Prohibited Transactions~~A lawyer is required to give~~
~~Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. 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.~~

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The~~lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the~~ lawyer is required to avoid ~~furthering~~ assisting the ~~purpose~~ client, for example, ~~by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how~~ ~~it~~ the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally ~~supposes is~~ supposed was legally proper but then discovers is criminal or fraudulent. ~~Withdrawal from the representation, therefore, may be required. See Rule 1.16.~~ 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 Rules 1.6, 4.1.

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

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

interpretation placed upon it by governmental authorities.

RULE 1.3. DILIGENCE

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(4).

Rule 1.3. Diligence.

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

Comment

COMMENT

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

[2] A lawyer's workload must be controlled so that each matter can be handled ~~adequately.~~ competently.

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

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

client. See Rule 1.2.

RULE 1.4. COMMUNICATION

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. C.f. Md. Rule 16-777 (providing for appointment of a conservator to inventory the files of an attorney who is deceased or has abandoned the practice of law, and to take other appropriate action to protect the attorney's clients in the absence of a plan to protect clients' interests).

Rule 1.4. Communication.

(a) A lawyer shall:

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

(2) keep ~~a~~the client reasonably informed about the status of ~~a~~the matter ~~and~~;

(3) promptly comply with reasonable requests for information—; and

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

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

Comment

COMMENT

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

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

[3] Under Rule 1.2(a), a lawyer is required, when appropriate, to consult with the client about the means to be used to accomplish the client's objectives. In some situations – depending on both the importance of the action under consideration and the feasibility of consulting with the client – this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(2) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(3) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

[5] *Explaining Matters.* - 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 should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2 (a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.~~ Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, ~~in negotiations~~ where there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that ~~might~~ are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily ~~cannot~~ will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(f).

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

[7] Withholding Information – *In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently*

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

Rule 1.5. Fees.

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

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

(b) ~~—When the lawyer has not regularly represented the client,~~ The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. ~~—, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.~~

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

the outcome of the matter, and, if there is a recovery, showing the remittance to the client and the method of its determination.

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

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or custody of a child or upon the amount of alimony or support or property settlement, or upon the amount of an award pursuant to Sections 8-201 through 213 of ~~Family Law Article, Annotated Md. Code of Maryland Ann., Fam. Law;~~ or

(2) a contingent fee for representing a defendant in a criminal ~~matter~~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, ~~by written agreement with the client,~~ each lawyer assumes joint responsibility for the representation;

(2) ~~the client is advised of and does not object to the participation of all the lawyers involved~~ the client agrees to the joint representation and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

Comment

COMMENT

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

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

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

[4] Terms of Payment – A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.15(c); Comment [3] to Rule 1.15; Rule 1.16 (d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (j). However, a fee paid in property instead of money may be subject to ~~special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.~~ the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

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

Contingent Fees

~~For purposes of Rules 1.5 (e) and 1.5 (d), a contingent fee arrangement means an agreement for legal services (1) made before the services are completed, and (2) providing compensation of the lawyer which is contingent in whole or in part upon the successful accomplishment or disposition of the legal matter and which is either in a fixed amount or in an amount determined under a specified formula.~~

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

[7] Division of Fee – A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on either 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 and the client ~~is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive.~~ agrees to the joint representation, which is confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails ~~the obligations stated in Rule 5.1 for purposes of the matter involved.~~ financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

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

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

Cross references. — See *Post v. Bregman*, 349 Md. 142 (1998) and *Son v. Margolius*, 349 Md. 441 (1998).

RULE 1.6. CONFIDENTIALITY OF INFORMATION

Rule 1.6. Confidentiality of information.

(a) A lawyer shall not reveal information relating to representation of a client unless the client ~~consents after consultation, except for disclosures that are~~ gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, ~~and except as stated in~~ or the disclosure is permitted by paragraph (b).

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

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

(2) to prevent the client from committing a ~~criminal~~ crime or ~~fraudulent act~~ fraud that ~~the lawyer believes is likely~~ is reasonably certain to result in ~~death or substantial bodily harm or in~~ substantial injury to the financial interests or property of another;

~~(2) — to rectify the consequences of a client's criminal or fraudulent act in the~~ and in furtherance of which the ~~lawyer~~ client has used or is using the lawyer's services ~~were used~~ ;

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

(4) to secure legal advice about the lawyer's compliance with these Rules, a court order or other law;

~~(3)~~ (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, ~~or~~ to establish a defense to a criminal charge, civil claim, or disciplinary complaint against the lawyer based upon conduct in which the client was involved or to respond to allegations in any ~~proceedings~~ proceeding concerning the lawyer's representation of the client. ~~—; or~~

~~(4)~~ (6) TO COMPLY WITH THESE ~~RULES~~ RULES, A COURT ORDER OR OTHER LAW.

Comment

COMMENT

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

the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

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

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

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

~~A fundamental~~[3] The principle in the client lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The principle ofof client-lawyer confidentiality is given effect ~~in two~~by related bodies of law; the attorney-client privilege ~~(which includes, the work product doctrine) in the law of evidence~~ and the rule of confidentiality established in professional ethics. The attorney-client privilege ~~applies~~and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not ~~merely~~only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

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

~~Information Relating to Representation~~

~~"Information relating to representation" protected under paragraph (a) includes revelations made to a lawyer by a person seeking to engage the lawyer's services. The revelations are protected even if the prospective client decides not to engage the services of the lawyer or the lawyer does not agree to undertake the representation.~~

Authorized Disclosure

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

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

[6] Disclosure Adverse to Client – Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b), however, permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

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

~~Several situations must be distinguished.~~

~~First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2 (d). There can be situations where the lawyer may have to reveal information relating to the representation in order to avoid assisting a client's criminal or fraudulent conduct. Similarly, a lawyer has a duty under Rule 3.3 (a) (4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2 (d) to avoid assisting a client in criminal or fraudulent conduct. The same is true of compliance with Rule 4.1 concerning truthfulness of a lawyer's own representations.~~

~~Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2 (d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. Even if the involvement was innocent, however, the fact remains that the lawyer's professional services were made the instrument of the client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct, and has the professional right although not a professional duty to rectify the situation. Exercising that right may require revealing information relating to the representation. Paragraph (b) (2) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification.~~

~~Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in death or substantial bodily harm or in substantial injury to the financial interests or property of another. As stated in paragraph (b) (1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury or substantial injury to the financial interests or property of another which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind. The lawyer's exercise of discretion requires consideration of~~[7]
Paragraph (b) permits, but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b) (1) does not violate this Rule. Paragraph (b) (2) does not apply where a lawyer is employed after a crime or fraud has been committed to represent the client in matters ensuing therefrom. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules regardless of whether the disclosure is permitted by Rule 1.6. See Rules 1.2(d), 3.3(a)(4), 4.1(b), 8.1 and 8.3. A lawyer representing an organization may in some circumstances be permitted to disclose information regardless of whether the disclosure is permitted by Rule 1.6(b). See Rule 1.13(c).

[8] Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably believed necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease, and the lawyer reasonably believes disclosure is necessary to eliminate the threat or reduce the number of victims.

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

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

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

[12] *Withdrawal.* — If the lawyer knows that the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16 (a) (1). After withdrawal the lawyer is

required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule ~~1.6~~1.6 or in other Rules.

[13] If the lawyer knows that despite the withdrawal the client is continuing in conduct that is criminal or fraudulent, and is making use of the fact that the lawyer was involved in the matter, the lawyer may have to take positive steps to avoid being held to have assisted the conduct. See Rules 1.2 (d) and ~~4.1~~4.1(b). In other situations not involving such assistance, the lawyer has discretion to make disclosure of otherwise confidential information only in accordance with Rules 1.6 and 1.13 (c). Neither this Rule nor Rule 1.8 (b) nor Rule 1.16 (d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

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

[14] *Dispute Concerning Lawyer's Conduct* – Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b) (~~3~~5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, ~~applies~~ where a proceeding has been commenced. ~~Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.~~

~~If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together.~~[15] A lawyer entitled to a fee is

permitted by paragraph (b) (35) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. ~~As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.~~

[16] Disclosures Otherwise Required or Authorized – As noted in Comment 7, Rules 3.3(b) and 4.1(b) require disclosure in some circumstances regardless of whether the disclosure is permitted by Rule 1.6. Circumstances may be such that disclosure is required under other Rules, for example, Rule 1.2(d), in order to avoid assisting a client to perpetrate a crime or fraud.

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

[18] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

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

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

security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

~~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, Rule 1.6 (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.~~

~~The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 1.13, 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client.~~

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

~~**RULE 1.7. CONFLICT OF INTEREST: GENERAL RULE.**~~

Rule 1.7. Conflict of Interest: General Rule.

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

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

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

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

(1) the lawyer reasonably believes ~~the~~ that the lawyer will be able to provide competent and diligent representation ~~will not adversely affect the relationship with the other~~ to each affected client; and

(2) ~~each client consents after consultation.~~

~~(b) — A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:~~

~~(1) — the lawyer reasonably believes the representation will not be adversely affected; and~~

~~(2) — the client consents after consultation.~~

~~(c) — The consultation required by paragraphs (a) and (b) shall include explanation of the implications of the common representation and any limitations resulting from the lawyer's responsibilities to another, or from the lawyer's own interests, as well as the advantages and risks involved.~~

Comment

(2) the representation is not prohibited by law;

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

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

COMMENT

[1] *General Principles.* - Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's

own interests. For specific Rules regarding certain conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(f) and (b).

Loyalty to a Client

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

~~Loyalty is an essential element in the lawyer's relationship to a client. An impermissible~~

~~[3] A conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2 (e)~~ must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

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

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

Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

~~As a general proposition, loyalty to a~~ _____ [6] *Identifying Conflicts of Interest: Directly Adverse.* - Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. ~~Paragraph (a) expresses that general rule.~~ Thus, absent consent, a lawyer ~~ordinarily~~ may not act as an advocate in one matter against a person the lawyer represents in some other matter, even ~~if it is wholly unrelated~~ when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

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

~~Loyalty to a client is also impaired when a lawyer cannot~~ _____ [8] *Identifying Conflicts of Interest: Material Limitation.* – Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client ~~because will be~~ materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. ~~Paragraph (b) addresses such situations. A possible conflict~~ The mere possibility of subsequent harm does not itself preclude the representation ~~require disclosure and consent.~~ The critical questions are the likelihood that a ~~conflict~~ difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. ~~Consideration should be given to whether the client wishes to accommodate the other interest involved.~~

Consultation and Consent

~~A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a) (1) with respect to representation directly adverse to a client, and paragraph (b) (1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.~~

Lawyer's Interests

[9] *Lawyer's Responsibilities to Former Clients and Other Third Persons.* – In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

[10] *Personal Interest Conflicts.* – The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, ~~a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5.~~ If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. ~~A~~ Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed ~~interest.~~ financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family

relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A sexual relationship with a client, whether or not in violation of criminal law, will create an impermissible conflict between the interests of the client and those of the lawyer if (1) the representation of the client would be materially limited by the sexual relationship and (2) it is unreasonable for the lawyer to believe ~~otherwise~~ the lawyer can provide competent and diligent representation. Under those circumstances, ~~client~~ informed consent ~~after consultation~~ by the client is ineffective. See also Rule 8.4.

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

[14] *Prohibited Representations.* – Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

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

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients

are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(o)), such representation may be precluded by paragraph (b)(1).

[18] *Informed Consent.* – Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(f) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

[20] *Consent Confirmed in Writing.* – Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(p) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

[21] *Revoking Consent.* – A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the

nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

[22] *Consent to Future Conflict.* – Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

[23] *Conflicts in Litigation.* – Paragraph (ab)(3) prohibits representation of opposing parties in the same litigation. ~~Simultaneous~~, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as ~~co-plaintiffs or co-defendants~~ coplaintiffs or codefendants, is governed by paragraph (ba)(2). ~~An impermissible~~ A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one ~~co-defendant~~ codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the ~~risk of adverse effect is minimal and the~~ requirements of paragraph (b) are met. ~~Compare Rule 2.2 involving intermediation between clients.~~

~~Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can~~

~~depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.~~

~~A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.~~

Interest of Person Paying for a Lawyer's Service

~~A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8 (f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.~~

Other Conflict Situations

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking

to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

[26] *Nonlitigation Conflicts.* – Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation ~~sometimes may be difficult to assess.~~ For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for adverse effect material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that ~~actual conflict~~ disagreements will arise and the likely prejudice to the client from the conflict ~~if it does arise.~~ The question is often one of proximity and degree. See Comment [8].

~~For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.~~

~~Conflict~~ [27] For example, conflict questions may ~~also~~ arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may ~~arise~~ be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. ~~The~~ In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

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

[29] *Special Considerations in Common Representation.* – In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if

the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

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

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

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

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9

concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

[34] *Organizational Clients.* – A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

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

Conflict Charged by an Opposing Party

~~Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.~~

~~RULE 1.8. CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS~~

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules.

(a) A lawyer shall not enter into a business, ~~financial or property~~ transaction with a client unless:

(1) ~~the transaction is~~ and terms on which the lawyer acquires the interest are fair and ~~equitable~~ reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; ~~and~~

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent ~~counsel in the legal counsel on the transaction~~ and is given a reasonable opportunity to do so.; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client ~~consents after consultation.~~ gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not ~~prepare~~ solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer ~~as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where:~~ any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

~~(1) — the client is related to the donee; or~~

~~(2) — the client is represented by independent counsel in connection with the gift.~~

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

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

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

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

(1) the client ~~consents;~~ gives informed consent;

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

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) **A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client ~~consents after consultation, including disclosure of~~ gives informed consent, in a writing signed by the client or confirmed on the record before a tribunal. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.**

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless ~~permitted by law and~~ the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client ~~without first advising that person in writing that independent representation is appropriate~~ unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

~~(i) — A lawyer 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 consent by the client after consultation regarding the relationship.~~ (j) — A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

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

(2) subject to Rule ~~1.5~~1.5, contract with a client for a reasonable contingent fee in a civil case.

Comment

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

COMMENT

~~[1] *Business Transactions between Client and Lawyer* As a general principle, all transactions between client and lawyer must be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. The lawyer is required by paragraph (a) (2) to advise the client to seek advice of independent counsel and to give the client a reasonable opportunity to do so. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. See paragraph (b). For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraphs (a) and (b) do not, however.~~ – 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. Paragraph (a) also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable. For restrictions regarding lawyers engaged in the sale of goods or services related to the practice of law, see Rule 5.7.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction,

including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(f) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

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

[5] *Use of Information Related to Representation.* – Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

[6] *Gifts to Lawyers.* – A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, ~~however, paragraph (e) (2) requires that~~ the client should have the detached advice that another lawyer can provide. ~~Paragraph (e) recognizes an~~ The sole exception to this Rule is where the client is a relative of the donee ~~or the gift is not substantial.~~

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

[9] *Literary Rights.* – An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and ~~paragraph (j).~~ paragraphs (a) and (i).

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

[11] *Person Paying for **Lawyer's Services*** ~~a Lawyer's Services.~~ – Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation

is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

~~Rule 1.8 (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement~~^[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality ~~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.~~. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Limitation of Liability

~~Rule 1.8 (h) is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.~~

~~Family relationships between lawyers.—Rule 1.8 (i) 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. The disqualification stated in Rule 1.8 (i) is personal and is not imputed to members of firms with whom the lawyers are associated.~~

Acquisition of Interest in Litigation

^[13] Aggregate Settlements. – Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(f) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating

notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

[14] *Limiting Liability and Settling Malpractice Claims.* – Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

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

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

RULE 1.9. CONFLICT OF INTEREST: FORMER CLIENT.

[17] Imputation of Prohibitions. – Under paragraph (i), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client.

Rule 1.9. Duties to Former Clients.

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

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

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

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

(b1) use information relating to the representation to the disadvantage of the former client except as ~~Rule 1.6~~ these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Comment

COMMENT

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. ~~The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus~~ Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule 1.9(a) may depend depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded for that reason alone from later representing another client in a wholly factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

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

[4] *Lawyers Moving Between Firms.* – When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second,

the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof ordinarily rests upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

Information [8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

Disqualification from subsequent representation is [9] The provisions of this Rule are for the protection of former clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client. With regard to an opposing party's raising a question of conflict of interest if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(f). With

regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

~~**RULE 1.10. IMPUTED DISQUALIFICATION: GENERAL RULE**~~

Rule 1.10. Imputation of Conflicts of Interest: 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, 1.8 (c), 1.9 or 2.2.~~ 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

~~(b) — When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person unless:~~

~~(1) — the newly associated lawyer has acquired from the former client no information protected by Rules 1.6 and 1.9 (b) that is material to the matter; or~~

~~(2) — the newly associated lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom. For purposes of this subparagraph, a lawyer in a firm will be deemed to have been screened from any participation in the matter if:~~

~~(A) — the lawyer has been isolated from confidences, secrets, and material knowledge concerning the matter;~~

~~(B) — the lawyer has been isolated from all contact with the client or any agent, officer or employee of the client and any witnesses for or against the client;~~

~~(C) — the lawyer and the firm have been precluded from discussing with each other the matter and any information acquired from the client that is protected by Rules 1.6 and 1.9 (b) and is material to the matter; and~~

~~(D) — the firm has taken affirmative steps to accomplish the foregoing.~~

~~(e)~~ (b) 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 represented by the formerly associated lawyer and 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

Rules (2) any lawyer remaining in the firm has information protected by 1.6 and 1.9 ~~(b)~~ (c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the

firm shall knowingly represent a person in a matter in which the newly associated lawyer is disqualified under Rule 1.9 unless the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

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

Comment

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

Definition of "Firm"

COMMENT

[1] Definition of "firm." – A "firm" is defined in Rule 1.0(d). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4]. A lawyer is deemed associated with a firm if held out to be a partner, principal, associate, of counsel, or similar designation. A lawyer ordinarily is not deemed associated with a firm if the lawyer no longer practices law and is held out as retired or emeritus. A lawyer employed for short periods as a contract attorney ordinarily is deemed associated with the firm only regarding matters to which the lawyer gives substantive attention.

~~For the purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way 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.~~

~~With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, 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.~~

~~Similar questions can also arise with respect to lawyers in legal aid. 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.~~

~~Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11 (a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11 (c) (1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7, and 1.9.~~

~~Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 1.6, 1.9, and 1.11. However, 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.~~

~~_____ [2] *Principles of Imputed Disqualification* .— The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by ~~paragraphs~~ Rules 1.9(b), 1.10(b) and 1.10(c).~~

~~Lawyers Moving between Firms~~

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

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(m) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, 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. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Where the conditions of paragraph (c) are met, imputation is removed, and consent to the new representation is not required. Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.

[7] Requirements for screening procedures are stated in Rule 1.0(m). Paragraph (c) 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.

~~When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. 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. 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.~~

~~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.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the Maryland Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of 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.

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. The provisions for screening address both functions; they are necessary to prevent the disqualification rule from imposing too severe a deterrent against moving between private firms, so long as the newly-associated lawyer does not participate in the adverse representation and the confidentiality of protected information acquired by that lawyer is preserved.

Confidentiality

[8] Rule 1.10(d) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(f).

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.~~

~~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.~~

~~Paragraphs (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9 (b) and has not been screened in accordance with subparagraph (b) (2). Thus, if a lawyer (including a partner) while with one firm acquired no actual 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 related matter even though the interests of the two clients conflict.~~

~~Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.~~

Adverse Positions

[9] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

~~The second aspect of loyalty to client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9 (a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of Rule 1.10 (b) and (c) concerning confidentiality have been met.~~

[10] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (j) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

~~RULE 1.11. SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT~~

Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees.

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

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a private-client in connection with a matter in

which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency ~~consents after consultation.~~ No gives its informed consent, confirmed in writing, to the representation.

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

(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 appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

~~(b)~~ (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

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

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

~~(+)~~ (i) participate in a matter in which the lawyer participated

personally and substantially while in private practice or nongovernmental ~~employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or~~ employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

~~(2)~~ (ii) negotiate for private employment with any person who is involved as a party or as ~~attorney~~lawyer for a party in a matter in which the lawyer is participating personally and substantially, ~~except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).~~ negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

~~(d)~~

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

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

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

~~(e) — As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.~~

Comment

COMMENT

~~This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10 (b), which applies to lawyers moving from one firm to another.~~

[1] A lawyer ~~representing a government agency, whether employed or specially retained by the government,~~ who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against ~~representing adverse interests~~concurrent conflicts of interest stated in Rule ~~1.7 and the protections afforded former clients in Rule 1.9.~~1.7. In addition, such a lawyer ~~is~~may be subject ~~to Rule 1.11 and~~ to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(f) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

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

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

When the client is an agency of [5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency ~~should be treated as a private~~ as another client for purposes of this Rule ~~if the lawyer thereafter represents an agency of another~~

~~government~~, as when a lawyer ~~represents~~ is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [8].

~~Paragraphs (a) (1) and (b) do not~~

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(m) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary ~~or partnership share established by~~ or partnership share established by prior independent agreement. ~~They prohibit directly relating the attorney's, but that lawyer may not receive compensation to the~~ directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

~~Paragraph (a) (2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.~~

[7] 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.

[8] Paragraph (b~~c~~) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

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

~~Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.~~

~~RULE 1.12. FORMER JUDGE OR ARBITRATOR~~

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

Rule 1.12. Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral.

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, ~~arbitrator~~ or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent after disclosure, confirmed in writing.

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

(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 ~~it~~ them to ascertain compliance with the provisions of this rule.

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

Comment

COMMENT

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a ~~multi-member~~ multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11.

[2] The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. See Md. Code of Conduct for Judicial Appointees, Md. Rule 16-814.

RULE 1.13. ORGANIZATION AS CLIENT

[3] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(f) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[4] 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.

[5] Requirements for screening procedures are stated in Rule 1.0(m). 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.

[6] 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.

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 to the organization, or a violation of law ~~which~~that 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. ~~In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, 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. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:~~

~~(1) — asking reconsideration of the matter;~~

~~(2) — advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and (3) — referring~~
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 ~~seriousness of the matter, referral~~circumstances, to the highest authority that can act ~~in~~on behalf of the organization as determined by applicable law.

(c) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is ~~likely~~reasonably certain to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by Rule 1.6 only if the lawyer reasonably believes that:

(1) the highest authority in the organization has acted to further the personal or financial interests of members of the authority which are in conflict with the interests of the organization; and

(2) revealing the information is necessary in the best interest of the organization.

(d) 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~~the lawyer knows or reasonably should know that the organization's interests

are adverse to those of the constituents with whom the lawyer is dealing.

(e) 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

COMMENT

[1] The Entity as the Client - An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.

[2] Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties ~~defined in~~ created by this Comment Rule 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.

[3] 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~~ for 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.

[4] 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. However, different considerations arise when the lawyer knows that the organization ~~may~~ is likely to be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. ~~Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority,~~ depending on the seriousness of the matter and whether the constituent in question has

apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

~~In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the~~^[5] The organization's highest authority. ~~Ordinarily, that is 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.

~~In such a situation, if the~~^[6] If a lawyer can take remedial action without a disclosure of information that might adversely affect the organization, the lawyer as a matter of professional discretion may take such action as the lawyer reasonably believes to be in the best interest of the organization. For example, a lawyer for a close corporation may find it reasonably necessary to disclose misconduct by the Board to the shareholders. However, taking such action could entail disclosure of information relating to the representation with consequent risk of injury to the client; when such is the case, the organization is threatened by alternative injuries; the injury that may result from the governing Board's action or refusal to act, and the injury that may result if the lawyer's remedial efforts entail disclosure of confidential information. The lawyer may pursue remedial efforts even at the risk of disclosure in the circumstances stated in paragraphs (c) (1) and (c) (2).

^[7] Relation to Other Rules — The authority and responsibility provided in ~~paragraphs (b) and (e)~~^{this Rule} are concurrent with the authority and responsibility provided in other Rules. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1)-(6). Under Paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation as it is under Rules 1.6(b)(2) and 1.6(b)(3), but it is required that the matter be related to the lawyer's representation of the organization. In particular, this Rule does not limit {or expand} the lawyer's responsibility under Rules ~~1.6~~, 1.8, ~~and~~ 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose information otherwise protected by Rule 1.6(a). In such circumstances, Rule 1.2 (d) ~~can~~ may also be applicable.

^[8] Government Agency — *The duty defined in this Rule applies to governmental organizations. ~~However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition,~~*

~~*duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining*~~ Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context— and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it ~~is~~ generally may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government as a whole may be the client for ~~purpose~~ purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See ~~note on~~ Scope.

[9] Clarifying the Lawyer's Role. — *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.

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

[12] Derivative Actions — *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 who ~~should~~ may represent the directors and the organization.

RULE 1.14. CLIENT UNDER A DISABILITY

Rule 1.14. Client With Diminished Capacity.

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

~~(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when~~ (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's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

(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

COMMENT

[1] The normal 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 disorder or disability capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, ~~an~~ severely incapacitated person may have no power to make legally binding decisions. Nevertheless, ~~a client lacking legal competence~~ to an increasing extent the law recognizes intermediate degrees of competence. Indeed, 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. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, For example, 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. In addition, 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.~~

~~The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented~~

~~person the status of client, particularly in maintaining communication. A lawyer representing a person under disability should advocate the position of the disabled person unless the lawyer reasonably concludes that the client is not able to make a considered decision in connection with the matter. This is~~ Consideration of and, when appropriate, deference to these opinions are especially important in cases involving children in Child In Need of Assistance (CINA) and related Termination of Parental Rights (TPR) and adoption proceedings. With respect to these categories of cases, the Maryland Foster Care Court Improvement Project has prepared Guidelines of Advocacy for Attorneys Representing Children in CINA and Related TPR and Adoption Proceedings. The Guidelines are included in an appendix to ~~these Rules.~~ the Maryland Rules.

