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D.C. RULES OF PROFESSIONAL CONDUCT

Former D.C. Rules of Professional Conduct 1991-2007
(Superceded by Rules effective on February 1, 2007)

The District of Columbia Bar
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District of Columbia Court of Appeals

No. M-165-88

BEFORE: Rogers, Chief Judge, and Newman, Ferren, Belson, Terry, Steadman, Schwelb, and Farrell, Associate Judges.

ORDER

On consideration of the petitions of the Board of Governors of the District of Columbia Bar dated November 19, 1986, March 13, 1987, September 11, 1987, and June 30, 1988, recommending adoption of Rules of Professional Conduct, and of the comments received in response to the order of this court filed September 1, 1988, it is, pursuant to a vote of the Board of Judges of this court on December 18, 1989,

ORDERED that, effective January 1, 1991, the following Rules of Professional Conduct are hereby adopted and promulgated as the standards governing the practice of law in the District of Columbia in accordance with Rule X of the Rules Governing the Bar of the District of Columbia and in place of the Code of Professional Responsibility, which is Appendix A to the Rules Governing the Bar and which is rescinded as of the effective date of the rules adopted and promulgated by this order. It is

FURTHER ORDERED that with respect to conduct occurring before January 1, 1991, the provisions of the Code of Professional Responsibility in effect on the date of the conduct in question are the governing rules of decision for this court, the Board on Professional Responsibility, its hearing committees, and the Bar Counsel. It is

FURTHER ORDERED that Rule XI, § 19(d), of the Rules Governing the Bar of the District of Columbia is hereby amended to read in its entirety:

(d) *Related Pending Litigation.* The processing of a disciplinary complaint shall not be deferred or abated because of substantial similarity to the material allegations of pending criminal, civil, or administrative proceedings, unless authorized by the Board or a Contact Member for good cause shown.

FOR THE COURT:

PREFACE TO THE DISTRICT OF COLUMBIA RULES

As a result of the Court Reorganization Act of 1970, the District of Columbia Court of Appeals was given disciplinary authority over lawyers practicing in the District. That authority, which was previously exercised by the United States District Court for the District of Columbia, was officially transferred to the Court of Appeals on April 1, 1972. On that date all members of the Bar of the District Court for the District of Columbia were automatically enrolled as members of the Bar of the District of Columbia Court of Appeals, and were made subject to its disciplinary jurisdiction. Pursuant to its new disciplinary jurisdiction, the Court of Appeals in 1972 adopted the American Bar Association's (ABA's) Model Code of Professional Responsibility, promulgated by the ABA in 1969, with certain amendments that were voted on by members of the Bar and approved by a wide margin. These changes included the deletion of DR 1-102(A)(6), the modification of DR 1-103, and the substitution of Canon 20 for DR 7-107(G) and (H).

One additional change made in 1972 was considered to be of major significance. The Court of Appeals deleted from DR 7-102(B)(1) a clause that appeared to require the lawyer to reveal that the lawyer's client has perpetrated a fraud on the tribunal. This amendment anticipated the ABA's 1974 amendment to DR 7-102(B)(1), stating that the lawyer need not reveal the client's fraud when that information is protected as a "privileged communication," and the ABA's later holding that the "privileged communications" protected by the new clause included all client "confidences and secrets" required to be preserved under the confidentiality rule set forth in DR 4-101 of the Code. ABA Formal Opinion 341 (Sept. 30, 1975). The ABA also explained in Opinion 341 that the amendment had been merely a clarifying one, intended to reflect the original intention of DR 7-102((B)(1).

Over the years, the code was amended further by the Court of Appeals. *See, e.g.,* DR 5-103(B) (revised April 18, 1980); DR 2-103(E) (added on June 11, 1981). Major changes in Canon 2's provisions regarding publicity and advertising, professional notices and letterheads, solicitation, and limitation of practice were made in 1978. And in 1982, following several years of debate and study of the "revolving door" between government and nongovernment practice, Canon 9 was modified extensively, with major changes in DR 9-101, and the addition of a new DR 9-102 dealing with imputed disqualification.