[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 legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

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

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. ~~If a legal representative has not been appointed, In matters involving a minor, whether~~ the lawyer should ~~see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.~~ look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2 (d).

Disclosure of the Client's Condition

[5] Taking Protective Action.- 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 normal 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, delaying action if feasible to permit clarification or

improvement of circumstances, using voluntary surrogate decisionmaking 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 and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[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 and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

Rules [7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation ~~generally~~ sometimes provide that minors or persons suffering mental disability shall with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can In many circumstances, however, appointment of a legal representative may be more expensive 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 be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

[8] *Disclosure of the Client's Condition.* - Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of disability 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 legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one. ~~The lawyer may seek guidance from an appropriate diagnostician.~~

Comment

[9] *Emergency Legal Assistance.* - 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.

RULE 1.15. SAFEKEEPING PROPERTY

[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.

Rule 1.15. Safekeeping property.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained pursuant to Title 16, Chapter 600 of the Maryland Rules. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and of other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for the purpose.

~~(b)~~ c) Unless the client gives informed consent, confirmed in writing, to a different arrangement, a lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) 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.

~~(e)~~ When in the course of representation a lawyer is in possession of property in which both two or more persons (one of whom may be the lawyer and another person) claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Comment

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 ~~which~~ that is the property of clients or third persons ~~should~~, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Paragraph (c) 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. Unless the client gives informed consent, confirmed in writing, 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).

[4] Lawyers often receive funds from ~~third parties from~~ which the lawyer's fee will be paid. ~~If there is risk that the client may divert the funds without paying the fee, the~~ The lawyer is not required to remit the ~~portion from which the fee is to be paid.~~ 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~~must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

~~Third~~[5] Paragraph (e) also recognizes that third parties, ~~such as client's creditors,~~ may have ~~just~~lawful claims against specific funds or other property in a lawyer's custody, ~~such as a client's creditor who has a lien on funds recovered in a personal injury action.~~ A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, ~~and accordingly may.~~ In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client. ~~However, a~~ until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[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 only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

~~A "client's 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.~~

~~RULE 1.16. DECLINING OR TERMINATING REPRESENTATION~~

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~~ 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~~ or

(3) the lawyer is discharged.

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

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

(~~1~~2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(~~2~~3) the client has used the lawyer's services to perpetrate a crime or fraud;

(~~3~~4) ~~a~~ the client insists upon ~~pursuing an objective~~ action or inaction that the lawyer considers repugnant or ~~imprudent;~~ with which the lawyer has a fundamental disagreement;

(~~4~~5) 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;

(~~5~~6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; ~~or~~ or

(~~6~~7) other good cause for withdrawal exists.

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

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to

the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned, or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

COMMENT

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

[2] Mandatory Withdrawal—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. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may ~~wish~~ request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligation to both clients and the court under Rules 1.6 and 3.3.

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

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

[6] If the client ~~is mentally incompetent~~ has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, ~~in an extreme case, may initiate~~

~~proceedings for a conservatorship or similar protection of the client. See Rule 1.14. may take reasonably necessary protective action as provided in Rule 1.14.~~

[7] Optional Withdrawal – A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer 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. The lawyer may also ~~may~~ withdraw where the client insists on ataking action or inaction that the lawyer considers repugnant or ~~imprudent objective.~~ with which the lawyer has a fundamental disagreement.

[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 fees or court costs or an agreement limiting the objectives of the representation.

[9] Assisting the Client ~~upon~~ Upon Withdrawal – 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 law~~—~~, subject to the limitations in paragraph (d) of this Rule. See Rule 1.15.

~~Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.~~

~~RULE 1.17. SALE OF LAW PRACTICE~~

Rule 1.17. Sale of law practice.

(a) Subject to paragraph (b), a law practice, including goodwill, may be sold if the following conditions are satisfied:

(1) ~~except~~ Except in the case of death, disability, or appointment of the seller to judicial office, the entire practice that is the subject of the sale has been in existence at least five years prior to the date of sale;

(2) ~~the~~ The practice is sold as an entirety to another lawyer or law firm; and

(3) ~~written~~ Written notice has been mailed to the last known address of the seller's current clients regarding:

(A) the proposed sale;

(B) the terms of any proposed change in the fee arrangement;

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

(D) the fact that the client's consent to the new representation will be presumed if the client does not take any action or does not otherwise object within sixty (60) days of mailing of the notice.

(b) If a notice required by subparagraph (a) (3) is returned and the client cannot be located, the representation of that client may be transferred to the purchaser only by an order of a court of competent jurisdiction authorizing the transfer. 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.

Comment

COMMENT

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice and another lawyer or firm takes 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~~ 5.6

[2] *Termination of Practice by the Seller.* — The requirement that all of the

private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the purchaser. The fact that a number of the seller's clients decide not to be represented by the purchaser but take their matters elsewhere does not therefore result in a violation. The purchase agreement for the sale of a law practice may allow for restrictions on the scope and time of the seller's reentry into practice.

[3] *Single Purchaser.*— The Rule requires a single purchaser. The prohibition against piecemeal sale of a practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchaser is required to undertake all client matters in the practice, subject to client consent. If, however, the purchaser is unable to undertake all client matters because of a conflict of interest in a specific matter respecting which the purchaser is not permitted by Rule 1.7 or another rule to represent the client, the requirement that there be a single purchaser is nevertheless satisfied.

[4] ~~Client confidences, consent and notice.~~ *Confidences, Consent and Notice.*— 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 Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers 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 can be disclosed by the seller to the purchaser, written notice of the contemplated sale must be mailed to the client. The notice must include the identity of the purchaser and any proposed change in the terms of future representation, and must tell the client that the decision to consent or make other arrangements must be made within 60 days. If nothing is heard from the client within that time, consent to the new representation is presumed.

[5] 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 new representation or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in *camera*.

[6] All the 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. Additionally, the transfer of the practice does not operate to change the attorney-client privilege.

[7] *Other Applicable Ethical Standards.*— Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to the involvement of 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 ~~after consultation~~ for those conflicts which can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(f) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[8] If approval of the substitution of the purchasing attorney for the selling attorney is required by the rules of any tribunal in which a matter is pending, that approval must be obtained before the matter can be included in the sale (see Rule 1.16).

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

[10] Admission to or retirement from 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.

[11] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice. This Rule does not prohibit an attorney from selling his or her interest in a law practice.

Committee note. – The sale of a practice does not mean that the appearance of a lawyer who is in a case will be stricken.

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 Rule 1.9 would permit with respect to information of a former client.

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

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

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. 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. For example, 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 lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

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

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

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if, under paragraph (d), all disqualified lawyers are timely screened. See Rule 1.0(m) (requirements for screening procedures). Paragraph (d) 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.

[8] 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.

COUNSELOR

~~RULE 2.1. ADVISOR~~

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

COMMENT

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

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's 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.**

[5] *Offering Advice.* — In general, a lawyer is not expected to give advice until

asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be 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 2.2. INTERMEDIARY~~

~~(a) — A lawyer may act as intermediary between clients if:~~

~~(1) — the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;~~

~~(2) — the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and~~

~~(3) — the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.~~

~~(b) — While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.~~

~~(c) — A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.~~

Comment

~~A lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentially conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.~~

~~The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable 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.~~

~~A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.~~

~~In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.~~

~~The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.~~

Confidentiality and Privilege

~~A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. 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.~~

~~Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.~~

Consultation

~~In acting as intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so, and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.~~

~~Paragraph (b) is an application of the principle expressed in Rule 1.4. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.~~

Withdrawal

Rule 2.2. [DELETED]

~~Common representation does not diminish the rights of each client in the client-lawyer relationship. Each has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.~~

~~RULE 2.3. EVALUATION FOR USE BY THIRD PERSONS~~

Model Rules Comparison.- This Rule has been deleted in conformity with the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct.

Rule 2.3. Evaluation for use by third parties.

(a) A lawyer may ~~undertake~~provide an evaluation of a matter affecting a client for the use of someone other than the client if: ~~(1) — the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and —~~
~~(2) — the client consents after consultation.~~

(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.

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

Comment

COMMENT

[1] Definition. — An evaluation may be performed at the client's direction ~~but~~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.

~~Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.~~

[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.

Duty [3] *Duties Owed to Third Person and Client.* – 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 in 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.

[4] *Access to and Disclosure of Information.* – 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 which 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.

[5] *Obtaining Client's Informed Consent.* – 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(f).

[6] *Financial Auditors' Requests for Information.* – 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 decisionmaker 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 apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. See Md. Rules 17-101-17-109. Lawyer-neutrals may also be subject to various codes of ethics, such as the Maryland Standards of Conduct for Mediators, Arbitrators and Other ADR Practitioners adopted by the Maryland Court of Appeals or the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information may 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 proceeding, 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(o)), 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.

ADVOCATE

~~RULE 3.1. MERITORIOUS CLAIMS AND CONTENTIONS~~

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 for doing so that is not frivolous, which includes, for example, a good faith argument for an extension, modification or reversal of existing law. A lawyer may nevertheless so defend the proceeding as to require that every element of the moving party's case be established.

Comment

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. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, ~~if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or~~ if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

~~RULE 3.2. EXPEDITING LITIGATION~~

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim that otherwise would be prohibited by this Rule.

Rule 3.2. Expediting litigation.

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

Comment

COMMENT

[1] Dilatory practices bring the administration of justice into disrepute. ~~Delay should not be indulged merely~~ Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates, ~~or~~ Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose— other than delay. Financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

~~**RULE 3.3. CANDOR TOWARD THE TRIBUNAL**~~

Rule 3.3. Candor toward the tribunal.

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
 - (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; ~~or~~ or
 - (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.
- (e) Notwithstanding paragraphs (a) through (d), a lawyer for an accused in a criminal case need not disclose that the accused intends to testify falsely or has testified falsely if the lawyer reasonably believes that the disclosure would jeopardize any constitutional right of the accused.

Comment

COMMENT

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(o) for the definition of “tribunal.” It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(4) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

The advocate's task is to present the client! [2] This Rule sets forth special duties of lawyers as officers of the court to avoid conduct that undermines the

integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value., the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

[3] Representations by a Lawyer. — An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2 (d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2 (d), see the Comment to that Rule. See also the Comment to Rule 8.4 (b).

[4] Misleading Legal Argument. — 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 paragraph (a) (3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

[5] False Evidence. — 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.

[6] 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. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

[7] Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2 (d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false

evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

[8] Perjury by a Criminal Defendant. — *Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. 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.*

[9] The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

[10] Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

[11] The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2 (d).

[12] Remedial Measures. — *If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done - - making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus*

escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

[13] Constitutional Requirements.—The general rule - that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client - applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. Paragraph (3)(e) is intended to protect from discipline the lawyer who does not make disclosures mandated by paragraphs (a) through (d) only when the lawyer acts in the "reasonable belief" that disclosure would jeopardize a constitutional right of the client. See the For a definition of this term under the TERMINOLOGY section of these Rules, supra.—“reasonable belief,” see Rule 1.0(k).

[14] Duration of Obligation.—A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. After that point, however, the lawyer may rectify the consequences as provided in be permitted to take certain actions pursuant to Rule 1.6 (b) (23).

[15] Refusing to Offer Proof Believed to be False.—Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. 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. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

[16] Ex Parte Proceedings.—Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

RULE 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL

Rule 3.4. Fairness to opposing party and counsel.

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(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 effort 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; or

(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.

Comment

COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled 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. Applicable law in many jurisdictions makes it an offense to destroy

material for purpose of impairing its availability in a pending proceeding or ~~in~~ one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses, including lost earnings, or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] 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.

~~RULE 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL~~

Rule 3.5. Impartiality and decorum of the tribunal.

- (a) A lawyer shall not:
- (1) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
 - (2) before the trial of a case with which the lawyer is connected, communicate outside the course of official proceedings with anyone known to the lawyer to be on the list from which the jurors will be selected for the trial of the case;
 - (3) during the trial of a case with which the lawyer is connected, communicate outside the course of official proceedings with any member of the jury;
 - (4) during the trial of a case with which the lawyer is not connected, communicate outside the course of official proceedings with any member of the jury about the case;
 - (5) after discharge of a jury from further consideration of a case with which the lawyer is connected, ask questions of or make comments to a member of that jury that are calculated to harass or embarrass the juror or to influence the juror's actions in future jury service;
 - (6) conduct a vexatious or harassing investigation of any juror or prospective juror;
 - (7) communicate ex parte about an adversary proceeding with the judge or other official before whom the proceeding is pending, except as permitted by law;~~or~~
 - (8) discuss with a judge potential employment of the judge if the lawyer or a firm with which the lawyer is associated has a matter that is pending before the judge; or
 - (9) engage in conduct intended to disrupt a tribunal.

(b) A lawyer who has knowledge of any violation of section (a) of this Rule, any improper conduct by a juror or prospective juror, or any improper conduct by another towards a juror or prospective juror, shall report it promptly to the court or other appropriate authority.

Comment

COMMENT

[1] Many forms of improper influence upon a tribunal are proscribed by criminal

law. Others are specified in Rules 16-813, the Maryland ~~Canons and Rules~~ Code of Judicial ~~Ethics~~ Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] 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.

[3] With regard to the prohibition in subsection (a) (2) of this Rule against communications with anyone on "the list from which the jurors will be selected," see Md. Rules 2-512 (c) and 4-312 ~~(c) of the Maryland Rules of Procedure.~~ (c).

~~RULE 3.6. TRIAL PUBLICITY~~

Rule 3.6. Trial publicity.

(a) ~~A lawyer~~ A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that ~~a reasonable person would expect to~~ the lawyer knows or reasonably should know will be disseminated by means of public communication ~~if the lawyer knows or reasonably should know that it~~ and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) ~~A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:~~

~~(1) — the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;~~

~~(2) — in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;~~

~~(3) — the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;~~

~~(4) — any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;~~

~~(5) — information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or~~

~~(6) — the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.~~ (e) ~~Notwithstanding paragraph (a) and (b) (1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:—~~

~~(1) — the general nature of the claim or defense;~~

~~(2) — the information contained in a public record; (3) — that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;~~

(2) information contained in a public record;

- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):
- (i) the identity, residence, occupation and family status of the accused;
- (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
- (iii) the fact, time and place of arrest; and
- (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Comment

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

COMMENT

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of

general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

~~No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. The formula in this Rule is based upon the Code of Professional Responsibility and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978.~~

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4 (c) requires compliance with such ~~Rules—rules.~~

~~RULE 3.7. LAWYER AS WITNESS~~

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a

criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(e) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

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:~~ unless:

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

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

COMMENT

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

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

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a) (1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a) (2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has ~~first-hand~~ firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a) (3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the

lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The ~~principle of imputed disqualification~~ conflict of interest principles stated in ~~Rule~~ Rules 1.7, 1.9 and 1.10 ~~has~~ have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

~~Whether the combination of roles involves an improper~~ [6] Conflict of Interest. – In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest ~~with respect to the client is determined by Rule~~ that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer ~~or a member of the lawyer's firm, the representation is improper.~~ , the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also. – If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(f) for the definition of "informed consent."

RULE 3.8. SPECIAL RESPONSIBILITIES OF A PROSECUTOR

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

Rule 3.8. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
- (e) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent an employee or other person under the control of the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule ~~3.6~~-3.6 or this Rule.

Comment

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. See also Rule 3.3 (d), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

RULE 3.9. ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

[4] Paragraph (e) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[5] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (e) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (e) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

Rule 3.9. Advocate in nonadjudicative proceedings.

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

Comment

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 engage in activities that are comparable to those of an advocate appearing before a tribunal. For example, 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 the tribunalit honestly and in conformity with applicable rules of procedure.

[2] Given these policies, this Rule requires that a lawyer who appears before legislative bodies or administrative agencies in such nonadjudicative proceedings must adhere to Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5. Lawyers appearing under these circumstances must also adhere to all other applicable Rules, including Rules 4.1 through 4.4.

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

[4] Not all appearances before a legislative body or administrative agency are nonadjudicative within the meaning of this Rule. This Rule only applies when a lawyer represents a client in connection with an official or formal hearing or meeting to which the lawyer or the lawyer's client is presenting evidence or argument. Thus, this Rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; ~~representation in such a transaction~~or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

[5] When a lawyer appears before a legislative body or administrative agency acting in an adjudicative capacity, the legislative body or administrative agency is considered a "Tribunal" for purposes of these Rules, and all Rules relating to

representation by a lawyer before a Tribunal apply. See Rule 1.0(o) for the definition of “Tribunal.”

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

~~RULE 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS.~~

Rule 4.1. Truthfulness in statements to others.

- (a) In the course of representing a client a lawyer shall not knowingly:
- (1) make a false statement of material fact or law to a third person; ~~or~~
or
 - (2) 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.
- (b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Comment

COMMENT

[1] Misrepresentation. – 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 ~~failure to act.~~ 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.

[2] Statements of Fact. – *This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, 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 or tortious misrepresentation.*

Fraud by Client

[3] Fraud by Client. – *Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that that the lawyer knows is criminal or fraudulent. Paragraph (a)(2) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Sometimes a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. It also 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, however, substantive law may require a lawyer to disclose*

information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, even though the disclosure otherwise would be prohibited by Rule 1.6.

~~This Rule governs representation by a lawyer. The critical elements under paragraph (a) (1) are the making of a statement by the lawyer and the lawyer's knowledge that the statement is false. Paragraph (a) (2) is essentially a special instance of the duty under Rule 1.2 (d), which forbids a lawyer to assist a client in conduct that is criminal or fraudulent.~~

[4] Disclosure. — As noted in the ~~Comment~~comment to Rule 1.6, the duty imposed by Rule 4.1 may require a lawyer to disclose information that otherwise is confidential and to correct or withdraw a statement. However, the constitutional rights of defendants in criminal cases may limit the extent to which counsel for a defendant may correct a misrepresentation that is based on information provided by the client. See ~~Comment~~comment to Rule 3.3.

~~**RULE 4.2. COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL**~~

Rule 4.2. Communication with person represented by counsel.

(a) Except as provided in paragraph (b), in representing a client, a lawyer shall not communicate about the subject of the representation with a person who the lawyer knows is represented in the matter by another lawyer unless the lawyer has the consent of the other lawyer or is authorized by law or court order to do so.

(b) If the person represented by another lawyer is an organization, the prohibition extends to each of the organization's (1) current officers, directors, and managing agents and (2) current agents or employees who supervise, direct, or regularly communicate with the organization's lawyers concerning the matter or whose acts or omissions in the matter may bind the organization for civil or criminal liability. The lawyer may not communicate with a current agent or employee of the organization unless the lawyer first has made inquiry to ensure that the agent or employee is not an individual with whom communication is prohibited by this paragraph and has disclosed to the individual the lawyer's identity and the fact that the lawyer represents a client who has an interest adverse to the organization.

(c) A lawyer may communicate with a government official about matters that are the subject of the representation if the government official has the authority to redress the grievances of the lawyer's client and the lawyer first makes the disclosures specified in paragraph (a).

Committee Note ~~The changes in the text and comment to Rule 4.2, including substitution~~ **note.** — The use of the word “person” for “party” in paragraph (a), ~~are~~ is not intended to enlarge or restrict the extent of permissible law enforcement activities of government lawyers under applicable judicial precedent.

COMMENT

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the lawyer-client relationship, and the uncounseled disclosure of information relating to the representation.

[2] **This Rule does not prohibit communication with a person, or an employee or agent of the person, 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 nonlawyer 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 or legal authorization for communicating with a represented person is permitted to do so.**

[3] Communications authorized by law include communications in the course of investigative activities of lawyers representing governmental entities, directly or through investigative agents, before the commencement of criminal or civil enforcement

proceedings if there is applicable judicial precedent holding either that the activity is permissible or that the Rule does not apply to the activity. The term "civil enforcement proceedings" includes administrative enforcement proceedings. Except to the extent applicable judicial precedent holds otherwise, a government lawyer who communicates with a represented criminal defendant must comply with this Rule.

[4] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order in exceptional circumstances. For example, when a represented criminal defendant expresses a desire to speak to the prosecutor without the knowledge of the defendant's lawyer, the prosecutor may seek a court order appointing substitute counsel to represent the defendant with respect to the communication.

[5] This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by counsel concerning the matter to which the communication relates. The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[6] If an agent or employee of a represented person that is an organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4 (f). In communicating with a current agent or employee of an organization, a lawyer must not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of the organization. Regarding communications with former employees, see Rule 4.4 (b).

[7] The prohibition on communications with a represented person applies only if the lawyer has actual knowledge that the person in fact is represented in the matter to be discussed. Actual knowledge may be inferred from the circumstances. The lawyer cannot evade the requirement of obtaining the consent of counsel by ignoring the obvious.

[8] Rule 4.3 applies to a communication by a lawyer with a person not known to be represented by counsel.

[9] Paragraph (c) recognizes that special considerations come into play when a lawyer is seeking to redress grievances involving the government. Subject to certain conditions, it permits communications with those in government having the authority to redress the grievances (but not with any other government personnel) without the prior consent of the lawyer representing the government in the matter. Paragraph (c) does not, however, permit a lawyer to bypass counsel representing the government on every issue that may arise in the course of disputes with the government. Rather, the paragraph provides lawyers with 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 does not provide direct access on routine disputes, such as ordinary discovery disputes or extensions of time.

~~RULE 4.3. DEALING WITH UNREPRESENTED PERSON~~

Rule 4.3. Dealing with unrepresented person.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Comment

COMMENT

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. ~~During the course of a lawyer's representation of a client, the lawyer should not give advice to an~~ In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person ~~other than the advice to obtain counsel.~~ For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

RULE 4.4. RESPECT FOR RIGHTS OF THIRD PERSONS

[2] A lawyer should not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client. This distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the lawyer should not give any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has 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.

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 use methods of obtaining evidence that the lawyer knows violate the legal rights of such a person.

(b) In communicating with third persons, a lawyer representing a client in a matter shall not seek information relating to the matter that the lawyer knows or reasonably should know is protected from disclosure by statute or by an established evidentiary privilege, unless the protection has been waived. The lawyer who receives information that is protected from disclosure shall (1) terminate the communication immediately and (2) give notice of the disclosure to any tribunal in which the matter is pending and to the person entitled to enforce the protection against disclosure.

Committee Note: If the person entitled to enforce the protection against disclosure is represented by counsel, the notice required by this Rule shall be given to the person's counsel. See Md. Rule 1-331 and Maryland Rule of Professional Conduct 4.2.

Cross-References

See Camden v. Maryland, 910 F. Supp. 1115 (D. Md. 1996).

Comment

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.

[2] Third persons may possess information that is confidential to another person under an evidentiary privilege or under a law providing specific confidentiality protection, such as trademark, copyright, or patent law. For example, present or former organizational employees or agents may have information that is protected as a privileged attorney-client communication or as work product. A lawyer may not knowingly seek to obtain confidential information from a person who has no authority to waive the privilege. Regarding current employees of a represented organization, see also Rule 4.2.

LAW FIRMS AND ASSOCIATIONS

~~RULE 5.1. RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER.~~

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, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the ~~rules of professional conduct.~~ 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.~~ Rules of Professional Conduct.

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

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

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

Comment

COMMENT

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

[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.

~~The~~^[3] Other measures that may be required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and occasional admonition periodic review of compliance with the required systems ordinarily might be sufficient. In a large firm, or in practice situations in which ~~intensely~~ difficult ethical problems frequently arise, more elaborate ~~procedures~~ measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and ~~a lawyer having authority over the work of another~~ the partners may not assume that ~~the subordinate lawyer~~ all lawyers associated with the firm will inevitably conform to the Rules.

~~Paragraph (c) (1)~~^[4] expresses a general principle of personal responsibility for acts of another. See also Rule 8.4 (a).

^[5] Paragraph (c) (2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has ~~such~~ supervisory authority in particular circumstances is a question of fact. Partners ~~of a private firm~~ and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily ~~has direct authority over~~ also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of ~~the partner~~ that lawyer's involvement and the seriousness of the misconduct. ~~The~~ A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

^[6] 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.

^[7] 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.

~~RULE 5.2. RESPONSIBILITIES OF A SUBORDINATE LAWYER~~

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

Rule 5.2. Responsibilities of a subordinate lawyer.

(a) A lawyer is bound by the ~~rules of professional conduct~~ **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~~ **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

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~~

Rule 5.3. Responsibilities regarding nonlawyer assistants.

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

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

(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~~ Rules of Professional Conduct if engaged in by a lawyer if:

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

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

Comment

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~~ must 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 nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

RULE 5.4. PROFESSIONAL INDEPENDENCE OF A LAWYER

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 purchases the practice of a lawyer who is deceased or disabled or who has disappeared may, pursuant to the provisions of Rule 1.17, pay the purchase price to the estate or representative of the lawyer.

(3) a lawyer who undertakes to complete unfinished legal business of a ~~deceased, retired, disabled, or suspended~~ lawyer may pay to ~~the~~that lawyer or that lawyer's estate ~~of the deceased lawyer that~~ proportion of the total compensation which fairly represents the services rendered by the ~~deceased~~former lawyer; ~~and~~

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

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) 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.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

Cross references.-Maryland Rule 16-760(d)(6).

COMMENT

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

~~RULE 5.5. UNAUTHORIZED PRACTICE OF LAW~~

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

Rule 5.5. Unauthorized practice of law; multijurisdictional practice of law.

(a) A lawyer shall not: ~~(a)~~ — practice law in a jurisdiction ~~where doing so violates~~ in violation of 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.~~ assist another in doing so.

Comment

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission; or

(2) are services that the lawyer is authorized to provide by federal law or

other law of this jurisdiction.

COMMENT

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer's assisting another person.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing

[3] A lawyer may provide 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. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.

RULE 5.6. RESTRICTIONS ON RIGHT TO PRACTICE

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in

this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word “admitted” in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. A lawyer who is not admitted to practice in this jurisdiction must obtain admission *pro hac vice* before appearing before a tribunal or administrative agency, as provided by Rule 14 of the Rules Governing Admission to the Bar. See also Md. Code Bus. Occ. & Prof. § 10-215.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted *pro hac vice*. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other

alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain permission *pro hac vice* in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require. See Rule 14 of the Rules Governing Admission to the Bar regarding admission to appear in arbitrations.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that non-lawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraph (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer is governed by Md. Code Bus. Occ. & Prof. § 1-206(d). In general, the employed lawyer is subject to disciplinary proceedings under the Maryland Rules and must comply with Md. Code Bus. Occ. & Prof. § 10-215 (and Rules Governing Admission to the Bar 14) for authorization to appear before a tribunal. See also Rules Governing Admission to the Bar Rule 15 (as to legal services attorneys).

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a) and Md. Rules 16-701, 16-731.

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Rules 7.1 to 7.5 govern whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction.

Rule 5.6. Restrictions on right to practice.

A lawyer shall not participate in offering or making:

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

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

Comment

COMMENT

[1] An agreement restricting the right of ~~partners or associates~~lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such ~~agreements~~agreement except for restrictions incident to provisions concerning retirement benefits for service with the firm.

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

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

Comment

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 of 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] A lawyer is not required to comply with Rule 1.8(a) when referring a person to a separate law-related entity owned or controlled by the lawyer for the purpose of providing services to the person. If the lawyer also is providing legal services to the person, the lawyer must exercise independent professional judgment in making the referral. See Rule 2.1. Moreover, the lawyer must explain the matter to the person to the extent necessary for the person to make an informed decision to accept the lawyer's recommendation. See Rule 1.4(b).

[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 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(a)(2) and 1.8(b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, 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's decisional law.

[11] When the full protections of all of 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. See also Rule 8.4 (Misconduct).

[12] Regarding a lawyer's referrals of clients to non-lawyer professionals, see Rule 7.2(c) and related Comment.

PUBLIC SERVICE

Rule 6.1. Pro Bono Publico Service.

(a) Professional Responsibility. A lawyer has a professional responsibility to render pro bono publico legal service.

(b) Discharge of Professional Responsibility. A lawyer in the full-time practice of law should aspire to render at least 50 hours per year of pro bono publico legal service, and a lawyer in part-time practice should aspire to render at least a pro rata number of hours.

(1) Unless a lawyer is prohibited by law from rendering the legal services described below, a substantial portion of the applicable hours should be devoted to rendering legal service, without fee or expectation of fee, or at a substantially reduced fee, to:

(A) people of limited means;

(B) charitable, religious, civic, community, governmental, or educational organizations in matters designed primarily to address the needs of people of limited means;

(C) individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties, or public rights; or

(D) charitable, religious, civic, community, governmental, or educational organizations in matters in furtherance of their organizational purposes when the payment of the standard legal fees would significantly deplete the organization's economic resources or would otherwise be inappropriate.

(2) The remainder of the applicable hours may be devoted to activities for improving the law, the legal system, or the legal profession.

(3) A lawyer also may discharge the professional responsibility set forth in this Rule by contributing financial support to organizations that provide legal services to persons of limited means.

(c) Effect of Noncompliance. This Rule is aspirational, not mandatory. Noncompliance with this Rule shall not be grounds for disciplinary action or other sanctions.

Cross references – For requirements regarding reporting pro bono legal service, see Md. Rule 16-903.

COMMENT

[1] The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation, and the administration of justice. This Rule expresses that policy but is not intended to be enforced through the disciplinary process.

[2] The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. 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.

[3] The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. 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, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession, the government, and the courts to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and more will be developed by the profession, the government, and the courts. Every lawyer should support all proper efforts to meet this need for legal services.

[4] The goal of 50 hours per year for pro bono legal service established in paragraph (b) of this Rule is aspirational; it is a goal, not a requirement. The number used is intended as an average yearly amount over the course of the lawyer's career.

[5] A lawyer in government service who is prohibited by constitutional, statutory, or regulatory restrictions from performing the pro bono legal services described in paragraph (b)(1) of the Rule may discharge the lawyer's responsibility by participating in activities described in paragraph (b)(2).

Rule 6.2. Accepting appointments.

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

- (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 an unreasonable financial burden on the lawyer; ~~or~~ 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

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 publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

[2] Appointed Counsel. *— 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 unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.*

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

~~RULE 6.3. MEMBERSHIP IN LEGAL SERVICES ORGANIZATION~~

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~~ 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

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~~

Rule 6.4. Law reform activities affecting client interests.

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

Comment

COMMENT

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. 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 ~~benefitted.~~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(a) 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(a) 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, pro se counseling programs, or programs in which lawyers represent clients on a pro bono basis for the purposes of mediation only, 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.

[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 Rules 1.6 and 1.9(c), are applicable to the limited representation.

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

[4] Because the limited nature of the services significantly reduces the risk of

conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not 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(a) and 1.10 become applicable.

INFORMATION ABOUT LEGAL SERVICES

~~RULE 7.1. COMMUNICATIONS CONCERNING A LAWYER'S SERVICES~~

Rule 7.1. Communications concerning a lawyer's services.

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

- (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; ~~or~~ or
- (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Comment

COMMENT

[1] This Rule governs all communications about a lawyer's services, including advertising and direct personal contact with potential clients permitted by Rules 7.2 and 7.3. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

[2] A communication will be regarded as false or misleading if it (1) asserts the lawyer's record in obtaining favorable awards, verdicts, judgments, or settlements in prior cases, unless it also expressly and conspicuously states that each case is different and that the past record is no assurance that the lawyer will be successful in reaching a favorable result in any future case, or (2) contains an endorsement or testimonial as to the lawyer's legal services or abilities by a person who is not a bona fide pre-existing client of the lawyer and has not in fact ~~benefitted~~ benefited as such from those services or abilities.

~~RULE 7.2. ADVERTISING~~

[3] See also Rule 8.4(f) for the prohibition against stating or implying an ability to influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Rule 7.2. Advertising.

(a) Subject to the requirements of Rules 7.1 and 7.3 (b), a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television advertising, or through communications not involving in person contact.

(b) A copy or recording of an advertisement or such other communication shall be kept for at least three years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may

(1) pay the reasonable cost of advertising or written communication permitted by this Rule, ~~may;~~

(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service ~~or other legal service organization, and may;~~

(3) pay for a law practice purchased in accordance with Rule ~~1.17.~~ 1.17;
and

(4) refer clients to a non-lawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(d) Any communication made pursuant to this Rule shall include the name of at least one lawyer responsible for its content.

(e) An advertisement or communication indicating that no fee will be charged in the absence of a recovery shall also disclose whether the client will be liable for any expenses.

Cross references. — Maryland Rule of Professional Conduct 1.8(e).

(f) A lawyer, including a participant in an advertising group or lawyer referral service or other program involving communications concerning the lawyer's services, shall be personally responsible for compliance with the provisions of Rules 7.1, 7.2, 7.3, 7.4, and 7.5 and shall be prepared to substantiate such compliance.

Comment

COMMENT

[1] 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 moderate 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. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or ~~overreaching~~ over-reaching.

[2] 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.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

[5] Paragraph (a) permits communication by mail to a specific individual as well as general mailings, but does not permit contact by telephone or in person delivery of written material except through the postal service or other delivery service.

[6] *Record of ~~Advertising~~ advertising.* — Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

[7] *Paying ~~Others to Recommend a Lawyer~~ others to recommend a lawyer.* — A lawyer is allowed to pay for advertising permitted by this Rule and for the purchase of

a law practice in accordance with the provisions of Rule 1.17, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

[8] *Assignments or Referrals from a Legal Services Plan or Lawyer Referral Service.* – A lawyer who accepts assignments or referrals from a legal services plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer’s professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communications must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[9] *Reciprocal Referral Agreements with Non-lawyer Professionals.* – A lawyer may agree to refer clients to a non-lawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer to provide them with legal services. Such reciprocal referral arrangements must not be exclusive or otherwise interfere with the lawyer’s professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). The client must also be informed of the existence and nature of the referral agreement. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. Conflicts of interest created by such arrangements are governed by Rule 1.7. Referral agreements between lawyers who are not in the same firm are governed by Rule 1.5(e).

[10] *Responsibility for Compliance*~~compliance~~. — Every lawyer who participates in communications concerning the lawyer's services is responsible for assuring that the specified Rules are complied with and must be prepared to substantiate compliance with those Rules. That may require retaining records for more than the three years specified in paragraph (b) of this Rule.

RULE 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS

Rule 7.3. Direct contact with prospective clients.

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

~~(a) — A lawyer may initiate in person contact with a prospective client for the purpose of obtaining professional employment only in the following circumstances and subject to the requirements of paragraph (b):~~

~~(1) — if the prospective client is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client;~~

~~(2) — under the auspices of a public or charitable legal services organization; or~~

~~(3) — under the auspices of a bona fide political, social, civic, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization.~~

~~(b) — A lawyer shall not contact, or send a communication to, a prospective client for the purpose of obtaining professional employment if:~~

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone, or real-time electronic contract even when not otherwise prohibited by paragraph (a), if:

~~(1)~~ (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the ~~person~~ prospective client is such that the ~~person~~ prospective client could not exercise reasonable judgment in employing a lawyer;

(2) the ~~person~~ prospective client has made known to the lawyer a desire not to ~~receive communications from~~ be solicited by the lawyer; or

(3) the ~~communication~~ solicitation involves coercion, duress, or harassment.

Comment

(c) Every written, recorded, or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in

need of legal services in a particular matter shall include the words “Advertising Material” on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular in matter covered by the plan.

Cross References. – For additional restrictions and requirements for certain communications, see Md. Code Bus. Occ. & Prof. § 10-605.1, 10-605.1.

COMMENT

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in- person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the

dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(2) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[7] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or

directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

~~Unrestricted solicitation involves definite social harms. Among these are harassment, overreaching, provocation of nuisance litigation and schemes for systematic fabrication of claims, all of which were experienced prior to adoption of restrictions on solicitation. Measures reasonably designed to suppress these harms are constitutionally legitimate. At the same time, measures going beyond realization of such objectives would appear to be invalid under relevant decisions of the United States Supreme Court.~~

~~In determining whether a contact is permissible under Rule 7.3 (b), it is relevant to consider the time and circumstances under which the contact is initiated. For example, a person undergoing active medical treatment for traumatic injury is unlikely to be in an emotional state in which reasonable judgment about employing a lawyer can be exercised.~~

~~**RULE 7.4. COMMUNICATION OF FIELDS OF PRACTICE**~~

Rule 7.4. Communication of fields of practice.

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law, subject to the requirements of Rule 7.1. A lawyer shall not hold himself or herself out publicly as a specialist.

Comment

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation.

COMMENT

[1] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services; for example, in a telephone directory or other advertising. If a lawyer practices only in ~~ertain~~such fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate.

~~RULE 7.5. FIRM NAMES AND LETTERHEADS~~

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office.

Rule 7.5. Firm names and letterheads.

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

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those 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

COMMENT

[1] A firm may be designated by the names of all or some of its members, by the names of deceased or retired 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 firm may not be designated by the names of non-lawyers. See Rule 5.4. 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. 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, or the name of a nonlawyer.

[2] A lawyer in private practice may not practice under a name which implies any connection with the government or any agency of the federal government, any state or any political subdivision, or with a public or charitable legal services organization. This is to prevent a situation where nonlawyers might conclude that they are dealing with an agency established or sanctioned by the government, or one funded by either the government or public contributions and thus charging lower fees. The use of any of the following ordinarily would violate this Rule:

1. The proper name of a government unit, whether or not identified with the type of unit. Thus, a name could be the basis of a disciplinary proceeding if it included the designation "Annapolis" or "City of Annapolis," "Baltimore," or "Baltimore County," "Maryland," or "Maryland State" (which could be a violation as a confusing although mistaken reference to the state or

under the third application of this instruction below).

2. The generic name of any form of government unit found in the same area where the firm practices, e.g., national, state, county, or municipal.

3. The name of or a reference to a college, university, or other institution of higher learning, regardless of whether it has a law school, unless the provider of legal higher learning. For example, the names "Georgetown Legal Clinic (or "Law Office," etc.)" and "U.B. Legal Clinic (or "Law Office," etc.)" could both violate this Rule if used by unaffiliated organizations.

4. The words "public," "government," "civic," "legal aid," "community," "neighborhood," or other words of similar import suggesting that the legal services offered are at least in part publicly funded. Although names such as "Neighborhood Legal Clinic of John Doe" might otherwise appear unobjectionable, the terms "legal aid," "community" and "neighborhood" have become so associated with public or charitable legal services organizations as to form the basis of disciplinary proceedings.

[3] Firm names which include geographical names which are not also government units, or adjectives merely suggesting the context of the practice (e.g., "urban," "rural") ordinarily would not violate Rule 7.5. The acceptability of the use of a proper or generic name of a government unit when coupled with an adjective or further description (beyond mere reference to the provision of legal services) should be judged by the general policy underlying Rule 7.5, and any doubt regarding the misleading connotations of a name may be resolved against use of the name.

[4] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

Rule 7.6.

Maryland Ethics 2000 Committee Note.- After due consideration, the Committee recommends against the adoption of ABA Rule 7.6 dealing with “pay-to-play,” the text of which is as follows:

Rule 7.6: Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

Although Model Rule 7.6 was adopted by the ABA nearly four (4) years ago, to the best of our knowledge no jurisdiction has adopted it. The application of the Rule would be very limited, and the Committee does not believe it is desirable that Maryland have such a Rule.

MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.1. BAR ADMISSION AND DISCIPLINARY MATTERS

Rule 8.1. Bar admission and disciplinary matters.

An applicant for admission or reinstatement 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 material fact; ~~or~~ or
- (b) **fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.**

Comment

COMMENT

[1] The duty imposed by this Rule extends to persons seeking admission or reinstatement to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission or for reinstatement, it may be the basis for subsequent disciplinary action if the person is admitted or reinstated, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] The Court of Appeals has considered this Rule applicable when information is sought by the Attorney Grievance Commission from any lawyer on any matter, whether or not the lawyer is personally involved. See Attorney Grievance Commission v. Oswinkle, 364 Md. 182 (2001).

[3] 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.

[4] 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.

RULE 8.2. JUDICIAL AND LEGAL OFFICIALS

Cross references. – Md. Rule 16-701(j) (defining “Reinstatement”).

Rule 8.2. Judicial and legal officials.

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) Canon 5C (4) of Rule 16-813, Maryland Code of Judicial Conduct, provides that a lawyer becomes a candidate for judicial office when the lawyer files a certificate of candidacy in accordance with Maryland election laws, but no earlier than two years prior to the general election for that office. ~~A candidate for judicial position shall not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he shall not announce in advance his conclusions of law on disputed issues to secure class support, and he shall do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.~~ office:

(1) shall maintain the dignity appropriate to the judicial office that the lawyer seeks and act in a manner consistent with the independence and integrity of the judiciary;

(2) shall not make a pledge or promise of conduct in office other than the faithful and impartial performance of the duties of the office;

Comment

Committee note: Rule 8.2 (b)(2) does not prohibit a candidate from making a pledge or promise respecting improvements in court administration.

(3) shall not misrepresent his or her identity or qualifications, the identity or qualifications of an opponent, or any other fact;

(4) shall not allow any other person to do for the candidate what the candidate is prohibited from doing; and

(5) may respond to a personal attack or attack on the candidate's record as long as the response does not otherwise violate this Rule.

COMMENT

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] To maintain the fair and independent administration of justice, lawyers are

encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

RULE 8.3. REPORTING PROFESSIONAL MISCONDUCT

Rule 8.3. Reporting professional misconduct.

(a) A lawyer **having knowledge 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 **having knowledge 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~~-1.6 or information gained by a lawyer or judge while participating in a lawyer or judge assistance or professional guidance program.

Comment

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. For the definition of "knows" under these Rules, see Rule 1.0(g).

[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.

[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 bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[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 8.4. MISCONDUCT

[5] Information about a lawyer's or judge's misconduct or fitness may be received

by a lawyer in the course of that lawyer's participation in an approved lawyer or judge assistance or professional guidance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek assistance through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in harm to their professional careers and injury to the welfare of client and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in such programs; such an obligation, however, may be imposed by the rules of the program or other law.

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) **commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;**
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of this paragraph;
- (f) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (fg) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

COMMENT

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

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense 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, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when

considered separately, can indicate indifference to legal obligation.

[3] Sexual misconduct or sexual harassment involving colleagues, clients, or co-workers may violate paragraph (d) or (e). This could occur, for example, where coercion or undue influence is used to obtain sexual favor in exploitation of these relationships. See ~~also~~ Attorney Grievance Commission v. Goldsborough, 330 Md. 342 (1993). See also Rule 1.7.

[4] Paragraph (e) reflects the premise that a commitment to equal justice under the law lies at the very heart of the legal system. As a result, even when not otherwise unlawful, a lawyer who, while acting in a professional capacity, engages in the conduct described in paragraph (e) and by so doing prejudices the administration of justice commits a particularly egregious type of discrimination. Such conduct manifests a lack of character required of members of the legal profession. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. A judge, however, must require lawyers to refrain from the conduct described in Paragraph (e). See Md. Code of Judicial Conduct, Canon 3 A (10).

[5] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2 (d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[6] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

~~RULE 8.5. JURISDICTION~~

Rule 8.5. Disciplinary Authority; Choice of Law.

(a) Disciplinary Authority. A lawyer admitted by the Court of Appeals to practice in this State is subject to the disciplinary authority of this State ~~for a violation of these rules in this or any other jurisdiction. (b)~~, regardless of where the lawyer's conduct occurs. A lawyer not admitted ~~by the Court of Appeals to practice~~ in this State is also subject to the disciplinary authority of this State ~~for conduct that constitutes a violation of these Rules and that:~~ if the lawyer provides or offers to provide any legal services in this State. A lawyer may be subject to the disciplinary authority of both this State and another jurisdiction for the same conduct.

~~(1) — involves the practice of law in this State by that lawyer, or~~

~~(2) — involves that lawyer holding himself or herself out as practicing law in this State, or~~

~~(3) — involves the practice of law in this State by another lawyer over whom that lawyer has the obligation of supervision or control.~~

Comment

(b) Choice of Law. In any exercise of the disciplinary authority of this State, the rule of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

COMMENT

[1] Disciplinary Authority. – It is longstanding law that the conduct of a lawyer admitted to practice in this State is subject to the disciplinary authority of this State. Extension of the disciplinary authority of this State to other lawyers who provide or offer to provide legal services in this State is for the protection of the citizens of this State. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. A lawyer who is subject to the disciplinary authority of this State under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this State.

[2] Choice of Law. – 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. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of 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 a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of professional conduct of that tribunal. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

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

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

VI. PUBLIC COMMENTS AND COMMITTEE RESPONSES

A. Introduction

The Committee received a substantial number of comments from the public. The Committee extends its gratitude to those who took the time and interest to submit these comments. They have proven invaluable in helping us to refine our work.

In order to facilitate the Court's review of these comments, the comments have been edited to correspond to Rules as they appear in the Rules of Professional Conduct. As a result, communications that address different rules have been split up. In addition, spelling has been silently regularized and the Committee has edited transitional words and non-substantive comments to promote readability without sacrificing substance. Also to promote readability and avoid repetition, when a single communication includes comments on many rules, only the first appearance of the communication below includes introductory or concluding material of a non-substantive nature. In rare instances, a comment might focus on one Rule while touching on others tangentially, in which case the comment is included under the Rule primarily addressed.

The Committee has provided responses to most of the Comments it has received. The Report notes when the Committee's response is to more than one comment or to a set of comments.

In order that there be a complete Record of public comments received by the Committee, the Committee will make available an unedited compendium of public comments in the form in which they were received.

B. Public Comments and Committee Responses

Public Comments: Preamble

From: samroy [mailto:samroy@screaminet.com]
Sent: Friday, September 05, 2003 9:20 PM
To: rrubinson@ubmail.ubalt.edu,
Subject: Comments on Md's Lawyers' Rules of Conduct
Importance: High

[Prof. Rubinson, Good Evening!!!](#)

I am compelled to send comments on this document, as I just happened to see it. In just reviewing the second page, PREAMBLE: A LAWYER'S RESPONSIBILITIES, I see that a Lawyer's Responsibilities have NOT been defined as "an officer of the legal system" on this page; when this most important role of a Lawyer is what sets a Lawyer apart from another person with Graduate Degrees or even a Doctorate Degree

(Ph.D.)!! Thus, this role should be the first and foremost role of a Lawyer, and should be stated as such, and NOT relegated in place as a second(ary) role, and then to make matters worse, NO responsibilities are defined for this important role that sets a Lawyer apart to begin with!!

I hope you will pass on these comments to the appropriate staff and the panel, even though it is after July 15, 2003 (last date for public comments). I thank you for your time in this important matter. I may make more comments after reviewing the rest of this lengthy document.

[SAM](#)

COMMITTEE'S RESPONSE:

While the Committee shares the writer's view that a lawyer's role as an "officer of the legal system" is crucial, we do not take the order in which lawyer's roles are listed in Comment [1] as a reflection of priority or importance. We thus do not believe it is necessary to depart from the ABA language in this instance.

[The following letter has been edited to include comments relating to the Preamble]

MILES & STOCKBRIDGE P.C.

James P. Garland
(410) 385-3755
igarl andliVmi lesstockbrid!e .com

Jefferson V. Wright
(410) 385-3600
iwrightiWmi lesstockbrid!e.com

July 15, 2003

VIA HAND DELIVERY

Professor Robert J. Rubinson .
University of Baltimore School of Law 40 West Chase Street
Baltimore, MD 21201

Re: Proposed 2003 Revisions to the Maryland Rules of Professional Conduct

Dear Professor Rubinson:

We are members of the Ethics Committee of Miles & Stockbridge P.C. and are principals of the firm. We are practicing members of the Maryland Bar. We are writing in response to the Rodowsky Committee's request for public comment regarding the proposed 2003 revisions to the Maryland Rules of Professional Conduct (the "Rules").

Having reviewed the proposed revisions, we submit the following comments in the hope that they will assist the Committee in its continuing deliberations. In making these comments, we do not speak on behalf of Miles & Stockbridge P.C., as the firm is not taking an institutional position with respect to the proposed revisions to the Rules. Rather, we write merely as individual members of the Maryland Bar, who each have been deeply involved with issues of ethics and professionalism for many years, to express our own concerns regarding a few of the proposed revisions.

First, we wish to express our appreciation for the difficult and challenging work undertaken by the Committee in drafting the proposed revisions. As our profession evolves to meet the demands of our rapidly changing economy and society, conforming the rules of conduct that govern our professional actions to the challenges of the new millennium is of the utmost importance. In undertaking this difficult task, the Committee is providing an invaluable service to the Maryland Bar and the legal profession as a whole.

As detailed below, our comments relate to the following proposed revisions:

(1) Proposed Section 20 of the Preamble, which states that "a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct;"

* * *

1. Section 20 of the Preamble

With respect to Section 20 of the Preamble, we respectfully suggest that the Committee strike the final sentence, which reads: "Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."

We make this suggestion for several reasons. First, this final sentence appears to contradict the language and intent of the preceding sentences of Section 20. One such sentence expressly provides that the Rules are "not designed to be a basis for civil liability." Similarly, the remaining sentences of Section 20 stress, properly in our view, that the purpose of the Rules is to "provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies." Having correctly set forth the purpose and intent of the Rules in these sentences, it appears counter-intuitive to then, in the last sentence of the same section, endorse the notion that an alleged violation of the Rules can form an evidentiary basis for establishing the standard of care in a professional malpractice or other civil lawsuit. This is especially troublesome in the context of the simultaneous proposal to delete the existing sentence that provides, "Accordingly,

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

The inclusion of the proposed last sentence in Section 20 of the Preamble is a dramatic departure from the traditional role of the Rules as a vehicle for providing professional guidance and facilitating effective peer review within the profession. By making a pronouncement as to the potential evidentiary value of an alleged violation of the Rules, the Rules begin to encroach upon the Maryland Rules of Evidence, thereby raising significant issues regarding the admissibility of an alleged violation of the professional conduct Rules in civil malpractice proceedings. Judgments as to the evidentiary value of alleged violations of the Rules should be addressed within the context of the Maryland Rules of Evidence.

Moreover, as a practical matter, inclusion of the last sentence invites litigation of the Rules in every civil malpractice action brought against an attorney in Maryland. This raises the likelihood of inconsistent application of the Rules by disciplinary panels, on the one hand, and by trial judges and juries throughout the state deciding civil claims, on the other. Complex issues of *res judicata* and collateral estoppel undoubtedly will arise as a result of parallel disciplinary and civil proceedings.