On February 22, 1985, the court added DR 9-103(C), authorizing certain clients' funds to be placed in interest-bearing accounts benefiting a court-approved Interest on Lawyers Trust Accounts program.

Also during the years, certain amendments to the ABA code were automatically incorporated in the District of Columbia version by virtue of an adoption provision contained in the court's Rule X. Examples include amendments to DR 2-102(C) and DR 3-102(A)(3).

On August 2, 1983, the ABA House of Delegates adopted the Model Rules of Professional Conduct. On August 15, 1983, David B. Isbell, then president of the District of Columbia Bar, recommended to the District of Columbia Court of Appeals that the new Model Rules not be adopted automatically and recommended procedures for consideration of the ABA proposals by the District of Columbia Bar and the court. With the approval of the court, the Board of Governors of the Bar established the District of Columbia Bar Model Rules of Professional Conduct Committee to make recommendations to the Board of Governors of the District of Columbia Bar regarding adoption of the Model Rules. The committee, chaired by Robert E. Jordan III, Esq., sought comments from members of the Bar and, after almost two years of detailed and intensive review of the ABA's proposal, issued a report recommending adoption of a number of the ABA proposals, adoption of others with minor changes, and substantial modifications, additions, or deletions with respect to other portions of the ABA proposal. The committee's report was transmitted to the Board of Governors of the Bar in September 1985.

In the October/November 1985 issue of *Bar Report,* the Board of Governors solicited comments to the committee report from the public and Bar members. The board received comments from over 35 organizations, law firms, and individuals. Many commentators addressed a number of different Rules.

The Board of Governors made a detailed review of the committee proposal and the comments received. The board discussed the Rules at its regular meetings on September 10, 1985, October 8, 1986, November 12, 1986, February 4, 1986, March 11, 1986, April 8, 1986, June 17, 1986, and July 15, 1986. In addition, the board held a series of special meetings exclusively devoted to the Rules. These special meetings were held on December 16, 1986, January 28, 1986, February 25, 1986, March 25, 1986, May 1, 1986, May 9, 1986, May 23, 1986, May 28, 1986, and June 5, 1986.

A public meeting was held to discuss the committee proposal on May 1, 1986. Certain Rules were also the focus of discussion at the midyear meeting of the District of Columbia Bar on March 4, 1986, and the annual meeting on June 25, 1986.

During its discussion of the proposed Rules and Comments, the Board of Governors recognized the need for special study of potentially unique problems associated with applying rules of professional conduct to Bar members who are serving as lawyers for governments. As recommended by the Model Rules of Professional Conduct Committee, the board appointed a special committee known as the Special Committee on Government Lawyers and the Model Rules of Professional Conduct, chaired by Joe Sims, Esq. This committee began its consideration of situations unique to the role of government lawyers.

By petition dated November 19, 1986, the Board of Governors of the District of Columbia Bar requested that the District of Columbia Court of Appeals adopt Rules of Professional Conduct and Related Comments as set forth in recommendations attached to the petition. Subsequently, while the petition of November 19, 1986, was pending with the court, the Board of Governors submitted three petitions supplementing or amending the November 19 petition. These further petitions were

dated March 13, 1987 (seeking modifications to Rules 1.6 and 1.10 and Related Comments), September 11, 1987 (seeking modifications to Rule 5.4 and Related Comments), and June 30, 1988, (seeking modifications to Rules 1.7 and 1.6 and Related Comments, and to the Comments to Rule 8.3).

While the court was considering the Bar's various petitions, the Sims Committee completed its work, and its report was transmitted to the Board of Governors. After consideration by the Board of Governors, the Sims Committee's report was forwarded to the court on December 1, 1988.

Between November 19, 1986, and September 1, 1988, the Board of Judges met on numerous occasions to consider the pending petitions of the District of Columbia Bar. As a result of its deliberations and discussions at these meetings, the Board of Judges determined to make proposed additions, deletions, and modifications to the language of the proposed Rules and Comments, subject to publication, for comment by members of the Bar and the public, of a version of the Rules and Comments that reflected such tentative modifications.