Finally, endorsing the evidentiary value of an alleged violation of the Rules will likely have the effect of increasing the amount of civil malpractice litigation against attorneys in Maryland. The traditional avenue for establishing the standard of care in a malpractice suit is through the testimony of an expert, who is subject to the evidentiary rigors of expert qualification and admissibility under the Maryland Rules of Evidence. If the Rules in and of themselves are accepted as sufficient evidence to establish the applicable standard of care, without expert testimony, the ability of a potential malpractice plaintiff to survive summary judgment and/or a motion for judgment is substantially enhanced. The end result likely will be an increase in malpractice litigation and a consequential increase in the cost of professional liability insurance for Maryland lawyers. The higher cost of insurance, of course, ultimately leads to higher rates for the provision of legal services in the State to the detriment of both the Maryland Bar and the clients they serve.

For these reasons, we respectfully suggest that the proposed new final sentence of Section 20 of the Preamble be stricken and the existing final sentence be retained.

* * *

In short, we believe that the proper role of the Rules is to provide guidance to practicing lawyers and to create a structure for effective peer review and discipline within the profession. They should not be used as a vehicle to enhance, supplement or otherwise supplant existing substantive areas of the law.

Please forward these comments to the Committee for their consideration, as well as our appreciation at the hard work and effort put into proposed substantial revisions by the members of the Committee. Thank you for your assistance.

Very truly yours,

James P. Garland

Jefferson V. Wright

COMMITTEE'S RESPONSE:

The Committee believes that it is appropriate and advisable for the Rules of Professional Conduct to provide attorneys with fair notice that activities that violate the Rules may contribute to a finding of civil liability. The Committee also appreciates the concerns expressed in this correspondence, and has accordingly modified its proposed language of Comment [20] of the Preamble as follows:

**Prior proposal (verbatim from the ABA Ethics 2000 Amendments):
“Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of a breach of the applicable standard of conduct.**

New proposal: “Nevertheless, in some circumstances, a lawyer’s violation of a Rule may be evidence of a breach of the applicable standard of conduct.”

Public Comment: Rule 1.0

I am opposed to the whole “informed consent” notion. I think it is a can of worms that will just give disgruntled clients a basis to sue over such nebulous terms as “adequate information and explanation”, “material risks”, and “reasonably available alternatives.” These terms will guarantee that every informed consent lawsuit will have to go to a jury.

James J. Nolan, Jr.
410-887-2654

COMMITTEE’S RESPONSE:

The Committee believes that the ABA’s substitution of “informed consent” for “consent after consultation” enhances clarity and provides more meaningful guidance for attorneys and protection for clients. The Committee thus believes the concept should be adopted.

Public Comment: Rule 1.2

UNIVERSITY OF MARYLAND SCHOOL OF LAW

1. The Maryland Rules of Professional Conduct should expressly authorize lawyers to limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent to it.

*Your proposed revisions of Maryland Rule 1.2 do exactly this. I believe this is the right approach. As you know, your proposed revisions track the ABA revisions of Model Rule 1.2(c), which authorize lawyers to "limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."*³

I was pleased to see that your proposed revisions also adopt, in substantial form, the ABA's revised Comments to Model Rule 1.2, which explain that "limited representation may be appropriate because the client has limited objectives for the representation", or because the client wishes to "exclude specific means that might

³ Model Rules of Prof'l Conduct R. 1.2(c) (2002). Several states have adopted this revision, either completely or in substantial part. See, e.g., revised rules of Maine and Washington, and proposed revision based on ABA Model Rule 1.2(c) pending before the Florida Supreme Court.

otherwise be used to accomplish the client's objectives.,⁴ One reason the client might wish to do this is because "the client thinks [the means] are too costly."⁵

Moreover, the proposed changes also include the ABA's new comment indicating that the scope of service has an effect on competency requirements: "Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *See* MODEL RULES OF PROF'L CONDUCT R. cmt. 1.2 (2002).

I commend your Committee for adding these comments as well.

I suggest that your Committee consider adding text to the new Comments to note the connection between limited representation and access to justice, *e.g.*, you might borrow from The ABA 2000 Ethics Commission, which said that the ultimate purpose of unlimited representation is to "expand access to legal services by providing limited but nonetheless valuable legal services to low or moderate income persons who otherwise would be unable to obtain counsel."⁶

Very truly yours,

Michael Millemann

COMMITTEE'S RESPONSE:

The Committee, of course, agrees with most of the writer's comments. While the Committee also agrees that limited representation can expand access to legal services, we believe that the Comment provides adequate background about this type of representation.

Public Comments: Rule 1.5

In view of the types and number of grievances I have seen over the past 22 years, and despite the failure of the ABA to adopt a proposed change to rule 1.5, let me suggest the following: "Absent a prior written engagement agreement with an ongoing client, and absent exigent circumstances when it would not be possible to have a written engagement agreement, every attorney-client relationship must be established by a written engagement agreement, signed by both attorney and client, and a copy given to the client, and the agreement must set forth any limitations by the attorney as to the time or scope of the engagement. No attorney-client relationship shall commence, with the exceptions noted above, until the written engagement agreement has been completed." [Note, I take

⁴ Model Rules of Prof'l Conduct R. 1.2 cmt. 6 (2003).

⁵ *Id.* The Reporter's notes state: "Cost has been added as a factor that might justify limitation." 2000 Report on Evaluation of the Rules, *supra* note 3, at 147.

⁶ *Id.*

no pride in the wording of the proposed rule, hoping that it will be adopted, with appropriate editing].

* * *

Third, I urge that the Court of Appeals establish mandatory arbitration for fee disputes between an attorney and a client, the arbitration panel to include at least one public member.

Mel Hirshman, Bar Counsel

COMMITTEE'S RESPONSE:

While written engagement or retainer agreements are virtually always advisable, the Committee believes that a requirement that they be executed in virtually all instances would be unduly burdensome, particularly on solo practitioners.

A requirement to arbitrate would, in the view of the Committee, deprive attorneys of the right to a jury trial. Nothing in these Rules, however, discourages or inhibits the desirability of pursuing arbitration for fee disputes.

Re: Impact of Rule 1.5 on Elder Law/Medicaid Planning

I read the proposed regulation and Comment 4 with some concern. Elder law attorneys are frequently hired to apply for means tested benefits for their clients, most often Medical Assistance long term care benefits. These benefits shift the burden of paying a \$5,000-\$8,000/month nursing bill to the State for eligible individuals. An applicant for benefits can have no more than \$2,000 or \$2,500 in countable assets on the first of the month in which they are applying for benefits. Most elder law attorneys require a retainer, placed into their escrow accounts, which is withdrawn as services are provided, either at flat rates or at hourly rates. If those funds are deemed to be the client's funds, subject to the order of the client at any time, they will be deemed available resources and, to the extent that they exist, they will render the client ineligible for the benefits that the attorney has been retained to obtain. The attorney then faces the dilemma of working without compensation or the client is denied counsel. Neither of these alternatives would appear to be consistent with the intent of the Rules. Our retainer agreement deems the balance of the retainer as non-refundable as of the first day of the month for which means tested benefits are sought, with any remaining funds applied to future services, usually provided in the month of application and following up on the application.

As President of the Maryland/D.C. Chapter of the National Academy of Elder Law Attorneys, Inc. I ask that this issue and all its' consequences, be fully reviewed in the issuance of the new Rules.

Jason A. Frank

The Elder Law Section of the Maryland State Bar Association submits the following comments on proposed changes to Rule 1.5. We realize the deadline for comments was July 15, but we did not have the opportunity to meet and discuss this issue until the evening of July 15. We respectfully request your consideration of our comments despite our tardiness of a few days.

The Elder Law Section has 465 members, the second largest section in the MSBA. Our Section has won the MSBA "best section" award for the past two years. One of the Section's award-winning projects involves providing pro bono representation to indigent clients in appealing denials of Medicaid eligibility.

Many members of our section assist elderly clients in qualifying for Medical Assistance ("Medicaid") in a nursing home. To be eligible for Medicaid, a single person in a nursing facility cannot have more than \$2,500 in assets on the first day of the month for which eligibility is sought. An application for Medicaid, which is submitted only after the client has "spent down" his or her assets, often requires significant time and effort by the applicant's attorney, as well as knowledge of complicated Medicaid regulations and policies. The attorney must meet with the state Department of Social Services caseworker, organize and file often voluminous financial documentation, and work with the client's family and the caseworker to ensure all information is provided in proper order.

Our specific concern is with the first sentence of Comment 4 to proposed Rule 1.5. Most elder law attorneys require either a retainer, which is deposited into their escrow accounts and withdrawn as services are provided, or a reasonable engagement fee. If some portion of those funds is deemed to be "unearned" as of the Medicaid eligibility date applied for, and is therefore treated as subject to the client's control, that amount may be deemed to be an asset available to the client. If deemed to be an asset, that portion of the legal fee could cause the client to be ineligible for the very Medicaid benefits that the attorney was engaged to obtain.

Rule 1.5 is intended to protect the client from attorney misuse of the legal fees charged to the client. However, in this context, a requirement to treat some portion of the fee as belonging to the client defeats the client's purpose in retaining the attorney in the first place, namely

qualifying for Medicaid benefits. The client would be prejudiced in this instance if a portion of the fees paid to the attorney were deemed to remain available to the client.

Take the following example: Ms. Jones is in a nursing home that charges \$6,000 a month. She has retained an attorney to help her qualify for Medicaid. On June 1, she has \$2,300 in her bank account. Of the retainer she paid to her attorney, \$500 remains in the lawyer's escrow account. The \$500 is earmarked to pay for legal services required to complete the application process and to ensure that she will be eligible for Medicaid as of June 1, because she does not have sufficient funds to pay the \$6,000 for her next nursing home bill. If her only asset is her bank account of \$2,300, then she will qualify for Medicaid as of June 1. But if the \$500 in the attorney's escrow account is also treated as her asset, then she will be ineligible for Medicaid ($\$2,300 + \$500 = \$2,800$, which exceeds the \$2,500 limit).

In this example, Ms. Jones' goal is to qualify promptly for Medicaid. If, under proposed Comment 4, her attorney were required to refund the portion of the fee that had not been earned as of June 1, or if it were treated as Ms. Jones' asset, then she would be unable to qualify for Medicaid. Treatment of any portion of the legal fee as her asset prejudices her ability to accomplish her goal, Medicaid eligibility, and is adverse to her interests.

In the Medicaid application process, much of the work is completed before the eligibility date applied for, which is the date when the client's assets must be below \$2,500. But some of the lawyer's services must be rendered after that date, including the required face-to-face interview with the Department of Social Services, responding to queries and additional document requests from the Department, defending the client's position, and preventing errors and abuses in nursing home billing while the Medicaid application is pending and afterwards.

If some portion of the attorney's fee could arguably be considered as an asset available to the client, then an attorney representing a Medicaid applicant would face a difficult dilemma. The attorney would either have to complete the application process without compensation or leave the client unrepresented at a critical point. If attorneys are expected or forced to provide legal services without compensation, then they may be reluctant to take these cases, and the vulnerable population of nursing home residents may be denied much-needed legal counsel. This result does not appear to be consistent with the intent of Rule 1.5.

This issue deserves further consideration and study to avoid unintended harm to clients, particularly to elderly and disabled nursing home residents who have a great need for legal representation. We understand that other

members of the bar, such as those providing representation to debtors in bankruptcy proceedings, also have concerns about Comment 4 to the proposed Rule. Perhaps the first sentence of Comment 4 should be amended to read as follows: "A lawyer may require advance payment of a fee, but is obliged to return any unearned portion, except where return of the unearned portion would be detrimental to the client's interests or contrary to the purpose for which the lawyer was retained." Any such retention of a portion of the fee would, of course, remain subject to the requirements of reasonableness under the criteria set forth in subsection (a) of the proposed Rule.

In any event we would respectfully suggest that the Committee give further consideration to possible prejudice to clients if the first sentence of Comment 4 is allowed to stand as it now reads, and solicit comment from other sections of MSBA whose clients may be affected. Representatives of the Elder Law Section would welcome the opportunity to meet with the Committee to discuss this important issue.

Respectfully submitted by the MSBA Elder Law Section Council

BRAULT, GRAHAM, SCOTT & BRAULT, L.L.C.

The Honorable Lawrence F. Rodowsky

620 Mitchell Courthouse

100 North Calvert street Baltimore, MD 21202

Dear Judge Rodowsky:

I have been retained to represent a lawyer for whom there is currently a docketed Complaint awaiting disposition by trial or otherwise in Maryland. The facts of the case are simple and will not be disputed. The lawyer was retained to defend a young man indicted for first degree murder in the District of Columbia. In discussing the case with his family, the lawyer agreed to represent the lawyer in exchange for a flat fee which he quoted. He obtained a written retainer in which he specified that the fee was not refundable and became the property of the lawyer upon payment.

In response to a Complaint about the handling of the case, Bar Counsel apparently concluded that he handled it well but questioned the manner in which the fee was deposited. Bar Counsel then docketed the Complaint and said that Maryland law requires that a "substantial" fee in a criminal case must be placed in escrow and cannot be put into

the operating account or treated as the property of the attorney. I know this issue was discussed at the MSBA Meeting in Ocean City. I have talked to criminal lawyers and the criminal defense association here is up in arms.

The District of Columbia addressed this issue in its commentary to Rule 1.15. Therein they said:

[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 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)

I am deeply concerned that Bar Counsel can exercise his subjective discretion as to what constitutes a substantial fee in any given case and then prosecute a grievance for failing to place monies in escrow. Presumably, Bar Counsel would then attempt to use time or some other standard used in civil cases to establish what is and is not reasonable in any given case and what must be refunded.

I would urge that we take immediate action to forestall this activity by Bar Counsel by either placing in the Rule or in the Commentary to the Rule language similar to that utilized in D. C.

Very truly yours,

Albert D. Brault

ADB:lk

cc: Ethics Committee 2000 Members

BRAULT, GRAHAM, SCOTT & BRAULT, L.L.C.

The Honorable Lawrence F. Rodowsky 620 Mitchell Courthouse

100 North Calvert street Baltimore, MD 21202

Dear Judge Rodowsky:

Thank you very much for your letter of June 30, 2003. I have reviewed both the Chasnoff and Briscoe cases. Indeed, those footnote comments (albeit they are dicta) do somewhat muddy the waters. In each case, however, the attorneys were so derelict that it is hard to draw a parallel applicable to all criminal fees regardless of how well the attorney performs.

In my discussions with some criminal lawyers, everyone is in full agreement that whether you deposit the fee as an earned fee in operating accounts or as a retainer against which you will bill in a trust account, does not alter the fact that an excessive fee can never be charged.

We have compared it to the problem of contingent fees in personal injury cases. Clearly, the fee agreement provides that the attorney is entitled to a contingency (1/3 usually) of any money recovered. What happens if the money is recovered with little or no effort?

My problem is leaving the setting of fees and their reasonableness or appropriateness to Bar Counsel. When lawyers have been as derelict as in Chasnoff and Briscoe, no one really cares because they deserve discipline not just because of the fee they charged but because of their complete disregard of their duties to the client.

In any event, it makes for a good discussion.

Sincerely,

Albert D. Brault

ADB:lk

cc: Ethics Committee 2000 Members

COMMITTEE'S RESPONSE:

These comments have been especially helpful to the Committee in advising us of potential complications generated by proposed amendments to Rule 1.5. We believe that the language from the District of Columbia cited in Mr. Brault's letter offers a solution, and accordingly have made changes both to the text and Comment [3] of Rule 1.15 (see discussion of Rule 1.15 below). In order to provide adequate guidance to readers, we have added cross-references to Rule 1.15(c) and Comment [3] to Comment [4] of Rule 1.5.

On behalf of the Worcester County Bar Association, I write you today in response to the May 22, 2003, solicitation for response from the local bar associations to the proposed changes to the Maryland Lawyers' Rules of Professional Conduct.

As to the overwhelming majority of the proposed changes, the Worcester County Bar Association does not take a position. However, the Worcester County Bar Association does formally oppose the proposed changes to Rule 1.5 (specifically Rule 1.5(e) and Comment 3) and Rule 1.15(c).

Should you have any questions or comments, please do not hesitate to contact me.

Respectfully,

William C. Hudson, President
Worcester County Bar Association

December 18, 2003

Professor Robert J. Rubinson
University of Baltimore
School of Law
40 West Chase Street
Baltimore, MD 21201

Re: Maryland Court of Appeals Rules of Professional Conduct

Dear Professor Rubinson:

This letter is written to provide the comments of the Prince George's County Bar Association for the proposed amendments to the Maryland Lawyers' Rules of Professional Conduct. We understand that the Committee appointed by the Maryland Court of Appeals to study the ABA proposed amendments to the Rules of Professional Conduct will be completing its report to the Court of Appeals for the September 2003, term. We thank you for the opportunity to allow the Bar Association to comment and have input on the proposed amendments.

The Prince George's County Bar Association assigned the task of reviewing the proposed amendments to the Maryland Lawyers' Rules of Professional Conduct to its Draft Rules Committee. The Bar Association, through its Draft Rules Committee and Board of Directors, sought input from our membership to solicit comments regarding the Rules.

Given the limited input that we have received from our membership, the Prince George's County Bar Association generally supports the changes as proposed to the Maryland Lawyers' Rules of Professional Conduct. The amendments are positive and, for the most part, provide further clarification and guidance to attorneys practicing in the State of Maryland on standards of professional conduct expected when dealing with potential clients, retained clients and the community at large. However, the Bar Association would urge the Committee of the Court of Appeals of Maryland to consider the following issues during its deliberation and discussion of the proposed amendments to the Maryland Lawyers' Rules of Professional Conduct:

- A. Rule 1.5 pertaining to lawyers' fees, as amended in Paragraph (c), requires that a contingent fee agreement between the lawyer and client must clearly notify the client of any expenses for which the client will be responsible whether or not the client is the prevailing

party. There may be circumstances for which “unanticipated” expenses could arise in litigation that an attorney may not have known of at the time a contingent fee agreement was initially discussed with a potential client. Although attorneys attempt to draft contingent fee and retainer agreements in broad enough language to encompass all possible expenses, there may, from time to time, arise occasions where litigation requires unanticipated, though necessary and legitimate expenses that must be paid by the client. In this instance, there should be some flexibility on the part of counsel to also advise a potential client that this could occur and that the client would still be responsible for the expense.

* * *

On behalf of the Prince George’s County Bar Association, we thank you for the opportunity to provide comment to the Court of Appeals’ Committee reviewing the proposed amendments in the Maryland Lawyers’ Rules of Professional Conduct. If you or any members of the Committee wish to meet with representatives of the Bar Association or our Committee to discuss the Bar Associations’ comments, please do not hesitate to contact us.

Very truly yours,

Krystal Quinn Alves
President

Roger C. Thomas
Chairman, Rules of Professional Conduct
Subcommittee

COMMITTEE’S RESPONSE:

The concern expressed in this communication should be addressable through appropriate drafting of retainer agreements. The Committee does not believe that these Rules should enable reimbursement for an “unanticipated” expense in the unlikely event that such an expense is not reimbursable through an appropriately drafted agreement.

LAW OFFICES OF
LESLIE A. POWELL

July 15,2003

Professor Robert J. Rubinson

University of Baltimore School of Law 40 West Chase Street
Baltimore, Maryland 21201

SUBJECT: Proposed Changes to The Rules of Professional Conduct

Dear Professor Rubinson:

I am a lawyer with a small firm in Frederick, Maryland, and have reviewed the committee's proposed modifications to the Rules of Professional Conduct. I have the following comments and concerns about the proposed and existing rules. I thank you for taking the time to consider this.

Rule 1.5 Fees. First, I wholeheartedly endorse the clarification of "informed consent" and the requirement that contingent fee agreements be in writing. I believe, however, that further clarification on Rule 1.5 is appropriate. Although 1.5(a) requires that fees charged be reasonable, there are a class of cases in which contractually based fees are assessed that may not be reasonable; in particular, confessed judgment notes with percentage fees. Typically the debtor has no bargaining power and agrees simply because he must. Judgment is then entered including a large fee which typically exceeds the amount of effort and time involved in the collection. While the debtor has theoretically "agreed," given that the fee is not commensurate with the work performed, it seems to me that such fees should not be permitted. In addition, while 1.5(b) require that changes in rates be communicated to the client, there is no requirement that the communication take place in *advance* of the increase in charge. Certainly we would be perturbed if we had contracted for a service and then received a bill for a higher rate than we were initially advised even if that bill was accompanied by an explanation of the rate increase.

* * *

Thank you for your consideration.

Sincerely,
Leslie A. Powell

COMMITTEE'S RESPONSE:

The issue of the reasonableness of attorney's fees collected through enforcement of confessed judgments is governed by law and subject to judicial review. We thus do not believe that regulation by these Rules of this circumstance is warranted.

The issue of "advance notice" of increases in fees is usually addressed through drafting of retainer agreements and subsequent notices of changes. A client may choose to seek to renegotiate the terms of a fee agreement or, depending on the application of principles of contract law to the circumstances at issue, might not be

liable for an increase. As a result, the Committee does not believe that changes to Rule 1.5 are warranted.

Public Comments: Rule 1.6

The 1.6 proposal from the Committee surprises me. I'm sure you are aware that the ABA House of Delegates rejected the Ethics 2000 Committee's proposal and, in fact, sharply cut back the then-existing Model Rule 1.6 to eliminate the "Rectify" exceptions. It's my understanding that this was mainly in response to arguments presented by the American College and by Larry Fox of Philadelphia. I think you all attended Larry's presentation to the College a few years ago and were impressed by it. My surprise results from the Committee's having opted to propose the Ethics 2000 language rather than the new Model Rule as adopted by the ABA, thereby broadening, rather than narrowing the exceptions to the duty of confidentiality. Instead of boring you with arguments of my own for the new Model Rule, I attach a copy of the College's Report on the Duty of Confidentiality which frames the arguments against the Ethics 2000 proposal. I think the arguments are beyond cavil and should impel a reconsideration by the Rodowsky Committee when it reconvenes. If there is concern about the Enron/Sarbanes-Oxley problem, I suggest that it is more than adequately handled by Rule 1.13. Thanks for allowing me to share my concerns with fellow Fellows.

Jim Garland

COMMITTEE'S RESPONSE:

The Committee is aware that issues surrounding Rule 1.6 remain subject to intense debate in this State and nationally. The changes to Rule 1.6 that we have proposed largely retain existing Maryland law while enhancing the internal consistency of the Rule through selective incorporation of language from the ABA and from the Committee. We believe that these changes have improved the clarity, scope, and operation of the rule.

LAW OFFICES OF
LESLIE A. POWELL

July 15, 2003

Professor Robert J. Rubinson
University of Baltimore School of Law 40 West Chase Street
Baltimore, Maryland 21201

SUBJECT: Proposed Changes to The Rules of Professional Conduct

Dear Professor Rubinson:

* * *

Rule 1.6 Confidentiality of Information. With respect to Rule 1.6 Confidentiality of information, the rule allows disclosure of privileged communications under circumstances where the lawyer's involvement is not current as well as to "rectify" financial harm. (1.6 (b) (3).) The disclosure in the rule as written permits disclosure "to prevent the client from committing a crime ..that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services". (Emphasis added.) This arguably creates a policing obligation on the lawyer relating to actions of former clients. A circumstance could arise where the lawyer performed a perfectly legitimate service such as the drafting of a contract and the client then induces another to sign it in conjunction with a threat of extortion or false promises. If "substantial financial" injury ensues, the lawyer is then in the position where the privilege is arguably waived or can be waived. Certainly lawyers should not participate in fraud or deception but this goes well beyond that principle. It also raises the question of whether the modification to the rule erodes the attorney-client relationship by creating a potential claim by a non-client of an obligation to disclose and hence a duty to that non-client. The same analysis applies to the provision in 1.6 (b) (3) where privileged communications may be waived to "rectify substantial injury". Again, this relates to past conduct and creates an obligation to a non-client. The lawyer can then be in the happy position of being sued by the former client for waiving the privilege and sued by the non-client for failing to timely disclose the information to prevent or rectify the financial injury.

This leads to the question of immunity for disclosure. I am unaware of any statutory immunity for lawyers in the event of disclosure. In many states, there is immunity for disclosure of patient communications by a mental health care professional when the professional believes there is a risk of bodily harm. If disclosure is permitted or required under the rules of professional conduct, such immunity should be considered for counsel as well.

* * *

Sincerely,

Leslie A. Powell

COMMITTEE'S RESPONSE:

The Committee's proposed Rule 1.6, like the current language of Rule 1.6, provides for permissive disclosure under carefully defined circumstances. The Rule has not and, if our proposal is adopted, will not create any "obligation" to disclose. The issue of immunity noted by the communication is a matter of substantive law that is beyond the scope of these rules.

STEVEN D. CAMPEN
LANDON HOUSE
FREDERICK. MARYLAND 21'104
TELEPHONE (301) 668-G808

Waiver Of Confidentiality To Deter Substantial Financial Harm/Breach Of Rule
Of Professional Conduct As Evidence Of Legal Malpractice

I address the above-referenced rules in combination because, as a plaintiff's lawyer, I see the possibility of their combination to cause great detriment to the practice of law. If I understand what Tom stated, there is a proposal that would allow the breach of a rule of professional responsibility to be used as proof of a breach of the standard of care in a legal malpractice case. That rule, in and of itself, does not cause me too much concern. I think that an attorney should abide by the Rules Of Professional Conduct and If he does not do so, liability is appropriate.

However, I also understood from both Tom and Leslie that there is a proposed rule change which would require a waiver of confidentiality, and place a positive burden on an attorney, to disclose client communications if such disclosure would deter substantial financial harm to a third party. That change causes me a great deal of concern because, depending upon how it is written, it could conceivably create an actionable duty on the part of the attorney to the third party, even though the third party is not the attorney's client. Once a legal duty is established, it would seem to me that duty is actionable if breached (particularly if another specific rule indicates that a breach of the Rules can be used as evidence of legal malpractice).

This sets up the very real possibility that an attorney could be sued by any adverse party who believes he or she has been financially harmed by the advice given by the attorney to his or her client. I can think of all kinds of wild examples that could subject lawyers to lawsuits by aggravated third parties simply because those third parties suffered financial loss due to the activities of one's client (even if those activities were simply good, competitive business practices). While the exposure would likely be more in the

area of legal business advice, I can even envision such a rule being used in the personal injury forum.

For instance, a client comes to me with an aviation accident case and the possibility of filing, and applying the substantive law, of three different jurisdictions. Choosing the best forum for the plaintiff will create the greatest liability exposure to the defendant because that jurisdiction applies comparative negligence (as opposed to contributory negligence) and allows for punitive damages. Having been told the facts of the accident, and knowing that filing in the most favorable jurisdiction for the plaintiff will expose the defendant to greater possible financial harm, am I then obligated to call the airline and relate the communications with my client concerning this issue?

This example may unnecessarily exaggerate the possibilities, but I cannot imagine that a rule can be written of this nature to make clear exactly what an attorney's obligation is both to his client and to the third party. In my opinion, an attorney's obligation should always run to his client only. Any dual obligation creates undue conflicts that can hurt both the client and the attorney.

COMMITTEE'S RESPONSE:

As noted in the Committee's response to the previous communication, Rule 1.6 does not create a "duty" or "obligation" to disclose. Moreover, our proposed Rule 1.6(b)(2) and Rule 1.6(b)(3) contain limitations that would prohibit disclosure under the circumstances set forth in the communication.

Public Comment: Rule 1.8

LAW OFFICES OF
LESLIE A. POWELL

July 15, 2003

Professor Robert J. Rubinson
University of Baltimore School of Law 40 West Chase Street
Baltimore, Maryland 21201

SUBJECT: Proposed Changes to The Rules of Professional Conduct

Dear Professor Rubinson:

I am a lawyer with a small firm in Frederick, Maryland, and have reviewed the committee's proposed modifications to the Rules of Professional Conduct. I have the following comments and concerns about the proposed and existing rules. I thank you for taking the time to consider this.

* * *

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules. Rule 1.8(c) permits a lawyer to prepare an instrument giving the lawyer or a lawyers family member a gift so long as the recipient is related to the client. Given the dynamics of families, I suggest that the provisions of (a) (2) and (a) (3) of this rule be incorporated here. At a minimum informed consent should be required of the client.

The lawyer as expert witness is not addressed in any of the conflict of interest rules. Given the prevalence of expert testimony, including expert testimony on the law, this is an area that merits consideration by the committee.

* * *

Thank you for your consideration.

Sincerely,
Leslie A. Powell

Committee's Response:

While the Committee recognizes that the dynamics identified by the commentator sometimes exist, we believe that applying the requirements of Rule 1.8(a)(2) and (a)(3) to Rule 1.8(c) would be overbroad and unduly burdensome.

As to expert testimony by lawyers, the Committee believes that other rules, particularly Rule 1.7, operate to limit inappropriate conflicts of interest in such circumstances.

Public Comments: Rule 1.10

LAW OFFICES OF
LESLIE A. POWELL

July 15,2003

SUBJECT: Proposed Changes to The Rules of Professional Conduct

Dear Professor Rubinson:

* * *

Rule 1.10, Imputation of Conflicts of Interest: General Rule. Rule 1.10 permits "screening" (*see* definition 1.0 (m)). The idea that one can be effectively "screened" from a matter to preclude participation or preclude benefit to one with interests contrary to another client: is implausible. In addition, it is unclear to me how Rule 1.18, Duties to prospective client, squares with screening.

* * *

Sincerely,
Leslie A. Powell

Committee's Response:

The Maryland Rules of Professional Conduct have provided for "screens" in Rule 1.10 since 1999, when this Rule was so amended by the Court of Appeals. This State has thus concluded that screens, when created in compliance with the requirements of the Rule, are an adequate means to limit conflicts. Rule 1.18(d) contains screening provisions for prospective clients.

Public Comments: Rule 1.15

Rule 1.15 should be clarified so that all fees, except an "engagement" fee, and that portion of a fee that is truly earned, must be placed in the attorney's trust account and available for a refund to the client in the event that the attorney-client relationship is concluded prior to completion, by the attorney, of the engagement agreed upon.

* * *

Mel Hirshman, Bar Counsel

July 15, 2003

The Maryland Criminal Defense Attorneys' Association (MCDAA) strongly believes that proposed Rule 1.15(c), which would require all legal fees paid in advance to be deposited into a client trust account until "earned" should not apply to fixed or flat

fees collected in criminal cases *where the attorney and client agree in writing*. When applied to the fixed fee/engagement type of agreements commonly used by criminal practitioners in this state, implementation of the proposed Rule will create a conflict of interest between attorney and client with potentially far-reaching consequences. Moreover, the proposed Rule unfairly places upon the attorney the burden of determining when a fee is earned in the face of the competing requirements of the Federal Tax Law, existing rules prohibiting commingling and this new Rule. As will be more thoroughly discussed below, proposed Rule 1.15(c) would unnecessarily regulate the fixed fee engagement agreements commonly entered into by criminal defense attorneys in a manner which would be detrimental to the best interests of clients, as well as attorneys, and which will impede the administration of justice.

Under Rule 1.5(a)(8) of the current ethics rules, "fixed" or "flat" fee agreements are permissible and but there is no requirement of a written fee agreement. The current rules also require that a fixed fee be reasonable and Rule 1.5 (a)(1)-(8) sets forth a number of factors for determining reasonableness. Contingency fee agreements are flatly and correctly prohibited in criminal cases pursuant to existing Rule 1.5 (d)(2). Interpreting these Rules, the Maryland State Bar Association Committee on Ethics Opinion in Opinion 93-20 (an opinion upon which the vast majority of criminal defense attorneys currently rely for their practices concerning the deposit of legal fees received) opines that "the possibility of a refund of part or all of a legal fee to insure its reasonableness under particular circumstances does not affect the ability of the attorney to deposit the initial flat fee into his or her operating account if such is in accordance with the parties' agreement." The Committee recognized that the mere fact that in some cases a refund may be necessary to "insure the reasonableness [of an attorney fee] under particular circumstances,^{1/4}" where the original agreement was for a fixed rather than an hourly fee, it is ethically unnecessary to place the fee in escrow.⁷

As a result and in accordance with Opinion 93-20, the typical criminal defense attorney's fee is not thereafter earned on an hourly basis. It is instead based on the task to be performed and, quite frankly, the typical criminal defense client could not care less how much time the attorney will take to complete the task. Such clients are only concerned that the task be completed for the agreed upon fixed fee. He or she does not care if the case is completed in a day or a year. The client properly demands only that his best interests will be considered at all times in the conduct of the case, that his defense be competent and vigorous and that his attorney's decision-making will be unimpeded by his own ulterior personal motives.

It is in this regard that the fixed fee agreement commonly used in criminal cases is unique. The client and lawyer have agreed in advance as to the amount of the attorney fee, removing all financial considerations and unseemly fee negotiations from the attorney client relationship at the outset of that relationship. The client is thus comfortable that his attorney's decision-making will be untainted by his personal

⁷Interestingly, current Md. Rule 16-604, requiring that certain client funds be deposited into trust accounts, specifically exempts from its provisions funds "received as payment of fees owed the attorney by the client^{1/4}"

financial concerns. It will not matter to the lawyer whether the case is resolved quickly or after several continuances because the lawyer has already received his agreed upon fee.⁸ And for his part, the attorney will not hesitate to seek a postponement should it be in his client's best interest, without regard to the need to meet payroll or make his car payment. Interjecting the escrow requirement into this relationship raises the appearance of a conflict of interest between the attorney's goal to make a living and the client's expectation that his lawyer will do the best he can regardless of how long it will take to finish the case.⁹

Numerous authorities have recognized the validity and function of fixed fee agreements in criminal cases, and recognized that the fees are the property of the attorney when received. For example, the bankruptcy court in In re Armstrong, 234 B.R. 899 (E.D. Ark. 1999) stated:

Criminal defense attorneys have a unique practice, and, as in many areas of the law, have ethical obligations and responsibilities peculiar to their practice. They are generally not permitted, for example, to utilize contingent fee contracts. *See* ABA Comm. on Professional Ethics, Informal Op. 832 (1965). In addition, they must take into account the limitations of their clients and the nature of the cases. For example, since it is only before trial that their services are valued, they typically seek to be paid in advance of their service. *Id.*; *see* North Carolina State Bar, Formal Ethics Opinion 4 (1998). It is thus customary in criminal practice to set fees in advance and obtain a substantial retainer. ABA Comm. on Professional Ethics, Informal Op. 832 (1965). A lawyer may charge and collect a set fee to perform specified legal services, regardless of the time required to complete the services so long as the fee is not clearly excessive under the circumstances. *See, e.g.*, North Carolina State Bar, Formal Ethics Opinion 4 (1998). These fee arrangements are not only permissible, they are typical. The reality in the criminal defense context (given the nature of the proceedings and the oft_ times result of the proceedings) is that criminal defense attorneys must obtain a flat fee, up front, which is property of the attorney.

In re Armstrong, 234 B.R. 899, 904 (E.D. Ark. 1999).

In District of Columbia Bar Opinion 264, the Legal Ethics Committee of the District of Columbia Bar considered when fees paid to a lawyer should be deposited in a client trust account. The Opinion significantly said:

⁸The counter argument, that attorneys are motivated to conclude cases for which the fee has already been paid and avoid trial, in our experience, does not hold true in practice.

⁹The members of our ad hoc committee who have extensive experience in post-conviction matters alleging ineffective assistance of counsel have suggested that the passage of proposed Rule 1.15 will certainly add to their repertoire of arguments. For example, the case where they will allege and attempt to prove that the attorney recommending an early plea did so because of his personal financial concerns and the need to "earn" the fee by finishing the case. Such an argument could easily tip the scale in post-conviction proceedings leading to new trials since it provides the ulterior motive to overcome the argument that a trial attorneys decision was a reasonable strategy decision.

In Opinion 113, the Legal Ethics Committee rejected the view that fee advances are "funds of a client" under DR 9-103, and therefore concluded that such advances do not need to be placed in a separate account. The Committee reasoned that the "funds" referred to in DR 9-103 did not include any fees paid to the lawyer, because that provision did not include any reference to "fees" despite the widespread usage of that term throughout the Code. The Committee added: "*Any escrow or trust requirement over the fee advance would defeat the objective of the fee advance: to take the attorney away from the financial mercies of the client.*" Finally, the Committee noted that policy considerations, including the lack of discontent over the placing of advance fees in the law firm's general account, supported continuing the policy of allowing commingling of advance fees.

Rule 1.15 makes this practice more explicit. Rule 1.15(d) states: Advances of legal fees and costs become the property of the lawyer upon receipt. Any unearned amount of prepaid fees must be returned to the client at the termination of the lawyer's services in accordance with Rule 1.16(d). It is clear from Rule 1.15(d) that any advance payment, regardless of whether it is denominated as a general retainer, or a special retainer or advance fee, becomes the property of the lawyer upon receipt and does not have to be placed in an account separate from the firm's general account. This conclusion in no way qualifies the duty to refund fees where appropriate, as Rule 1.15(d) itself states. For this reason, in this jurisdiction fee advances and general retainers should not be commingled with client funds contained in a client trust account. Indeed, our Rule 1.15(a) specifically prohibits commingling.

Emphasis added. (Inquiry 95-16-14, adopted February 14, 1996).

Once the fixed fee agreement is reached and the attorney hired, whether he or she is paid in full up-front or in regular installments, he or she must enter her appearance within five days under the Maryland Rules of Procedure (see Md. Rule 4-214) and may not withdraw from representation without a court order. In criminal cases, unlike in civil cases, once represented by an attorney, clients are rarely permitted to proceed *pro se*. In nearly all criminal cases, also unlike many other types of attorney client relationships, the attorney makes at least one court appearance and it is extremely unlikely thereafter that the court will permit or order counsel to withdraw from representation. Thus, the typical attorney-client relationship in the state courts of Maryland is already highly regulated by the Courts and withdrawal from representation or changes in counsel are rarely permitted. Once an attorney enters an appearance in most cases, he is in it for the duration.

Consequently, the proposed Rule's failure to define when a fee is "earned" sets up a "Hobson's" choice for the unwary. Firstly, it is axiomatic that an attorney may not commingle funds. (See generally Md. Rule 16-607). But, Rule 16-607(b)(2) requires that any portion of escrowed funds "belonging to the attorney or law firm shall be withdrawn

promptly when the attorney or law firm becomes entitled to the funds¹⁴." Juxtaposed against these rules are the federal income tax laws. Treas. Reg. §1.451-1 prohibits attorneys' fees from being held in escrow to defer the income. Thus, the lawyer who "plays it safe" and places all fees in escrow pending conclusion of the case runs afoul of either the commingling rules or the IRS regulations, while those who would attempt to follow the undefined requirements of the proposed rule would risk bar counsel's hindsight as to whether he in fact had "earned" the fee prior to withdrawing a portion of it during the representation.

While fixed or flat fees in criminal cases come in many forms, some of the most typical are as follows:

1. The entire fee is paid up front.
2. A portion of the fee (for example one-half, one-third, or two-thirds) is paid as a retainer, and the balance is paid in monthly installments, or in agreed upon lump sums (for example \$250 per month or one-third after motions and one-third after trial).
3. A portion of the fee is paid as a retainer, all or some of which is placed in trust, and the attorney bills against it and/or bills the client at an hourly or other agreed upon rate.
4. The entire fee is placed in escrow until the case is over.

Of these four methods of handling fees, the first two are commonly used in the vast majority of criminal cases, generally those that are less complex cases, such as District Court misdemeanors and felonies cases filed in circuit or federal court. The third type of fee arrangement is more typical of larger, more complex cases, being handled by attorneys in larger firms. The fourth type of fee arrangement is used by a very small number of lawyers. The vast majority of our members that are in private practice, according to an informal survey, handle fees as set out in option (1) and (2) above.

In fact, a substantial majority of the members of MCDAA and of the non-members informally surveyed on this issue, do not currently escrow the fixed or "flat" fees received from clients for representation in criminal matters. Fees in such matters are set in consultation with the client after the attorney obtains sufficient information to apply the various factors which Rule 1.5 mandates. Most such agreements are then documented in writing.¹⁰ Adoption of Rule 1.15(c) by the Court of Appeals would cause severe financial hardship for the vast majority of private practitioners. Many would have to hire additional employees and set up accounting systems to comply with the new Rule. Others would be required to finance operating expenses to offset the fees that would be deposited in escrow and not be immediately accessible to the lawyer.¹¹ Thus, both on a short and on a long term basis, the proposed Rule would jeopardize the financial viability

¹⁰ We believe that the rules should require that all flat or fixed fees agreements be in writing and signed by the client, something the current and proposed Rules do not require.

¹¹ No other issue has generated such passionate debate within the criminal defense community. Many attorneys are truly frightened by the prospect of financial hardship that is raised by the proposed Rule.

of the private criminal defense bar. The consequential effect on the criminal justice system must be considered by this Committee.

The MCDAA is not unmindful that this new rule has apparently been promulgated to make certain that funds are available to be refunded to the client in cases where circumstances require a refund. Such circumstances may occur in criminal engagements where the attorney becomes disabled, or dies, or perhaps where the client dies or wishes to retain new counsel before substantial work is completed on the case.¹² While the proposed Rule will apply to attorney fees in all types of cases, the issue seems to have become paramount after a large series of claims against the Client Security Trust Fund resulting from the disability of a single criminal defense attorney. Nevertheless, it is clear that the "problem" addressed by this proposed rule rarely arises in the context of criminal defense fixed fee agreements, at least according to the Administrator of the Client Security Trust Fund. Further, while not minimizing the possible concern of this Committee that clients should be free to obtain new counsel when permitted by the court, based on the accumulated years of experience of our members, criminal defendants attempt to change private counsel in an insignificant number of cases.

In conclusion, it seems clear to our members, that the minimal benefits to clients and attorneys of applying proposed Rule 1.15(c) to criminal fixed or flat fee cases are far outweighed by the detriments of jeopardizing conflict free decision making in criminal cases, severe financial hardship for many attorneys, possible decimation of the private criminal bar, and generation of an entire new class of post-conviction complaints. As a result, the MCDAA believes that fixed or flat fee agreements for representation in criminal cases should be specifically exempted from the provisions of proposed Rule 1.15(c), but only where the client consents pursuant to a written fee agreement.

Yours truly,

Larry A. Nathans, President

Leonard R. Stamm, President-Elect

Richard A. Finci, Past President &
Chairman Ad-Hoc Committee

Ad-Hoc Committee Members:

Steven F. Allen

Joseph E. Carey

Leonard H. Shapiro

Marie Fischer Cooke

John Patrick Kudel

William C. Brennan

Philip Dantes

¹² We do not see this issue as relating at all to the issue of the refundability of a fee. The MCDAA agrees that even fixed fees are refundable under certain circumstances.

Bruce L. Marcus

On behalf of the Worcester County Bar Association, I write you today in response to the May 22, 2003, solicitation for response from the local bar associations to the proposed changes to the Maryland Lawyers' Rules of Professional Conduct.

As to the overwhelming majority of the proposed changes, the Worcester County Bar Association does not take a position. However, the Worcester County Bar Association does formally oppose the proposed changes to Rule 1.5 (specifically Rule 1.5(e) and Comment 3) and Rule 1.15(c).

Should you have any questions or comments, please do not hesitate to contact me.

Respectfully,

William C. Hudson, President
Worcester County Bar Association

COMMITTEE RESPONSE:

As noted in the Committee's Response to comments received in connection with Rule 1.5, the comments of the Maryland Criminal Defense Association and others highlight potential complications that do not serve the interests of attorneys or clients. In order more effectively to address this issue, we have altered our proposal to incorporate a comment from the District of Columbia as well as to amend the language of Rule 1.15(c). We believe that these changes address the concerns that have been brought to our attention while, at the same time, address concerns expressed by Mr. Hirshman. The changes are as follows:

Prior Proposed Rule 1.15(c): "A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses are incurred."

Currently Proposed Rule 1.15(c): "Unless the client gives informed consent, confirmed in writing, to a different arrangement, a lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred."

New Proposed Comment [3]: Paragraph (c) 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. Unless the client gives informed consent, confirmed in writing, 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).

Public Comments: Rule 1.16

2. The Maryland Rules of Professional Conduct (and the Maryland Rules of Procedure) should allow lawyers to make limited appearances in courts and administrative agencies when they provide limited representation to clients, and to withdraw from that representation when they have completed the promised representation, after giving the client notice and a chance to be heard if the client objects.

There is a suggestion of this in your revisions. In your Committee's draft report, Comment 1 to Maryland Rule 1.16 contains this new language: "Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded." The cross- references to the proposed new provision in Maryland Rule 1.2(c), which recognizes limited representation, and to proposed new Maryland Rule 6.5, indicate that this new Comment is aimed at authorizing withdrawal in a limited-service context when the lawyer has completed the limited service.

I would, however, recommend that the Committee make more explicit the lawyer's right to withdraw from a case when the lawyer has provided the limited service the lawyer promised to provide. Recent revisions in the ethics rules of Maine and Washington, and proposed revisions in Florida, are, with one caveat, good models I believe. (These rules are contained in the attached Appendix to our report.)

The new rules in Washington, for example, authorize lawyers to enter limited appearances for particular proceedings, and provide that, "[a]t the conclusion of such proceedings the attorney's role terminates without the necessity of leave of court, upon the attorney filing notice of completion of limited appearance..."¹³

Rules like this are essential to encourage more lawyers to provide limited assistance to parties who now wholly represent themselves in litigation.

My caveat is this: Rules like these should require the withdrawing lawyer to give the client notice of his or her intention to withdraw and a chance to object if the client believes withdrawal is inconsistent with the retainer agreement. Absent client objection, withdrawal would be accomplished without action by the court. If the client objected, the court would treat the withdrawal notice as a motion, and grant or deny it depending on whether the lawyer had complied with the limited-service retainer agreement. California's new limited-representation forms, which recently were approved and now are effective, embody this approach. (They also are in the attached Appendix.)

Very truly yours,

Michael Millemann

COMMITTEE'S RESPONSE:

The Committee recognizes the potential utility of the procedures outlined in this Comment. It seems to us, however, that these changes are matters of procedure best

¹³ Wash. CR 70.1.

addressed initially through the Rules Committee rather than through a revision of the Rules of Professional Conduct. If such amendments to the Maryland Rules are enacted or proposed, it would then be appropriate to review the Rules of Professional Conduct to determine whether any amendments to the Rules of Professional Conduct would be warranted.

Public Comments: Rule 1.18

MILES & STOCKBRIDGE P.C.

James P. Garland
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Jefferson V. Wright
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July 15, 2003

Dear Professor Rubinson:

* * *

As detailed below, our comments relate to the following proposed revisions:

* * *

((2) Proposed Rule 1.18, which defines an attorney's duty to a prospective client;

* * *

2. Rule 1.18 -Duties to a Prospective Client

The proposed revisions to Rule 1.18 establish duties owed by a lawyer to a prospective client. Although we agree with the Committee that the profession needs guidelines for handling confidential information divulged by prospective clients, we disagree with the language of proposed Rule 1.18.

Specifically, we do not believe that the Rules should impose the same duty of care with respect to a prospective client as they do with respect to a former client, as set forth in subsection (b) of the proposed Rule. Equating the two relationships, even for the limited purpose of treating confidential client information, sets a dangerous precedent. The suggestion that there exists a fiduciary relationship between a lawyer and a prospective client that equates to the attorney-client relationship ultimately may lead to the creation of a new form of civil liability for Maryland attorneys. Once again, therefore, we believe that the language of this Rule indirectly undermines that stated goal of the Preamble that the Rules "are not designed to be a basis for civil liability."

Secondly, the conflict of interest prohibitions set forth in subsection (c) of the proposed Rule are too vague. Any provision attempting to address conflicts of interest in the context of prospective clients must make a clear distinction between a mere contact by a prospective client, as opposed to substantive communications with a prospective client in which confidential information regarding the potential representation is disclosed. The current draft of subsection (c) attempts to make this distinction by including language limiting disqualification to only those situations in which "the lawyer received information from the prospective client that could be significantly harmful to that person in the matter. ..." The ability of a lawyer to predict what information may be "significantly harmful" in future litigation in which he or she is not involved will be difficult to discern. We respectfully suggest, therefore, that the Committee revisit this particular language in an effort to establish more concrete criteria and guidance for lawyers confronted with these types of situations.

* * *

Very truly yours,

James P. Garland

Jefferson V. Wright

COMMITTEE RESPONSE:

The changes the Committee has made to the proposed Preamble addresses concerns expressed in this communication about the potential for civil liability. The balance of this new Rule is, in large measure, taken from language adopted by the ABA. The Committee believes that this Rule, addressing an important area that has heretofore been a source of some uncertainty, provides adequate guidance to attorneys. Nevertheless, the operation of this Rule, like other Rules that are entirely new to the Rules of Professional Conduct, should be monitored and, if circumstances warrant, amended in the future.

December 18, 2003

Professor Robert J. Rubinson
University of Baltimore
School of Law
40 West Chase Street
Baltimore, MD 21201

Re: Maryland Court of Appeals Rules of Professional Conduct

Dear Professor Rubinson:

This letter is written to provide the comments of the Prince George's County Bar Association for the proposed amendments to the Maryland Lawyers' Rules of Professional Conduct. We understand that the Committee appointed by the Maryland Court of Appeals to study the ABA proposed amendments to the Rules of Professional Conduct will be completing its report to the Court of Appeals for the September 2003, term. We thank you for the opportunity to allow the Bar Association to comment and have input on the proposed amendments.

The Prince George's County Bar Association assigned the task of reviewing the proposed amendments to the Maryland Lawyers' Rules of Professional Conduct to its Draft Rules Committee. The Bar Association, through its Draft Rules Committee and Board of Directors, sought input from our membership to solicit comments regarding the Rules.

Given the limited input that we have received from our membership, the Prince George's County Bar Association generally supports the changes as proposed to the Maryland Lawyers' Rules of Professional Conduct. The amendments are positive and, for the most part, provide further clarification and guidance to attorneys practicing in the State of Maryland on standards of professional conduct expected when dealing with potential clients, retained clients and the community at large. However, the Bar Association would urge the Committee of the Court of Appeals of Maryland to consider the following issues during its deliberation and discussion of the proposed amendments to the Maryland Lawyers' Rules of Professional Conduct:

* * *

Rule 1.18, Duties to prospective client, Paragraph (a) states that "a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client".

In order to make clear that mere communication with a lawyer does not necessarily form a “client-attorney” relationship, it would be helpful to move Paragraph [2] of the Comments section of this Rule and merge it with Paragraph (a) to further clarify this relationship. Thus, the revised Paragraph (a) would read as follows:

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

Moving this comment to Paragraph (a) helps to clarify and define the intent and meaning of the client-lawyer relationship without requiring the reader to move to the Comments section for this clarification.

On behalf of the Prince George’s County Bar Association, we thank you for the opportunity to provide comment to the Court of Appeals’ Committee reviewing the proposed amendments in the Maryland Lawyers’ Rules of Professional Conduct. If you or any members of the Committee wish to meet with representatives of the Bar Association or our Committee to discuss the Bar Associations’ comments, please do not hesitate to contact us.