On September 1, 1988, the court ordered that the following proposed Rules of Professional Conduct and Related Comments be published in *Bar Report* issue of August/September 1988 for comment by interested members of the Bar and other persons, such comments to be filed with the clerk of the District of Columbia Court of Appeals on or before December 1, 1988.

More than 50 comments, many of considerable length and detail, were received in response to the court's order publishing the proposed Rules and Comments for comment. The court requested that Robert E. Jordan III, chair of the D.C. Bar Model Rules of Professional Conduct Committee, furnish the court an analysis of the comments received. Mr. Jordan's analysis was submitted to the court on May 3, 1989. Thereafter, the Board of Judges met on a number of occasions to consider the comments received. A number of modifications to provisions of the Rules and Comments were made in response to the comments received by the court.

The court had also been considering the report of the Sims Committee, and during meetings of the Board of Judges in the fall of 1989, various recommendations of the Sims Committee were adopted and incorporated in the Rules and Comments along with the changes resulting from consideration of the December 1988 comments filed with the court.

On March 1, 1990, the court entered an order promulgating this Preface, the Scope and Terminology sections that follow, and the Rules and Comments that are set forth below as Rules of Professional Conduct Applicable to Members of the District of Columbia Bar, with an effective date of January 1, 1991. The order of March 1, 1990, also specified that, effective January 1, 1991, the Code of Professional Responsibility as in effect on December 31, 1990, was rescinded. The court's order also provided, however, that as to conduct occurring prior to the rescission of the Code of Professional Responsibility, the provisions of that code in effect on the date of the conduct in question would apply as the governing rules of decision for Bar Counsel, the hearing panels of the Board on Professional Responsibility, the Board on Professional Responsibility, and the court in disciplinary proceedings.

The Rules provide standards for the professional conduct of members of the District of Columbia Bar. In the absence of uniform rules in the states, the court recognized the importance of responding to the recommendations and comments of its bar. As a result, the court—like the highest courts of many other jurisdictions—has departed in some respects from the model professional rules promulgated by the American Bar Association in August 1983, while adopting many of the association's proposals designed to improve the disciplinary system. The court has carefully considered the recommendations of the Board of Governors of the District of Columbia Bar as well as the comments of members of the Bar on the proposed rules that were published in September 1988. The new Rules, however, will not meet everyone's concerns or objections—an impossibility given conflicting positions—and the court anticipates that, as in the past, experience will demonstrate that further modifications may be appropriate.

Over the course of the next year, the District of Columbia Bar will sponsor a series of educational workshops on the new Rules. All members of the Bar are encouraged to attend, for the Rules are complex and comprehensive. All members of the Bar, of course, will be subject to the Rules whether or not they attend a workshop.

Finally, the court and the Bar have been assisted throughout their consideration of the Rules by Robert E. Jordan III, Esq. His effort has immeasurably facilitated the court's review of the Board of Governors' proposals and the comments received by the court after publication of the proposed Rules in September 1988. The court accordingly wishes to acknowledge Mr. Jordan's outstanding contribution in addressing both the concerns of the Bar and the interests of the community served by lawyers. The court also recognizes the contributions of the members of the Model Rules of Professional Conduct Committee chaired by Mr. Jordan, of the District of Columbia Bar Special Committee on Government Lawyers and the Model Rules of Professional Conduct, chaired by Joe Sims, Esq., of the members of the Board of Governors of the District of Columbia Bar, and of the many individuals, law firms, and government agencies affording the court the benefit of their comments.

SCOPE

[1] 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 professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for interpreting the Rules and practicing in compliance with them.

[2] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

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

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

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

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

AMENDMENTS TO SCOPE

COMMENT [4]

Comment [4] previously included a discussion of the substantive law of legal malpractice. This discussion was deleted in favor of a restatement of general principles that apply. **(11/96)**

COMMENT [5]

Comment [5] was added to provide a rule of construction, namely that a specific rule takes precedence over a more general rule that arguably applies to the same issue. *See also* new Comment [9] to Rule 1.3. **(11/96)**

TERMINOLOGY

[1] "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.