Very truly yours,

Krystal Quinn Alves
President

Roger C. Thomas
Chairman, Rules of Professional Conduct
Subcommittee

COMMITTEE’S RESPONSE:

The Committee believes that the Rule and Comment are clear that communication with an attorney or status as a “prospective client” do not in and of themselves establish an attorney-client relationship. Nevertheless, upon review of this communication, the Committee has added “For example,” to the second sentence of Comment [2] to emphasize that that sentence presents one example of a communication “not entitled to protection under this Rule.”

Public Comments: Rule 2.1

I believe there ought to be stronger language about a lawyer's duty to advise clients of their ADR options. I suggest the following language for the comment:

A lawyer shall, under Rule 1.4, inform the client of appropriate forms of dispute resolution that might constitute reasonable alternatives to litigation, or that might otherwise assist the client in meeting the goals of the representation.

If possible, I would also suggest incorporating similar language directly into the Rule.

Such language would require lawyers to inform clients of their dispute resolution options in all cases where ADR may be appropriate, regardless of whether litigation is an option. This is related to comment (a) to Rule 1.2, which requires a lawyer to consult with the client as to the means by which the client's objectives of representation are to be pursued. Clients need to be advised about ADR options to make informed decisions about "means."

In addition to cases involving litigation, this duty to advise would apply to transactional legal practice, where contract clauses commonly address the voluntary or mandatory use of ADR. Lawyers should advise their clients about various ADR clause options (such as mediation, med-arb or arbitration clauses), and their possible affect on resolving contract disputes. This language would also apply to transactional practice where mediation may be used to help parties negotiate complex agreements, such as partnership or merger agreements.

To support Maryland lawyers' ability to meet this duty, the Maryland Judiciary's Mediation and Conflict Resolution Office (MACRO) is planning to offer free presentations on "mediation advocacy" to local bar associations. These presentations are designed to teach lawyers how to advise clients about their ADR options, as well as how to prepare and represent clients in ADR processes.

Respectfully,
Rachel Wohl, Esq.
Executive Director
Maryland Mediation and
Conflict Resolution Office

Rule 2.1 speaks to the lawyer as an advisor and in comment 5 states, "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."

I believe this is too mild and that in fact the lawyer has an obligation to advise the client of alternative dispute resolution forms. The comment rightly refers to Rule 1.4. I read the word "shall" in 1.4 (b) as requiring the lawyer to provide the information necessary so that the client can make an informed choice. If the client is to make must have the information necessary to make an informed decision under 1.4(b) then the lawyer must advise the client of alternatives to litigation for reasons of cost as well as outcome. Georgia provides [GA. Code of Professional Responsibility Canon 7-5 (1996)] "When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution which might constitute reasonable alternatives to litigation." Similarly Colorado and Hawaii provide that in matters where litigation is involved or expected the lawyer,"should advise a client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought," [Haw. Rules of Professional Conduct Rule 2.1 (1998); Colo Rules of Professional Conduct Rule 2.1 (1998)]. Not to make it mandatory for the lawyer to advise his client of alternatives contradicts the mandate of 1.4 as well as 1.2 (a). I believe that comment 5 should read, "Similarly, when a matter is likely to involve litigation, a lawyer shall inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." And cross reference to 1.4 and 1.2.

Rule 2.4 refers in comment 2 to 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." It would be more appropriate, I believe, to cite to the Standards adopted by the Maryland Court of Appeals relating to mediators as well as other forms of ADR which are required by Rule 17-104((a)(4) of practitioners handling court referred cases and should be considered the standard regardless of whether the matter is court referred or not.

I leave to others to comment on Rule 1.16 and 1.2 as they relate to the ability of the lawyer and client to agree to task specific, limited representation e.g representing the client for purposes of mediation only without committing to representation beyond mediation if the matter is not resolved there.

Thank you for considering these comments. The committee deserves credit for a job well done.

Roger C. Wolf
University of Maryland School of Law
500 W. Baltimore Street
Baltimore, MD 21201
410-706-3836
Fax: 410-706-5856

COMMITTEE'S RESPONSE:

The Committee is recommending that Maryland adopt the ABA language in Comment [5] to Rule 2.1, which provides as follows: “[W]hen 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.” In the view of the Committee, this language powerfully vindicates the importance of advising clients about ADR by making it mandatory in appropriate cases: there are circumstances where it will “be necessary . . . to inform the client about forms of dispute resolution that might constitute reasonable alternatives to litigation.” The Committee, however, is reluctant to propose that the Rules of Professional Conduct mandate details about the nature of legal advice to be rendered to clients in all circumstances.

The Committee believes that existing language in Rule 1.4(b) would mandate advice about ADR in transactional matters where appropriate.

The Committee has incorporated Professor Wolf’s suggested changes about references in Comment [2].

Public Comments: Rule 2.4

In Comment 2, the fourth sentence should be modified to recognize the existence of the "Maryland Standards of Conduct for Mediators, Arbitrators, and Other ADR Practitioners," adopted by the Maryland Court of Appeals on October 31, 2001, and referenced in the Maryland Rules, 17-104 (a)(4) and 17-105(a)(1). MACRO developed these standards by adapting the ABA, AAA, SPIDR Model Standards of Conduct for Mediators (mention of which should be deleted from Comment 2) for use in Maryland's courts. I suggest the following language:

Lawyer-neutrals may also be subject to various codes of ethics, such as the Maryland Standards of Conduct For Mediators, Arbitrators and Other ADR Practitioners adopted by the Maryland Court of Appeals, or the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association.

Such language would acknowledge the Court of Appeals' mandate that third-party neutrals adhere to these standards to maintain high quality mediation practice and ethical standards for court connected ADR programs.

Respectfully,
Rachel Wohl, Esq.
Executive Director

COMMITTEE'S RESPONSE:

The Committee has incorporated this suggested change.

Public Comment: Rule 3.1

LAW OFFICES OF
LESLIE A. POWELL

July 15, 2003

* * *

Rule 3.1 Meritorious Claims and Contentions. I do not understand comment 3. It appears to permit counsel to raise non-meritorious defenses in criminal cases that are nonetheless appropriate under constitutional principles? Likewise, there is a different duty of disclosure for a criminal defendant. What are the circumstances where disclosure would jeopardize a constitutional right? This also relates back to the issue of disclosure of privileged communications and the permission or obligations of counsel to disclose to prevent bodily injury or financial harm (Rule 1.6). What if disclosure under Rule 1.6 would place someone at risk for indictment?

* * *

Sincerely,
Leslie A. Powell

COMMITTEE'S RESPONSE:

The Committee has been advised by criminal law practitioners that the language cited in this communication, which we are recommending be retained from the existing Maryland Comment, has operated adequately and should not be modified.

Public Comments: Rule 4.2

The Maryland Rules of Professional Conduct, especially Rule 4.2, or a Comment to them, should clarify how the rules governing communications between and among parties and counsel apply in the limited representation context.

Some lawyers raise issues about whom they should communicate with—the limited-service lawyer or that lawyer's client—when the opposing lawyer does not represent the client completely. Recent rule revisions in several states require opposing counsel to communicate with the limited-service lawyer if opposing counsel *knows* that the party is partially represented. If not, counsel may communicate directly with the party.

To provide clear guidelines to lawyers, at least two states require that the limited-service lawyer and client provide opposing counsel with *written* notice of the limited representation if they wish opposing counsel to communicate with the limited-service lawyer. Maine's revised rules provide that "an otherwise unrepresented party to whom limited representation is being provided or has been provided.. .is considered to be unrepresented..., except to the extent the limited representation attorney provides other counsel *written* notice of a time period within which other counsel shall communicate only with the limited representation attorney."¹⁴ (*See* attached Appendix.)

Washington's revised rules add that the written notice also must include a description of the "subject matter within the limited scope of the representation" for which the lawyer is responsible.¹⁵ (*See* attached Appendix.)

Even without written notice, if a lawyer has good reason to believe an opposing party is partially represented, I think that lawyer should contact the limited-service lawyer to establish the communication ground rules for that matter. I would add this caveat to a communications rule.

Very truly yours,

Michael Millemann

COMMITTEE'S RESPONSE:

The Committee believes that Maryland would take an important step regarding "limited representation" with our proposed adoption of ABA's new Rule 6.5. The Committee believes, however, that related issues, including that raised by Professor Millemann in this communication, should await review in light of this State's experience with Rule 6.5 if the Court chooses to adopt it. At that time, a thorough review of other Rules of Professional Conduct as they relate to limited representation, as well as of other relevant Maryland Rules, would be warranted.

¹⁴ Me. Bar R. 3.6(f) (emphasis added).

¹⁵ Wash. R.P.C. 4.2(b), 4.3(b).

Public Comment: Rule 4.3

* * *

I commend your Committee for adopting the ABA's revision of Model Rule 4.3, which : provides that a lawyer "shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."¹⁶ I do not think it matters that your Committee places this language in the Comment to Maryland Rule 4.3, rather than in the text. You make the point that I think should be made.

Very sincerely yours,

Michael Millemann

COMMITTEE'S RESPONSE:

The Committee wishes to note that it is recommending combining ABA and existing Maryland language in the sentence cited in this communication. We are recommending the retention of Maryland's language that a "lawyer *should* not give legal advice . . ." (emphasis added). The Committee believes that existing language sends a strong message that such communications are improper.

Public Comment: Rule 5.5

OMNI LAND SETTLEMENT CORPORATION

July 10, 2003

Robert J. Rubinson, Esq. University of Baltimore School of Law
40 West Chase Street
Baltimore, Maryland 21201

Re: Comments for proposed changes to Rule 5.5 of the Rules of Professional I Conduct.

Dear Mr. Rubinson:

¹⁶ Model Rules of Prof'l Conduct R. 4.3 (2002).

I have reviewed several State's proposed and passed modified Rule 5.5 I addressing the "Unauthorized Practice of Law" since the American Bar Association's passage of the model rule and I am pleased that Maryland is now considering significant changes to its Rule 5.5. I believe the need for relief I for practitioners given the ever increasing interstate issues involved in handling business transactions in today's market place makes the proposed revisions long over due and necessary to provide guidance to practitioners with multi-state clients.

From the material that I have researched and articles that I have read it is predicted, at least in the short term, that there are bound to be pitfalls for some practitioners given the variations of the modified Rule 5.5 that States are now considering or have passed. Although many like myself are pleased to finally find some progress towards a safe harbor for multijurisdictional practice there will also be a great deal of caution do to these variations. For this reasoning I believe that it is important to consider language in Maryland's Rule 5.5 as is currently being considered by the Minnesota Bar Association in their deliberations over a new Rule 5.5. Specifically I believe the following language would provide, at least initially, some much needed assurance to members of the Maryland Bar:

**RULE 5.5: UNAUTHORIZED PRACTICE OF LAW;
MULTIJURISDICTIONAL PRACTICE OF L.AW**

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so, except that a lawyer admitted to practice in Maryland does not violate this rule by conduct in another jurisdiction that is permitted in Maryland under Rule 5.5 (c) and (d) for lawyers not admitted to practice in Maryland.

I want to thank the committee for making available the opportunity to comment on the proposed Rule 5.5.

Very truly yours,

Stephen R. McDonald, Esq.

[Enclosure]

PROPOSED MINNESOTA RULE 5.5

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

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so, except that a lawyer admitted to practice in Minnesota does not violate this rule by conduct in another jurisdiction that is permitted in Minnesota under Rule 5.5 (c) and (d) for lawyers not admitted to practice in Minnesota.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

- (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
- (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

- (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
- (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
- (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
- (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction. I

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. The exception is intended to permit a Minnesota lawyer, without violating this Rule, to engage in practice in another jurisdiction as Rule 5.5 (c) and (d) permit a lawyer admitted to practice in another jurisdiction to engage in practice in Minnesota. A lawyer who does so in another jurisdiction in violation of its law or rules may be subject to discipline or other sanctions in that jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent non lawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel non lawyers who wish to proceed ! pro se. :

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice I generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or ! other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1 (a) and 7 .5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraph (d), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(I) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission I pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in

this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require. ,

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Paragraph (d) identifies a circumstance in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraph (d), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[17] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or I otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[18] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[19] Paragraphs (c) and (d) do not authorize communications advertising legal services to I prospective clients in this jurisdiction by lawyers who are admitted to practice in other I jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

COMMITTEE'S RESPONSE:

Upon careful review of this communication, the Committee proposes that Maryland adopt Rule 5.5 as adopted by the ABA and not the proposed Minnesota rule. One issue with the Minnesota proposal is that, at least in theory, an attorney could knowingly violate ethical rules in another jurisdiction with the assurance that such a violation would not be sanctionable in this State.

Public Comments: Rule 5.7

LAW OFFICES OF
LESLIE A. POWELL

July 15,2003

* * *

Rule 5.7 Responsibilities Regarding Law-Related Services. A few examples of what constitutes a "law-related service" would be helpful in the comment.

* * *

Sincerely,
Leslie A. Powell

COMMITTEE'S RESPONSE:

Examples of law-related services are provided in Comment [9] to this Rule.

Public Comments: Rule 6.5

**BAR ASSOCIATION OF BALTIMORE CITY
EXECUTIVE COUNCIL
RESOLUTION**

The Executive Council of the Bar Association of Baltimore City, at the recommendation of its Professional Ethics Committee, hereby resolves to adopt and present to the Ethics 2002 Committee created by the Court of Appeals of Maryland, the following comment regarding the proposed modifications of the Maryland Rules of Professional Conduct:

The Bar Association of Baltimore City recognized the extensive time and effort devoted by the members of the Ethics 2002 Committee appointed by the Court of Appeals of Maryland in the process of examining the recently proposed amendments to the ABA Model Rules of Professional Conduct and recommending modifications of the Maryland Rules of Professional Conduct ("Rules") based on the ABA amendments to the extent deemed appropriate in Maryland. In light of this substantial commitment of resources and the critical analysis by eminently-qualified committee members in the process of formulating the Ethics 2002 Committee's proposed modifications of the Rules, the Executive Council of the Bar Association of Baltimore City supports the proposed Rules changes, notwithstanding the recognition that individual members of the Bar Association of Baltimore City may not in every case approve of all of the recommended modifications and are free and encouraged to provide different comments to the Ethics 2002 Committee. The Bar Association of Baltimore City's recommendation that the modifications of the Rules proposed by the Ethics 2002 Committee be adopted is qualified by its request for reconsideration by the Ethics 2002 Committee of proposed Rule 6.5(a) to expand the Rule's application to lawyers providing short-term limited legal services even if the work is not performed under the auspices of a program sponsored by a non-profit organization as long as the clients are persons of limited means, thus fostering even greater participation in pro bono publico legal representation. The recommendation of the Bar Association of Baltimore City extends to the currently proposed modifications of the Rules and any additional non-substantive revisions to the proposed modifications that are made by the Ethics 2002 Committee during or after the period provided for public comment on the proposed Rules modifications.

COMMITTEE'S RESPONSE:

The Committee believes that the provisions of Rule 6.5(a) should not be extended as suggested in this communication. No private law firm of which we are aware independently provides the short-term limited legal services to a client described in

Comment [1] to this Rule. Given the unique nature of such representation and the fact that this Rule is new, the Committee does not believe it prudent at this time to extend the provisions of Rule 6.5 beyond the terms delineated by the ABA. As with other matters relating to short-term limited legal services, however, this issue might well be worth revisiting as this and other jurisdictions gain experience with this Rule and with limited legal services more generally.

Professor Michael Millemann, University of Maryland School of Law

The Maryland Rules of Professional Conduct should relax conflicts of interest requirements for a lawyer who, as part of a pro bono or legal services program, 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.¹²

Your proposed adoption of the ABA's new Model Rule of Professional Conduct 6.5 does exactly this, and I commend you for it. This rule will help administrators of *pro se* assistance programs to recruit volunteer lawyers, and is an important step in giving low and moderate- income people more effective access to justice. (I believe Ayn Crawley will be providing your committee with more information about Rule 6.5.)

July 15, 2003

I am writing to comment on the proposed draft of the Maryland Lawyers' Rules of Professional Conduct. I endorse the recommended addition of Rule 6.5 which addresses non-profit and court-annexed limited legal services programs.

I have been working with the Maryland Circuit Court Family Divisions and Family Services Programs to improve the performance and professionalism of court-based programs. Over the last two years, in partnership with the Maryland Legal Assistance Network (MLAN), I have convened several joint meetings of Maryland family court professionals and *pro se* assistance providers. As a result of those meetings the group developed a document, entitled *Pro Se Best Practices*. I have enclosed a copy of that document for your review. The group recommended the adoption of Rule 6.5 as adopted by the American Bar Association's Ethics 2000 Project.

The *Pro Se Best Practices* is currently being vetted by the Judiciary. I have presented the document to the Maryland Judicial Conference Committee on Family Law, which I staff. They hope to consider it further in September when meetings reconvene. If approved by that committee and the Conference of Circuit Judges, the document will be distributed to all Circuit Courts to assist those courts in managing court-based *pro se* assistance projects effectively. Because the document has not yet been endorsed by the Judiciary, I have marked it as a draft.

In the meantime, I urge and support the inclusion of Model Rule 6.5 in the Rules of Professional Conduct. Its passage will improve the efficiency and quality of services provided to self-represented persons in our state.

The commentary included in Appendix B of the *Pro Se Best Practices* document is slightly different from that included in the proposed draft which your committee has prepared. The *Pro Se Best Practices* commentary provides some further justification for the Rule by pointing to:

1) the large number of persons served by these programs; 2) the fact that many of these programs use multiple lawyers; and finally, 3) that these programs do not retain documents or create client files. Each Circuit Court in Maryland currently operates a pro se assistance program to assist self-represented persons in family cases. In Fiscal Year 2002, the last period for which data is currently available, Maryland's Circuit Court pro se assistance programs served over 37,000 individuals.

My office maintains demographic data and program performance data on all 24 pro se assistance projects in Maryland. If your committee would like additional information on these programs, or the individuals they serve, I would be happy to provide it.

Thank you for the opportunity to comment on the pending Rule changes.

Sincerely,

Pamela Cardullo Ortiz
Executive Director
Family Administration

Enclosure

COMMENTS OF THE LEGAL AID BUREAU
TO ADDITION OF RULE 6.5 TO THE MARYLAND
LAWYERS' RULES OF PROFESSIONAL CONDUCT

I. Introduction

The Legal Aid Bureau, Inc. (Legal Aid) is a private non-profit Maryland law firm that represents indigent persons in civil matters free of charge from thirteen offices across the state. Legal Aid provides assistance in a variety of family, consumer, housing, employment and income maintenance matters. Its advocates also provide legal services to children in need of assistance, senior citizens, nursing home/assisted living residents and migrant and seasonal farm workers.

These comments are focused on the proposed addition of Rule 6.5, which tailors the application of conflict of interest rules to nonprofit and court-annexed limited legal

services programs. As the provider of court-annexed limited legal services programs in Baltimore City, Anne Arundel and Somerset Counties, Legal Aid strongly favors adoption of the new rule. Application of the current conflict rules to pro se programs or telephone advice hot-lines limits the number of persons who may receive service, dilutes the quality of the information conveyed to pro se litigants and does not further the purposes of the rules to protect confidentiality and zealous prosecution of a client's case. The proposed new rule permits pro se programs to provide legal advice to individuals without regard to whether the program had previously provided advice to a person with an adverse interest, as long as the lawyer does not have personal knowledge of relevant information from an adverse party. Amendment of the current rules would: (1) enable pro se programs to provide individuals with legal advice (rather than simply information about the process); (2) better equip all pro se litigants to advocate for themselves; (3) reduce the burdens unrepresented persons place on court personnel and judges; and (4) help more people achieve fairer resolution of difficult legal issues.

Legal Aid offers the following explanation of the value of the new rule and suggests some small changes to the comments to avoid confusion.¹⁷

II. Increasing Numbers of Unrepresented Litigants Require Effective Pro Se Programs.

Over the past 15 years, the number of unrepresented persons appearing in trial courts around the country has grown exponentially. Maryland is no exception. The increase has been especially marked in domestic proceedings. Many litigants are unrepresented because they cannot afford legal counsel.¹⁸

Unrepresented litigants place significant burdens on court clerks, judges and masters. Lay litigants find the court system confusing. They may not be able to obtain the relief they seek. They must accomplish tasks that are often difficult, such as service of process. They must evaluate concepts like jurisdiction or evidentiary requirements that are unfamiliar. While they may, with guidance, be able to fill in a form, they may not be able to move their case forward effectively after an initial filing, or provide the court with a full presentation of their situation at trial. If the other side is represented, an unrepresented person is truly disadvantaged.

¹⁷ The rule enjoys broad-based support among entities that provide legal and other services to family law litigants. On December 2, 2002, Legal Aid presented the ABA's proposed model rule 6.5, together with an analysis of the rule, to a meeting of family court coordinators from many Maryland counties and other legal services providers. The rule change received unanimous support from that group, as well as from the Department of Family Administration at the Administrative Office of the Courts.

¹⁸ For example, statistics compiled by the Administrative Office of the Courts reflect that, in Maryland in 2001, 40% of the users of pro se services for whom demographic information was obtained had household incomes of less than \$15,000 annually. 31% had household incomes of less than \$30,000, and only 9% had incomes exceeding \$50,000.

Starting in the early 1990s, state courts began to respond to the pro se explosion by developing form documents for basic court filings and establishing informational programs to assist unrepresented persons. The structure of those programs varies, but they usually provide some explanations of basic court processes and forms. They are generally staffed by lawyers. In Baltimore City Circuit Court, for example, the pro se center is staffed by Legal Aid Bureau lawyers and paralegals, pursuant to a contract with the Court. The services are available to low-income individuals who receive assistance with filling out forms and receive general information about court processes and family law. In some Maryland counties, the pro se services are provided by lawyers who are recruited by Maryland Volunteer Lawyer Services and who receive a reduced fee for their services. In others, private attorneys are recruited and paid by the Family Services Coordinators to staff the pro se programs.

In 2001, Maryland pro se programs served over 33,000 individuals. Over 1,900 individuals received assistance quarterly in Baltimore City alone. The pressures on pro se programs to respond to the large number of persons seeking assistance are thus significant and increasing.¹⁹

III. Pro Se Programs Limit Service to Avoid Providing Advice to Opposing Parties.

The goal shared by the courts and providers of pro se services is to provide the maximum number of unrepresented persons with meaningful assistance that will help them understand the processes associated with resolution of their legal issues and achieve a fair result.

Most people who seek assistance want legal advice: they ask for guidance on how to address their own particular situation. As soon as a lawyer provides advice based on the facts of an individual's situation, no matter how limited, the ethical rules come into play, including those regarding conflicts of interest with current or former clients and imputation of conflicts among members of the same firm.

The conflict of interest rules were developed prior to, and therefore without consideration of, the special circumstances, surrounding the emergence of pro se assistance. When applied to pro se programs, these rules may have unintended results which undercut the program's goals without furthering the purposes behind the original rules.

Performing conflict checks can be a time consuming and cumbersome process for legal services providers that run court-based or other high volume pro se delivery systems, such as hot lines. Were conflict checks performed on each individual seeking services at high volume pro se programs such as those in Baltimore City or Anne Arundel Circuit Court, the number of persons assisted would decrease dramatically. As soon as an individual entered the door, a staff member would have to take the individual's name and

¹⁹ Other types of assistance have developed for unrepresented litigants in addition to court-based services. In Maryland, the Legal Aid Bureau and the Women's Law Center operate a family law hotline that provides brief service and advice to eligible callers. The Women's Law Center also runs a Legal Forms Helpline.

run it through the Legal Aid Bureau's voluminous, statewide data base. If the search were to reveal prior representation of an individual with potentially adverse interests, staff would need to investigate further, ascertaining whether the "Mary Smith" whose name surfaced in the check is in fact the estranged wife of the applicant for services, for example, and, if so, whether application of the rules would lead a lawyer to conclude that there was a potential or actual conflict. The analysis may require consultation with a supervising attorney. The individual may not be able to wait until that analysis is complete and the time it takes detracts from the services the program is able to provide to others.

Perhaps more important, applicants for services will be rejected because of the actual or potential conflict with a client of the legal services provider, even though the person providing the pro se advice has no knowledge about the individual who presents the "conflict". There is generally nowhere else for the unrepresented litigant to find legal assistance and the individual remains at a permanent disadvantage throughout the remainder of his or her court proceedings.

To avoid these problems, pro se programs run by organizations often limit the assistance they provide to general information, rather than legal advice tailored to the individual's particular situation. In other words, if all an individual receives is information about how court processes work or the options available to litigants without consideration of the circumstances of a specific case, the lawyer has arguably not provided "legal advice". Since the communication did not involve the acquisition of client-specific information that could be used to the detriment of that client in consulting with an adverse party, and no legal advice was provided, the lawyer is not precluded from providing information to an adverse party. However, the scope of assistance to everyone is therefore dramatically reduced. Moreover, the line between legal "advice" and "information" is hard to draw. Is directing an individual to a certain kind of form legal "advice" or "information"? If a lawyer must hear something about the client's situation before telling the person which form to fill out, has the lawyer provided legal "advice"? The difficulty of drawing this information versus advice line may cause lawyers to be overly cautious with the guidance they provide to litigants, thereby further diluting the usefulness of the services provided. Litigants are therefore less prepared for court and less able to address issues in their cases, placing more burdens on judges and court personnel.

IV. The Proposed Rule Permits Greater Access to Meaningful Service Without Harming Litigants.

Relaxation of the conflict rules for pro se programs will not harm litigants. First, programs do not obtain or retain documents of or about persons who seek assistance from it. There is thus no institutional memory created through the existence of files that would enable a member of the firm providing the pro se litigant with advice to obtain information acquired by another employee about an adverse party. Second, the high volume of inquiries and quick transactions means that individual lawyers are unlikely to retain information about a particular client which they can use to the detriment of that person when advising someone with conflicting interests. (However, in the rare instance

in which someone's case is so unique that the advisor recognizes the situation when the adversary appears for advice, the attorney must decline to assist the second person, even under the relaxed conflicts standard of Rule 6.5).

There is no expectation on the part of anyone seeking services from the pro se program for ongoing representation. There is thus no realistic opportunity to compromise ongoing representation of a client because a person with an adverse interest has sought assistance. Protection of loyalty, confidentiality and zealous representation is simply not at risk under these circumstances.

If Rule 6.5 were adopted, the lawyers staffing pro se programs would have more latitude to render advice tailored to the individual's particular situation. More individuals would obtain meaningful assistance in litigating their cases, enabling them to handle their cases more efficiently and effectively. They would not only save the time of court personnel, but would have a better sense of their legal position and presumably would be able to make better informed choices about their options and achieve fairer results.

V. The Comments Should be Modified to Avoid Questions Regarding "Feasibility".

For the foregoing reasons, Legal Aid supports adoption of Rule 6.5, with the following suggestion. Comment [1] states that pro se 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." Comment [3] includes a similar suggestion regarding the difficulty of conflict checking, noting that "a lawyer who is representing a client in the circumstances address by this Rule ordinarily is not able to check systematically for conflicts of interest. . ." These comments may lead to a misinterpretation that conflict checking should be performed by pro se programs, if "feasible". With sufficient computer capability, conflict checking may be theoretically "feasible" but, for the reasons described above, wholly impracticable and at odds with the goals of providing assistance to a high volume of applicants for service. We suggest the replacement of the word "feasible" in Comment One with "practicable or necessary". We suggest replacement of Comment [3] with the following:

The use of multiple lawyers and non-retention of documents by programs covered by the Rule substantially reduces the possibility that confidential information about an individual who has sought assistance could be considered in, or influence the scope, quality or content of, a consultation with someone with adverse interests. The significant volume of transactions also generally means that attorneys do not remember specific advice given or facts disclosed which could influence the advice given to another individual. There is therefore no benefit to current or former clients in performing a conflict check in every case. However, if an attorney knows that the representation presents a conflict of interest for himself or (for the purposes of Rule 1.10) for another lawyer in his firm, the lawyer must comply with Rules 1.7 or 1.9(a).

Submitted by: The Legal Aid Bureau
Hannah Lieberman, Director of Advocacy

Dated: July 15, 2003

COMMITTEE'S RESPONSE:

We do not believe that the word "feasible" would have the construction placed on it by this communication, and thus do not think the suggested change to Comment [3] is warranted.

I believe that there should be additional language in Comment 1 to address issues facing new programs designed to improve access to justice. Of particular concern is a program MACRO is supporting that involves collaboration with Legal Aid and the Pro Bono Resources Center. This program connects indigent clients with pro bono counsel to advise and represent them solely for the purposes of pro bono mediation. In Comment 1, I suggest the following modification to the language in the second sentence of the current draft:

In these programs, such as legal-advice hotlines, advice-only clinics, pro se counseling programs, or programs in which lawyers represent clients on a pro bono basis for the purposes of mediation only, 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.

Adding such language will assist access to ADR and appropriate limited legal representation for a segment of society that is severely under-served.

Respectfully,
Rachel Wohl, Esq.
Executive Director
Maryland Mediation and
Conflict Resolution Office

COMMITTEE'S RESPONSE:

The Committee agrees with this suggested change and has incorporated it

July 16, 2003

Professor Robert J. Rubinson
University of Baltimore School of Law 40 West Chase Street
Baltimore, MD 21201

Dear Professor Rubinson:

I am writing to provide the Women's Law Center's comments regarding the proposed changes to the Maryland Lawyers' Rules of Professional Conduct. We appreciate the comprehensive recommendations made by the Committee and value the opportunity to present our perspective regarding the impact of the changes.

The Women's Law Center is a membership organization that advocates for the legal rights of women through policy analysis, research, advocacy, education and direct services. Our direct service programs include representation of victims of domestic violence in Protective Order hearings in Baltimore City, Baltimore County and Montgomery County and the provision of brief telephone services through the Family Law Hotline and the Legal Forms Helpline. Overall, the organization serves over 7,000 individuals a year. i

The Family Law Hotline answers calls about a variety of family law issues and for many callers it is their first contact with an attorney. The Law Center staffs the Family Law Hotline two days a week exclusively with volunteer attorneys who respond to approximately 2,400 calls per year. (The Legal Aid Bureau staffs the Hotline the remaining three days.) The Legal Forms Helpline assists pro se litigants to complete the standard Domestic Relations Forms and answers questions about related substantive and procedural issues. The Helpline is available 20 hours a week and is staffed by contractual attorneys. The Helpline responds to approximately 2,700 calls per year. A typical hotline call is approximately 15-20 minutes. Both hotline services are statewide.

The Women's Law Center strongly endorses the addition of Rule 6.5 because it would have a positive impact on the operation of the two telephone services by allowing attorneys to provide more comprehensive services. Under the new rule, the hotline attorneys could comfortably provide legal advice while now they must carefully navigate the fine line between information and advice. This would help insure that pro se litigants be provided with the most comprehensive and meaningful services possible, thereby improving their chances of success in the court system and minimizing the challenges their cases create for the court system. Due to the extremely high volume of calls to the Women's Law Center's hotlines and the volunteer and contractual nature of the staffing, a requirement to routinely screen for conflicts of interest is impracticable. In addition, both services are statewide and the calls are anonymous. While the probability of an actual conflict is relatively remote, Rule 6.5 would impose a reasonable requirement to take appropriate action if an attorney determined that an actual conflict existed.

We have reviewed the extensive comments submitted by the Legal Aid Bureau and endorse all of the compelling arguments presented in that document, including the suggested modification to the Comments. As mentioned in the Legal Aid Bureau's response, the proposed Rule 6.5 has wide support from pro se providers throughout the state. A "Pro Se Best Practices Work Group," comprised of representatives from the Administrative Office of the Courts, Maryland Legal Assistance Network, family court coordinators and pro se providers, including the Women's Law

Center and the Legal Aid Bureau, has been meeting since March 2003 to develop standards of practice. This representative group conducted an extensive analysis of the American Bar Association Model Rule 6.5 and enthusiastically endorsed its inclusion in the Maryland Rules of Professional Conduct.

Thank you for your consideration of the Women's Law Center's comments on the proposed changes to the Maryland Lawyers' Rules of Professional Conduct. If you have any questions about our position or the impact that the proposed rules would have on our program, please do not hesitate to contact me.

Sincerely,

L. Tracy Brown
Executive Director

cc: Gwen Tromley, President, Women's Law Center

LAW OFFICES OF
LESLIE A. POWELL

July 15,2003

* * *

Rule 6.5 Nonprofit and Court-annexed Limited Legal Services Programs. This rule permits a relaxation of standards of ethics under certain circumstances. Compromising the rule is inappropriate and unnecessary. There is no reason proffered as to why a conflict of interest review cannot be performed in advance of rendering legal advice. It is rare that a true legal emergency exists that requires instantaneous attention prior to doing a conflict review. Moreover, I am uncertain of the basis for the statement in comment 1 that "there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation." That would only be true if the person was explicitly so advised and understood the limitation. Does the client who consults under such a program then become a "former client" within the meaning of the rules?

* * *

Sincerely,
Leslie A. Powell

COMMITTEE'S RESPONSE:

In light of the previous comments on this Rule, the Committee believes that this Rule is useful and would enhance the provision of legal services to underserved

populations. The operation of conflicts of interest rules, including the applicability of Rule 1.9 governing “former clients,” is set forth in the Rule.

Public Comments: Rule 8.4(e)

I wanted to take a moment to further my comments at the meeting of the Ethics Committee of the Baltimore City Bar last week. These comments are my opinions alone and do not reflect the opinion of the Committee.

Let me begin by stating that I believe the conduct prohibited by the proposed rule is already covered by current Rule 8.4(d) [conduct which is prejudicial to the administration of justice]. I understand the good intentions of the people who wish to include this paragraph as a separate "rule." However, I believe such good intentions may have unintended consequences.

An initial problem is the special status assigned to the "protected" groups. Twenty years ago the addition of "sexual orientation" would have been controversial, today it is generally accepted. While I cannot predict what group will emerge next -- perhaps personal appearance, or height ("short people have no reason to live") and weight --- the position would certainly be sustainable under Rule 8.4(e) that bias or prejudice could be advanced against such groups is permitted. No one would argue that such conduct is permissible, but unless the Court were to continually amend the Rule, the only way to punish such biased conduct would be through Rule 8.4(d).

Another problem I have is with the "exceptions" and "conditions" necessary to assert the conduct is a violation of the Rule. The conduct must not be "legitimate advocacy" and must be in the course of acting in a "professional capacity." The exceptions swallow the rule. All an advocate must state is that the conduct was advocacy to advance a client's position. This makes the Rule a matter of determining the subjective intent of the attorney and also the subjective opinion of the receiver of the conduct. Where the Rule is subject to such interpretation, it invites abuse by attorneys seeking an improper advantage.

Finally, I believe that this Rule may discourage attorneys from representing clients on the fringes of society – in order to stay away from the Rule entirely. If an attorney faces possible disciplinary action for advancing the positions of a client, the Rule is flawed. If an attorney wishes to raise the rights of Nazis to march in Skokie or of the Ku Klux Klan to march in inner cities, that attorney will be making statements to

the media which defend offensive behavior. If that attorney is accused of supporting his clients positions for any reason other than "legitimate advocacy," the attorney has fallen within the borders of this proposed Rule. I cannot support such a Rule despite its goals

In my opinion, the proposal should be included in the comments as a clear violation of 8.4(d).

Thank you for taking the time to present my comments to the committee.

Alan Abramowitz

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July 15, 2003

Re: Comment to Proposed Rule 8.4(e)

I write to comment upon the proposed revision to Rule 8.4 of the Maryland Rules of Professional Conduct (the "Maryland Rules"). More particularly, I write to voice my objection to the speech code found in section 8.4(e) of the draft rules circulated by the committee appointed by the Maryland Court of Appeals to consider changes to the Maryland Rules (the "Committee").

As explained below, I believe that it would be a profound mistake for the Committee to recommend the adoption of proposed Rule 8.4(e). Including such a rule in the Maryland Rules would: (1) constitute an illegal restriction on admittedly offensive -- but constitutionally protected -- speech by Maryland attorneys; (2) chill the exercise of even inoffensive free speech by Maryland attorneys, (3) place Maryland attorneys in the impossible position of attempting to discern what speech is prohibited by the vaguely worded rule; and (4) undermine the legal profession's traditional association with the protection, rather than the suppression, of free speech. For these reasons, I would respectfully request that the Committee strike proposed Rule 8.4(e) from any draft that eventually is recommended to the Maryland Court of Appeals.

I have broken my comments down into three sections. First, I explain why, as a matter of policy, it is fundamentally ill advised for the Committee to recommend the adoption of a speech code for Maryland lawyers. Second, I offer my admittedly novice Constitutional analysis as to why proposed Rule 8.4(e) probably violates the First Amendment of the U.S. Constitution. Finally, I pose a number of hypotheticals where I believe proposed Rule 8.4(e) could lead to unintended, harmful, irrational or patently unconstitutional results.

I should stress at the outset that the comments in this letter are solely my own and should not be attributed to either any other member of my firm or to any professional organization to which I belong. Further, I would like to strongly emphasize that my comments are not intended as a slight upon the work of the Committee; I disagree with the language of proposed Rule 8.4(e), but I greatly admire the Committee's apparent desire that the profession should be free from all forms of discrimination. I also recognize that the members of the Committee clearly have devoted significant time and considerable effort to the task handed to them by the Court of Appeals.

I. A SPEECH CODE SHOULD NOT BE IMPOSED UPON MARYLAND ATTORNEYS

"If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."²⁰

Freedom of speech is a necessary precondition to the functioning of a healthy democracy. Nevertheless, for as long as democracy has existed, there have been victims to the cause of free expression. Ever since Socrates was sentenced to death for political incorrectness ("corrupting the youth of Athens"), brave men and women have defended the inherent right of human beings to think as they please and to express their thoughts without fear of government sanction.

Members of the legal profession have been at the forefront of this defense of liberty, serving as champions -- and occasionally as martyrs -- for free speech. Thomas More, the then future patron saint of lawyers, famously went to his death because he refused to swear to an oath he did not believe to be true. Anticipating the concerns that would lead to the adoption of the Bill of Rights, More recognized that the State cannot have a monopoly on truth. As a dramatized version of More explains in Robert Bolt's famous play:

Some men think the Earth is round, others think it flat; it is a matter capable of question. But if it is flat, will the King's command make it round? And if it is round, will

²⁰ John Stuart Mill, "On Liberty", reprinted in *Utilitarianism, On Liberty and Considerations of Representative Government*, 79 (1972).

the King's command flatten it?²¹

In more recent times, the professional progeny of More in this country have protected the right of socialists, anarchists, religious dissenters, racial bigots and other unpopular actors to express their views. Moreover, American lawyers traditionally have performed this role even when they are personally repelled by the underlying speech they help to protect. Jewish lawyers have defended the rights of Nazis to march in Illinois.²² Black lawyers have defended the rights of the Ku Klux Klan.²³ The reason for this seeming irony is simple but compelling: to protect the rights of all of us, it is necessary to protect the most despicable speech of even the most despised speakers. As Nadine Strossen, the President of the ACLU, explained that organization's role in protecting free speech:

We don't defend the Klan. We defend the Klan's right to engage in peaceful protests or to express its own views. We would never substantively defend its ideas. It may seem like a small distinction, but it really is a significant difference.²⁴

In other words, it is not enough to protect free speech only when that speech conforms to societal sensibilities. To the contrary, it is precisely speech which most offends the majority that is most in need of protection. As Constitutional scholar Gerald Gunther has stated:

The lesson I have drawn from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigot's hateful ideas with all my power, yet at the same time challenging any community's attempt to suppress hateful ideas by force of law.²⁵

In my view, proposed Rule 8.4(e) represents a significant and inappropriate retreat by the legal profession from this sentiment. Under the proposed rule, the coercive power of the State of Maryland, administered through the Maryland Court of Appeals, will be used to suppress speech on the basis of its content. Rather than acting as a bulwark preventing the legislative or executive branches from stifling speech, the judicial branch itself will

²¹ Robert Bolt, *A Man For All Seasons*, 133 (1st Vintage Ed. 1990).

²² See Aryeh Neier, *Defending My Enemy: American Nazis, The Skokie Case, and The Risks Of Freedom* (1979).

²³ See David B. Wilkins, *Race, Ethics and the First Amendment: Should A Black Lawyer Represent The Ku Klux Klan*, 63 Geo. Wash. L. Rev. 1030 (1995).

²⁴ "Nadine Strossen and Freedom of Expression: A Dialogue with the ACLU's Top Card-Carrying Member," 13 Geo. Mason v. Civ. Rts. L.J. 185, 203 (2003).

²⁵ See *Virginia v. Black*, 123 S.Ct. 1536, 1551 (2003) (quoting Gunther).

become a censor. How ironic it will be if the profession that long has protected unpopular free expression now chooses to silence its own members.

And what reasons would motivate the Bar to undergo this transformation from protector of liberties to suppressor? As far as I am aware, the Committee has not yet offered any public reason for the proposed change to Rule 8.4(e), other than the Comment that accompanies the proposed rule. Certain clues, however, are apparent from a review of the draft circulated by the Committee. First, I note that the revised rules, like the existing rules, will separately restrict speech that could affect the right of a litigant to receive a fair trial -- the only constitutionally recognized basis for restricting non-commercial attorney speech. See Rule 3.6.²⁶

Moreover, the existing rules and the proposed rules also will separately prohibit conduct prejudicial to the administration of justice. See Rule 8.4(d) (prohibiting “conduct that is prejudicial to the administration of justice”). So, for example, the intimidation of a witness or disrespect for the tribunal already are covered by other rules. The reference to “conduct” in Rule 8.4(e) is therefore either redundant or, more likely, reflects that Rule 8.4(e) is intended to reach areas beyond the scope of the existing Rules.

In fact, it appears that the only logical construction of the proposed rule is that it is intended to limit speech that does not prejudice trial proceedings but that expresses an obnoxious viewpoint on certain listed topics. In other words, the proposed rule would enact a comprehensive speech code that would eliminate from the Bar any speech tainted by bias or prejudice of a certain kind.

This, I respectfully submit, is a mistake. While it may be proper to limit attorney speech for the purpose of protecting trial proceedings, or to limit attorney conduct that prejudices the administration of justice, a broader limitation on speech by attorneys will only erode the principles enshrined in the First Amendment.

As a practical matter, adoption of the rule also will create great uncertainty and confusion. When does a lawyer act “in a professional capacity?” When does a lawyer engage in “legitimate advocacy?” What exactly is “illegitimate advocacy?” What is “socioeconomic status?” What does “prejudicial to the administration of justice” mean when that phrase is applied to attorney speech unrelated to litigation?

Because Maryland attorneys can only guess at the answers to these questions, the proposed rule undoubtedly will lead both to unintentional violations and to the self-censorship of speech that an attorney mistakenly believes falls under the proscription of Rule 8.4(e). This result would be utterly inconsistent with the Bar’s traditional association with freedom of expression. It also would be unconstitutional.

²⁶ See infra at 6-7 (discussing constitutional limits).

II. THE PROPOSED SPEECH CODE IS UNCONSTITUTIONAL

"Under the First Amendment, content-based restrictions on attorney speech are permissible only when they are no greater than necessary to protect an accused's right to a fair trial or an impartial jury."²⁷

I turn to a short discussion of the Constitutional concerns raised by proposed Rule 8.4(e). My purpose in this section is not to present a thorough and persuasive legal argument establishing that the proposed rule violates the First Amendment. Quite frankly, as a commercial litigator who has not participated in a single First Amendment case since graduating from law school in 1991, I probably am not capable of making that argument consistent with the requirements of Rule 1.1. Rather, I merely wish the Committee to consider that even a lawyer with no First Amendment experience, performing only a modest amount of research, can discern significant questions regarding the Constitutionality of Rule 8.4(e). I can only believe that far more formidable legal challenges will be advanced by public interest organizations, if and when proposed Rule 8.4(e) is adopted.

A. Overview: Proposed Rule 8.4(e) Constitutes An Illegal Viewpoint-Based Restriction On Speech

The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." This right, which applies to the States as a result of the Fourteenth Amendment, is perhaps the most celebrated in the Constitution.

At its core, the First Amendment means that the government may not proscribe certain speech simply because it disagrees with the content of that speech. This point is well illustrated by the landmark U.S. Supreme Court decision of R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). In R.A.V., the Court considered an ordinance which prohibited the display of a symbol which a defendant would or should know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." Id. at 380. Finding that the ordinance prohibited otherwise permitted speech solely on the basis of content, the Supreme Court struck down the ordinance (by a unanimous vote) as unconstitutional. The Court's opinion stressed that "[t]he government may not regulate based on hostility -- or favoritism -- towards the underlying message expressed." Id. at 386. Moreover, the Court rejected the argument that the restriction could be justified as a valid restraint upon "fighting words." The Court instead noted that the ordinance did not cover all "fighting words," but only those which concerned one of the disfavored topics. This selectivity did not comport with the requirements of the Constitution. As the Court summarized its holding: "The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."

Following R.A.V., speech codes generally have not fared well under Constitutional

²⁷ In re Morissey, 168 F.3d 134, 140 (4th Cir. 1999).

scrutiny. See, e.g., Dambrot v. Central Mich. Univ., 55 F.3d 1177 (6th Cir. 1995); (striking down discriminatory harassment policy); UVW Post, Inc. v. Regents, 774 F. Supp. 1163 (E.D. Wis. 1991) (striking down university speech code that prohibited, inter alia, “ ‘discriminatory comment’s, “directed at an individual that, ‘intentionally . . .demean’” the “ ‘sex . . . of the individual’” and ‘[c]reate an intimidating, hostile or demeaning environment for education, university related work, or other university - authorized activity’”); Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989) (similar); IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993) (overturning on First Amendment grounds university’s sanctions on a fraternity for conducting an event with “racist and sexist” overtones).

The reason for such a result is not hard to discern: Viewpoint-based restrictions are subject to the strictest level of Constitutional scrutiny. See Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Dept. of Motor Vehicles, 288 F.3d 610, 615 (4th Cir. 2002). To pass this strict test, a law “must be necessary to serve compelling government interests by the least restrictive means available.” Id. at 616 (quoting American Life League, Inc., v. Reno, 47 F.3d 642, 648 (4th Cir. 1995)).

Moreover, following R.A.V., courts repeatedly have held that an unconstitutional viewpoint- based restriction does not become valid simply because it seeks to regulate offensive speech. As the Maryland Court of Appeals explained in one noteworthy case:

Indeed, the promotion of racial and religious tolerance has become not just an interest of Maryland’s government, but a moral and ethical mission of our entire society in order both to correct past injustices and to give content to our nation’s belief in equality of opportunity. But the Constitution does not allow the unnecessary trammeling of free expression even for the noblest of purposes.

State v. Sheldon, 629 A.2d 753, 763 (Md. 1993) (emphasis added).

Nor is there any reason to believe that Rule 8.4(e) will be exempt from the analysis set forth above simply because it involves the regulation of the legal profession. It is true that lawyers representing clients in a courtroom proceeding may be regulated under a less demanding standard than that applicable to other speakers. See Gentile v. State Bar of Nevada, 111 S.Ct. 2720 (1991). For example, the Supreme Court has held that a State may adopt a regulation that limits attorney speech posing “a substantial likelihood of materially prejudicing an adjudicative proceeding.” Id.

Nevertheless, the regulation of speech by lawyers has clear Constitutional limits. As the Fourth Circuit has made clear, Gentile allows only narrowly tailored restrictions on attorney speech. See In re Morissey, 168 F.3d 134 (4th Cir. 1999). In Morissey, the Fourth Circuit recognized that “protecting the right to a fair criminal trial by an impartial jury whose considerations are based solely on record evidence” is a compelling state interest that would justify narrowly tailored restrictions on speech. Accordingly, the

Court upheld a local rule that prohibited, in the context of ongoing litigation, the disclosure of certain categories of information where such disclosure was reasonably likely to threaten the right to a fair trial.²⁸ The Fourth Circuit stressed, however, that limitations on lawyer speech "must be aimed at the two evils that threaten the integrity of the judicial system," namely, "(1) comments that will likely influence the outcome of a trial and (2) statements that will prejudice the jury venire even if an untainted jury panel can eventually be found."²⁹ Further, to pass constitutional muster, a restriction on lawyer speech "must be neutral as to points of view, apply equally to all lawyers in the case, and only postpone lawyers' comments until after the trial." *Id.* at 140 (emphasis added).

Here, proposed Rule 8.4(e) cannot withstand scrutiny under Gentile as that case has been interpreted by the Fourth Circuit in Morrissey. First, the regulation is not narrowly tailored to protect a litigant's right to a fair trial. Rather, the proposed rule is not limited to the representation of a client in litigation or, for that matter, to the representation of a client at all. It instead applies broadly to any words uttered by a lawyer when he acts in a "professional capacity. "

Second, the proposed rule is not "neutral as to points of view." Instead, in direct contravention of R.A.V., it restricts only speech that reflects a bias based upon gender, race, sexual orientation or any of the other designated topics. To be sure, such speech may be deeply offensive to the listener, but such speech is also Constitutionally protected. Rule 8.4(e) is therefore presumptively invalid.

Third, proposed Rule 8.4(e) does not merely postpone the lawyers' speech, but prohibits it for all time. It is thus the most severe type of restriction on expression imaginable.

In sum, it does not appear (at least to my untrained eye) that Rule 8.4(e) can survive Constitutional challenge under the reasoning of R.A.V., Gentile and Morrissey. At a minimum, proposed Rule 8.4(e) clearly raises significant Constitutional concerns. Thus, even if the Committee does not agree with my Constitutional analysis, it must concede that difficult litigation challenging that proposed rule is virtually certain to follow its adoption.

Moreover, proposed Rule 8.4(e) cannot be saved by the assurance that it will only be enforced "reasonably" by Bar Counsel. This may well be true, but the First Amendment cannot depend upon such predictions. Rather, overbreadth and vagueness concerns render the proposed rule void on its face.

B. Overbreadth

²⁸ See also U.S. v. Brown, 218 F.3d 415 (5th Cir. 2000) (finding that court may limit lawyer speech that presents a "substantial likelihood" of prejudice to a court's ability to conduct a fair trial, but refusing to decide whether a "reasonable likelihood" test also would pass constitutional muster).

²⁹ Cf. Seattle Times Co. v. Rinehart, 467 U.S. 20 (1984) ("on several occasions this Court has approved restriction on the communications of trial participants when necessary to ensure a fair trial for a criminal defendant") (emphasis added).

It long has been recognized that a regulation of speech may be struck down on its face if its prohibitions are sufficiently overbroad and reach too much constitutionally protected speech (i.e., “substantial overbreadth”). Although a court will attempt to construe a statute in a constitutional manner, it “will not rewrite a . . . law to conform it to constitutional requirements.” Virginia v. Am. Booksellers Ass’n, Inc., 484 U.S. 383, 397 (1988). A speech code is overbroad if there is a likelihood that the statute’s very existence will inhibit free expression. Members of the City Council v. Taxpayers For Vincent, 466 U.S. 789, 799 (1984); see also Dambrot v. Central Mich. Univ., 55 F.3d 1177 (6th Cir. 1995) (striking down university discriminatory harassment policy because it was overbroad, vague, and not a valid prohibition on fighting words).

Here, the breadth of proposed Rule 8.4(e) clearly exceeds Constitutional limitations. To begin, the rule certainly is not a reasonable regulation of the time, place or manner of speech. Instead, it regulates the content of speech (prejudicial or biased expressions), not the method or manner of delivery. The rule also does not address obscenity or some other clearly unprotected area of speech. It is therefore certain that the regulation will reach a great deal of speech protected by the Constitution. See infra at 9-12 (providing hypotheticals). If anything, the closest analogy to Rule 8.4(e) appears to be to prohibitions against “fighting words.” But as noted above, the selective prohibition of only certain “fighting words” cannot pass Constitutional scrutiny. See R.A.V., supra. Accordingly, it appears likely that Rule 8.4(e) will be invalidated on its face as overbroad if it eventually is adopted.

C. Vagueness

In addition to being overbroad, the proposed rule also is unconstitutionally vague. The Supreme Court has an established history of striking down statutes that are excessively vague. For when the language of regulation is vague, speakers are left to guess as to its application. This uncertainty will lead them to “steer far wider of the unlawful zone” than if the boundaries of the forbidden areas were clearly marked.” Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (internal citations omitted).

Proposed Rule 8.4(e) cobbles together a series of extremely vague terms that together render the meaning of the prohibition virtually incomprehensible. Consider, for example, the exception for “legitimate advocacy.” Does “advocacy” include conduct outside the courtroom -- for example in speaking to the press or lobbying a legislator? Does advocacy include instances where there is no client (e.g. when the lawyer expresses his “expert opinion” to a newscaster about a case in which he has no involvement). And what exactly is “legitimate” advocacy? As Ronald Rotunda has noted, “[t]he neighbors of Atticus finch, in *To Kill A Mockingbird*, no doubt thought his advocacy was illegitimate.”³⁰

Similarly troublesome is the phrase “in a professional capacity.” Am I acting in a professional capacity when I speak at an MSBA meeting? When I author a law review

³⁰ Ronald Rotunda, “*Raist Speech and Lawyer Discipline*”, 6 No. 2 Proflaw 1 (Feb. 1995).

article? When I appear as an expert witness? When I write this letter?

And what are we to make of such vague terms as “socio-economic status” or “sexual orientation”? How is a lawyer to know what speech is prejudicial to the “administration of justice”? These and other unanswered questions make it impossible for the average attorney to reasonably determine what speech is prohibited by the proposed rule. For these reasons, the proposed rule is unconstitutionally vague on its face.

III. A FEW HYPOTHETICALS THE COMMITTEE SHOULD CONSIDER

I have no doubt that the members of the Committee have in mind a noble purpose in seeking to restrict speech by Maryland attorneys. I suspect, however, that all members of the Committee have not considered the full implications of proposed Rule 8.4(e). I therefore pose the following hypotheticals. My purpose is not to suggest that in all (or for that matter any) of these examples is the potentially censored speech appropriate or desirable. Instead, I merely wish the Committee to consider whether it is opening up Pandora’s Box by attempting to establish viewpoint-based limitations on the speech of Maryland attorneys. In other words, if even one of the following hypotheticals suggests that proposed Rule 8.4(e) will censor speech that should not be censored by force of law, then I submit that the proposed rule change should be abandoned.

Hypothetical #1: Forum Selection

It is January 1, 2004. Alice Arthur, an African-American female, owns Supercyber, a small business that produces and distributes a unique software product. Supercyber leases that product to Beta Incorporated, a Mississippi firm owned and managed by Ben Beauregard, the brother of a former wizard of the Ku Klux Klan. The parties have had a falling out, and Supercyber intends to sue Beta for misappropriation of trade secrets and tortious interference with the employment contracts of several former Supercyber employees who have now gone to work for Beta. The evidence in the case will include conflicting testimony concerning conversations in which Ben allegedly made racially offensive statements while allegedly telling Alice he would steal her employees if she didn’t renegotiate their lease. It is theoretically possible that, if Supercyber succeeds on its claims, there may be a basis for the award of punitive damages. Jurisdiction and venue are possible either in the Circuit Court for Baltimore City or in the United States District Court for the District of Maryland.

Alice is discussing with her attorney, Tommy More, where Supercyber should bring its lawsuit. Tommy is an Asian-American male. Alice tells Tommy that she would like to get a quick decision and that she has heard the federal courts are faster. Tommy tells Alice that she nevertheless would be better off before a Baltimore City jury than before a federal jury. Tommy says, without elaboration, that a Baltimore City jury would be more sympathetic to a plaintiff in her circumstances. Alice then asks whether this is because Tommy believes that “white jurors will rule against me even if I’m in the right.” Although he may well be entirely incorrect in his conclusions, Tommy subjectively believes the following: (1) African-American jurors, on the whole, are more likely to reject the testimony of Ben Beauregard and Beta than other jurors; (2) white jurors, on

the whole, are more likely than other jurors to be biased against Alice; (3) African-American jurors, on the whole, are more likely than white jurors to rule in Alice's favor in this case, and (4) if liability is established, African-American jurors are more likely than white jurors to award substantial punitive damages.

But for the existence of newly enacted Rule 8.4(e), Tommy might answer Alice's question as follows: "In my professional judgment, an African-American juror is more likely to rule in your favor than a white juror; I won't comment upon whether that is because I believe white jurors are more likely to be biased against African-American plaintiffs, or because African-American jurors are more likely to be biased against Beta." Instead of giving this response, and because he is vaguely familiar with a new speech code enacted by the Maryland Court of Appeals, Tommy says: "the rules of professional conduct prohibit me from giving you any further advice on this topic." Tommy also makes a mental note never to again do anything which might suggest to any client that the race of jurors could impact a jury decision.

If Tommy had spoken candidly and conveyed his honest opinion to Alice, wouldn't he have violated proposed Rule 8.4(e)? He clearly would be acting in a professional capacity. Moreover, because his advice was sought in private by a client, his speech presumably could not fairly be characterized as advocacy. And it seems quite clear that, had he spoken his mind, Tommy would have indicated a bias based upon race: he believes that race could affect how jurors will decide the case and that his client should seek a forum that is more likely to have a higher percentage of African-American jurors.

It could be argued that Tommy's views cannot be violative of Rule 8.4(e) because they are not "prejudicial to the administration of justice." This possibility, however, will be cold comfort to Tommy. He has little doubt that it will be argued that it is prejudicial to the administration of justice for a well-known and respected attorney like himself to suggest that decisions in the judicial system can be affected by race. Tommy can envision the closing argument he will hear in later disciplinary or civil proceedings: "Mr. More's outright attack on the impartiality and integrity of the judicial process undermines respect for the rule of law itself. In Mr. More's world, plaintiffs win or lose not because of the merits of their claims, but based on the color of their skin. This may be the sad world Mr. More inhabits, but the Maryland Rules of Professional Conduct reflect a rather different perspective...."

Hypothetical #2: The Retired Jurist

Same facts as hypothetical #1. Assume that Supercyber sues Beta in the Circuit Court for Baltimore City and that the case has been assigned to Judge Wendy Holmes. Judge Holmes is 87 years old and previously served on the bench for over 30 years before retiring in 1995. Because of an unexpected vacancy, she has just come out of retirement to again serve as a judge. Ben Beauregard asks his 35 year-old attorney, Danny Webster, if the assignment of Judge Webster is a favorable development. Danny says: "I know Judge Holmes well and although she was an extremely capable jurist, I suspect she is now past her prime and should never have come out of retirement." Danny recommends that they remove the case to federal court.

Has Danny reflected a bias or prejudice based on age that cannot be considered legitimate advocacy and that is prejudicial to the administration of justice? I don't know, but I suspect that Danny, when he looks at proposed Rule 8.4(e) after his conversation with the client, wouldn't know the answer either.

Hypothetical #3: The Wayward Wife

Jayne Haiber, the wife of a Baltimore lawyer, attends a demonstration against the death penalty along with other members of the St. Margaret's Church mother's group. As a result of mistaken identity, Jayne and several priests from St. Margaret's are later arrested for threatening a police officer at the demonstration. Jayne approaches Claire Darrow, a noted Harford County criminal defense lawyer, to represent her. Claire Darrow interviews Jayne and then says: "I honestly believe that my representation of you may be materially limited by my views about Catholics like yourself. I have nothing against you personally, and I will do everything in my power to represent you faithfully and to the best of my ability, but it would be wrong of me not to disclose this bias now before I begin representing you." Ignoring the advice of her long-suffering husband, Jayne does not retain Claire but instead files a complaint with disciplinary counsel, arguing that Claire has violated Rule 8.4(e).

Hypothetical #4: Deposition Break

During a break in a deposition, a secretary comes in to take orders for lunch. The examining lawyer, Terry Mason, asks for a burger and french fries. Then Terry changes his mind: "On second thought cancel the french fries; after the way they treated us over Iraq, I don't want anything to do with the French." The witness (who unbeknownst to Terry is married to a Frenchman) is so upset that she is unable to continue with the deposition. When Terry arrives at work the next day, he sees an ominous looking letter from Bar Counsel sitting on his desk.

Hypothetical #5: The Would-Be Jurist

Annie Finch, a former Deputy Attorney General, is nominated for a federal judgeship. In her confirmation hearings, Ms. Finch is asked why she recently cancelled a family trip to Disneyland. Ms. Finch answers quite truthfully that she discovered her vacation would occur during a weekend when many homosexuals traditionally attend the theme park. Ms. Finch states that she is a devout Christian and that she views homosexuality as morally wrong and inconsistent with her family's values.³¹

Ms. Finch eventually is confirmed by the U.S. Senate, but faces disciplinary proceedings under Rule 8.4(e) in Baltimore because she expressed a bias based on sexual orientation while acting in a professional capacity (a lawyer seeking to become a judge). Bar counsel takes the position that it is inherently prejudicial to the administration of justice for a lawyer seeking appointment to the bench to admit an improper bias.

³¹ Cf. "Senate Judiciary Committee Grills Catholic Nominee on Abortion Views", National Catholic Register at 3 (July 6, 2003) (quoting a very similar exchange in the confirmation hearings of Bill Pryor).

Hypothetical #6: The Confederate Re-Enactor

Eddie Beauregard, a distant relative of Ben from hypothetical #1, is a member of the Sons of Confederate Veterans. He also spends virtually every weekend as a Civil War “Re-Enactor.” He displays a miniature Confederate battle flag on the desk in his office.

Eddie also sometimes serves as a court-appointed magistrate to resolve discovery disputes. In such cases, he sometimes will ask counsel to argue their motions in a conference room at his firm.³² On one such occasion, an attorney on his way to the conference room in Eddie’s firm notices the flag on Eddie’s desk while passing the open doorway. That attorney, feeling compelled to do so by the mandate of Rule 8.3, reports the information to Bar Counsel, who initiates proceedings under Rule 8.4(e).

Hypothetical #7: The Activist Attorney

Gene Debs, a prominent attorney and self-described social justice activist, is invited to speak at a program at the University of Baltimore School of Law that is jointly sponsored by the ACLU and the Federalist Society. The audient will include law students, judges, practicing attorneys and a reporter for the Daily Record. Paraphrasing a law review article he has written, Gene argues that the poor can never expect to get a fair shake from the American judicial system because “there is no such thing as a poor judge.” He also says: “Its about time that the rich see what it feels like to be treated unfairly.” Unbeknownst to Gene, Bar Counsel also is seated in the audience.

* * *

In each of these examples, the members of the Committee may well feel that the speech at issue would be better left unsaid. After all, who wants to protect the confederate battle flag, a derogatory remark about the capabilities of an older judge or the injection of racial issues into the counseling of clients about forum selection. But I would ask the members of the Committee to consider whether they can confidently say that the speech in each of these hypotheticals should be banned outright by the State of Maryland. If not, I would suggest that the Committee reconsider proposed Rule 8.4(e).

IV. CONCLUSION

I would like to thank the Committee for providing practicing attorneys with an opportunity to comment upon the proposed revisions to the Maryland Rules. I also would like to thank you for undertaking, for the benefit of all of us in the Bar, the thankless task of reviewing those rules and suggesting needed improvements.

Very truly yours,

Scott R. Haiber

³² See Sons of Confederate Veterans, Inc., 288 F.3d 610 (4th Cir. 2002); Sons of Confederate Veterans, Inc. v. Glendening, 954 F. Supp. 1099 (D.Md. 1997) (display of confederate flag is Constitutionally protected speech).

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July 15, 2003

As detailed below, our comments relate to the following proposed revisions:

* * *

(3) Proposed Rule 8.4(e), which defines professional misconduct as including "words or conduct" that manifest "bias or prejudice."

* * *

3. Rule 8.4(e) -Expanded Definition of Attorney Misconduct

Newly proposed Rule 8.4(e) expands the definition of attorney misconduct. Under the proposed revision, it shall be attorney misconduct to, "knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of this paragraph." We respectfully suggest that this provision be deleted in its entirety.

While we agree with the Committee that a professional commitment to equal justice under the law lies at the very heart of the legal system, and we fully endorse that commitment, we do not believe that the proposed provision is an appropriate means of accomplishing that noble end. First, we believe that the language "when acting in a professional capacity" is overly broad, as it is not limited to a lawyer's role in representing clients, but arguably embraces a much wider variety of "professional" activities in which a lawyer may be involved. Such activities could include, for example, teaching, public speaking engagements, participation in political action groups, or participation in civic or professional committees and associations. The sheer breadth of the proposed Rule, therefore, raises significant First Amendment issues regarding freedom of speech and association. Those concerns could lead to a constitutional

challenge. While we recognize that the proposed Rule is limited to words and conduct that are "prejudicial to the administration of justice," we question whether the inherent vagueness of this phrase could pass constitutional muster.

While we do not profess to be experts in the field of constitutional law, we raise these issues out of a concern that this provision will transform deliberations regarding the much needed passage of the revised Rules to guide practicing lawyers into a political and social debate over discrimination and freedom of speech. The substantive legal issues surrounding discrimination in our society are addressed in a complex series of state and federal statutes and regulations that are constantly evolving through the legislative and judicial processes of this country. In light of this expansive and ever-changing body of existing substantive law, we believe that it is unwise to attempt to supplement and, in this case, go beyond existing law to regulate discriminatory conduct within the context of our professional Rules.

Moreover, we are concerned that the provisions of Rule 8.4(e), when viewed in combination with the above-referenced provision of Section 20 of the Preamble regarding the evidentiary value of an alleged violation of the Rules, will lead to a new form of discrimination-based malpractice liability in Maryland.

* * *

In short, we believe that the proper role of the Rules is to provide guidance to practicing lawyers and to create a structure for effective peer review and discipline within the profession. They should not be used as a vehicle to enhance, supplement or otherwise supplant existing substantive areas of the law.

Very truly yours,

James P. Garland

Jefferson V. Wright

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August 29, 2003

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2. Discrimination As A Rule Of Professional Conduct

I want to chime in with Leslie in agreeing that anti-discrimination laws do not belong in the Rules Of Professional Conduct. There are certainly enough anti-discrimination laws on the books, locally and federally, that we do not need to include them in the Rules *Of* Professional Conduct, particularly in an area that is so fraught with frivolous lawsuits. The latest statistic I recall seeing concerning discrimination claims was that, at least in federal court, less than 10% *of* the cases filed proceeded to trial, with the rest being defeated by motions *for* summary judgment. Certainly, increasing the likelihood *of* bar association complaints and ethics investigations by disgruntled employees or clients, in addition to the civil avenues already available, is not going to inure to the benefit. of anyone.

[This letter has been edited to include comments relating to Rule 8.4(e)]

LAW OFFICES OF
LESLIE A. POWELL

July 15,2003

SUBJECT: Proposed Changes to The Rules of Professional Conduct

Dear Professor Rubinson:

I am a lawyer with a small firm in Frederick, Maryland, and have reviewed the committee's proposed modifications to the Rules of Professional Conduct. I have the following comments and concerns about the proposed and existing rules. I thank you for taking the time to consider this.

*

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Rule 8.4 Misconduct. The conduct proscribed in Rule 8.4(e) is currently covered by substantive law. The inclusion here creates great opportunity for mischief. One could argue that any such conduct is "prejudicial to the administration of justice" and the rule could easily serve as a spring board for more fighting. Certainly no one should make racist or sexist remarks. However, the possibility for distortion and exaggeration exists and this could become a tool for I over-aggressive litigators. In addition, it likely does not comport with the First Amendment. ; There is a tendency to want to address personal conduct in the rules. Regulating morality has never worked. Unless the conduct has direct bearing on the practice of law it should not be included in the Rules.

* * *

Sincerely,
Leslie A. Powell

July 25, 2003

Dear Professor Rubinson:

I am writing to express the Women's Law Center's additional comments regarding the proposed changes to the Maryland Lawyers' Rules of Professional Conduct. The Women's Law Center is a membership organization that advocates for the legal rights of women through policy analysis, research, advocacy, education and direct services. The organization's members and supporters are deeply committed to efforts to insure that the legal system is free from gender bias and other prejudices. Therefore, the Women's Law Center strongly supports the proposed new section of Rule 8.4 that would make it professional misconduct for a lawyer while acting in a professional capacity to knowingly manifest bias or prejudice when such action is prejudicial to the administration of justice.

Attorneys are the representatives of the legal system within the community. In addition, they often serve as gatekeepers to the system. In order to promote the public's respect for the profession and to insure equal access to a fair and equitable system, attorneys must be held to a very high standard of conduct. Prejudicial actions or words occurring within the attorney's professional capacity are reprehensible because they can convey the perception that the legal system is biased. The proposed section of Rule 8.4 provides the profession with a method to sanction and deter these damaging actions when the result of the biased conduct is prejudicial to the administration of justice.

The 2001 report of the Select Committee on Gender Equality concluded that, while significant progress has been made, vestiges of gender bias remain. The report also observed that there is a significant perception of racial and/or ethnic bias which affects the administration of justice. The Commission on Racial and Ethnicity Fairness in the Judicial Process was appointed to address these perceptions. The state-wide investigations and the complementary local efforts continue to find evidence of the perception and reality of bias within the system, thereby demonstrating the need for continued attention. The court system is making every effort to insure the integrity and fairness of the legal system. The legal profession must do its part by sanctioning behavior which manifests bias and which influences the proper administration of justice.

Thanks you for your consideration of the Women's Law Center's comments on these proposed changes. I strongly urge you to include the proposed language in Rule 8.4 to promote the public's confidence in the legal system and to insure the continued integrity of the profession.

Sincerely,

L. Tracy Brown
Executive Director

cc: Gwen Tromley

COMMITTEE'S RESPONSE:

The Committee is aware that the proposed Rule 8.4(e) has generated strong views. As elaborated in Comment [4], the Committee believes that this subsection addresses egregious circumstances warranting separate treatment in the text of Rule 8.4. We have, moreover, sought to draft this provision narrowly: the subsection operates only when there have there has been 1) a manifestation: 2) of bias or prejudice; 3) that is "knowing"; 4) that takes place while "acting in a professional capacity"; 5) that relates to one of the enumerated categories; 6) that "is prejudicial to the administration of justice"; and 7) that does not "constitute legitimate advocacy." The judgment of the Committee is that circumstances contemplated by the Rule, described narrowly and in detail, constitute, in the language of Comment [4], a demonstration that an attorney lacks the requisite "character required of members of the legal profession."

Public Comment: Process

From: Natalie M. Bohm
Date: 7/21/03

I just read about the new rule changes in the P.G. County Bar Newsletter that I received on Friday, July 18, 2003. I am sorry I was not aware of them sooner since the closing Comment date was July 15, 2003.

Nevertheless, I am writing to suggest that the process of reviewing proposed changes would be a 1,000 times easier if the Committee adopted a form similar to that used by the legislature to clearly differential the current from the proposed. I am not sure how arduous a task it will be to try to compare the two. Also, I would suggest that the Committee publish only the *changed* Rule section and any altered or added Comment(s). The document will be much more handleable and easier to compare.

Also, please add a document saved in a WordPerfect format. I had to get someone who has/uses Word to open the document and save it in TXT format (I do not believe that she knew how to save it in WP format). Then I had to format it for consistency.

I am attaching ROPCdbl.wpd and ROPCsing.wpd. The "dbl" document is formatted for double-sided printing, with 1/2 inch top, bottom and side margins offset for hole punching. Each Rule begins on a new right-hand page, meaning that there are blank

pages added to force the start on the right. The "sing" document is formatted with 1/2 inch top, bottom and side margins. Each Rule begins on new page.

Public Comments: Further Issues Regarding Limited Representation

The Maryland Rules of Professional Conduct might allow lawyers to help otherwise pro se litigants to prepare pleadings, or allow lawyers to prepare those pleadings themselves, without requiring disclosure that a lawyer provided this assistance. Alternatively, they might require that the pleading reflect that a lawyer helped the litigant to prepare it without personally identifying the lawyer. In any event, the rules should make it clear that, solely by providing such document-preparation assistance, a lawyer does not make an appearance in the case in which the pleading is filed.

This "ghostwriting" issue is a major one across the country. Many lawyers complained to us that they were afraid to help otherwise *pro se* litigants to prepare pleadings because, if their participation became known, they might be "conscripted" into full-service representation. This deters many lawyers from giving useful help to people who really need it.

Admittedly, this is a controversial issue. But the majority of judges to whom I talked about it said it is usually very clear when a litigant has received some legal assistance, and it is better that litigants receive some help, rather than none.³³

I favor rules like those in California and Washington, which require no disclosure under these circumstances. If disclosure is required, it ought to be an anonymous disclosure, for example, that "a lawyer helped in the preparation of this pleading."³⁴

The Maryland Rules of Professional Conduct should allow an attorney who provides drafting assistance to an otherwise pro se litigant to rely on that person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney should make an independent reasonable inquiry into the facts.³⁵

The above substantially is the text of a new Washington rule, which I believe fairly responds to the Rule 11 issues that some raise in response to "ghostwriting." (*See*

³³ *See* LIMITED REPRESENTATION COMMITTEE OF THE CALIFORNIA COMMISSION ON ACCESS TO JUSTICE, REPORT ON LIMITED SCOPE LEGAL ASSISTANCE WITH INITIAL RECOMMENDATIONS 10-11 (Oct. 2001). The Limited Representation Committee of the California Commission on Access to Justice proposed "a rule of court that would allow attorneys to assist in the preparation of pleadings without disclosing that they assisted the litigant if they are not appearing as attorney of record." In support, the Committee noted: "Judicial officers in... focus groups reported that it is generally possible to determine from the appearance of a pleading whether an attorney was involved in the drafting of the document. They also report that the benefits of having documents prepared by an attorney are substantial." *Id.* at 15. This led to the recent adoption of such a rule in California. (*See* attached Appendix.)

³⁴ This is the requirement in a number of states, including Florida, New York, and New Hampshire.

³⁵ Wash, Spcr.Ct. R. 11(b)

attached Appendix.) The Washington approach, which embodies the consensus view of ethics opinions, recognizes the lawyer's limited role, and at the same time prevents litigants from abusing the judicial system.

* * *

It would be helpful if there were an appendix to the Maryland Rules of Professional Conduct that included court-approved, limited-service practice forms.

This may be beyond the scope of your charge. Court-developed and court-approved forms, like a limited-service retainer agreement that Maine's Supreme Court recently developed, encourage lawyers to provide limited assistance to clients, standardize practices, and implement limited-assistance practice rules. (California also recently adopted such forms, and Florida is considering them.) (Again, *see* attached Appendix.) I think it would be a great step if a process were put in place to create and obtain court approval for such limited-representation practice forms. This would give lawyers confidence to enter into limited-service agreements with clients, to enter limited appearances in court, and to withdraw from the limited representation. Approved forms also are important risk-management tools. Lawyers who use them, in sensible ways adapted to the individual circumstances of clients, can improve the quality of the limited services they provide to clients, and substantially reduce the risks of malpractice.

Very truly yours,

Michael Millemann

COMMITTEE'S RESPONSE:

As noted previously in our Response to Professor Millemann's suggestion relating to Rule 4.2, the Committee believes that Maryland would take an important step regarding "limited representation" by adopting the ABA's new Rule 6.5. The Committee believes, however, that related issues, including those raised by Professor Millemann here, should await review in light of this State's experience with Rule 6.5 if the Court chooses to adopt it. At that time, a thorough review of other Rules of Professional Conduct, as well as of other Maryland Rules in general and the efficacy of the addition of limited-practice forms, would be warranted.

Public Comment: MSBA Civility Guidelines

LAW OFFICES OF
LESLIE A. POWELL

July 15, 2003

* * *

Guidelines. With respect to the guidelines, on number 10 relating to ex parte communications with the court staff, an exception should be made for scheduling and ministerial matters. The insertion of "on substantive issues" following the word "communications" in the first clause would provide clarification. I am not recommending that such communications occur directly with the court but that such communications are permissible with the administrative staff or law clerks.

Thank you for your consideration.

Sincerely,
Leslie A. Powell

COMMITTEE'S RESPONSE:

Given that the MSBA Guidelines are reprinted as an Appendix to the Rules of Professional Conduct, this suggestion is being forwarded to the MSBA for its consideration.

³⁶ Section 1(b) is optional; it may be included as written, modified through the substitution of shorter periods than five and seven years, respectively, or omitted entirely.

³⁷ Section 1(d) is optional; it may be included as written, modified through the substitution of a lesser age than twenty-six years, or omitted entirely.