[2] "Consent" denotes a client's uncoerced assent to a proposed course of action, following consultation with the lawyer regarding the matter in question.

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

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

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

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

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

[8] "Matter" means any litigation, administrative proceeding, lobbying activity, application, claim, investigation, arrest, charge or accusation, the drafting of a contract, a negotiation, estate or family relations practice issue, or any other representation, except as expressly limited in a particular Rule.

[9] "Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

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

[11] "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.

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

[13] "Tribunal" denotes a court, regulatory agency, commission, and any other body or individual authorized by law to render decisions of a judicial or quasi-judicial nature, based on information presented before it, regardless of the degree of formality or informality of the proceedings.

AMENDMENTS TO TERMINOLOGY

COMMENT [8]

Comment [8] adds a general definition of "matter," a term used in a number of Rules. Note that the definition of matter expressly includes lobbying. **(11/96)**

NOTE TO THE READER

The *D.C. Rules of Professional Conduct* have a unique page numbering system as well as two lapses in sequential numbering within the *Rules* themselves.

These *Rules* are divided into nine sections. Each of the sections is numbered independently of the others with a roman numeral preceding an arabic numeral. The roman numeral refers to one of the nine sections: Client-Lawyer Relationship (I), Counselor (II), Advocate (III), Transactions with Persons Other than Clients (IV), Law Firms and Associations (V), Public Service (VI), Information About Legal Services (VII), Maintaining the Integrity of the Profession (VIII), and Nondiscrimination by Members of the Bar (IX); the arabic number is the actual page number within the section.

The *Rules* were drafted following the numbering system promulgated by the American Bar Association in its *Model Rules of Professional Conduct.* Following the recommendation of the D.C. Bar Board of Governors, the D.C. Court of Appeals in its Order of March 1, 1990, chose not to adopt several rules included in the ABA *Model* and also elected not to renumber the remaining rules sequentially. Therefore, the section entitled Information About Legal Services contains no Rules 7.2, 7.3, and 7.4, and the section entitled Maintaining the Integrity of the Profession contains no Rule 8.2. These omissions are deliberate and do not represent an error in this text.

The Editors

CLIENT-LAWYER RELATIONSHIP

RULE 1.1 COMPETENCE

(a) A LAWYER SHALL PROVIDE COMPETENT REPRESENTATION TO A CLIENT. COMPETENT REPRESENTATION REQUIRES THE LEGAL KNOWLEDGE, SKILL, THOROUGHNESS, AND PREPARATION REASONABLY NECESSARY FOR THE REPRESENTATION.

(b) A LAWYER SHALL SERVE A CLIENT WITH SKILL AND CARE COMMENSURATE WITH THAT GENERALLY AFFORDED TO CLIENTS BY OTHER LAWYERS IN SIMILAR MATTERS.

COMMENT:

Legal Knowledge and Skill

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

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

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

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

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation, and continuing attention to the needs of the representation to assure that there is no neglect of such needs. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in such continuing study and education as may be necessary to maintain competence, taking into account that the learning acquired through a lawyer's practical experience in actual representations may reduce or eliminate the need for special continuing study or education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

RULE 1.2 SCOPE OF REPRESENTATION

(a) A LAWYER SHALL ABIDE BY A CLIENT'S DECISIONS CONCERNING THE OBJECTIVES OF REPRESENTATION, SUBJECT TO PARAGRAPHS (c), (d), AND (e), AND SHALL CONSULT WITH THE CLIENT AS TO THE MEANS BY WHICH THEY ARE TO BE PURSUED. A LAWYER SHALL ABIDE BY A CLIENT'S DECISION WHETHER TO ACCEPT AN OFFER OF SETTLEMENT OF A MATTER. IN A CRIMINAL CASE, THE LAWYER SHALL ABIDE BY THE CLIENT'S DECISION, AFTER CONSULTATION WITH THE LAWYER, AS TO A PLEA TO BE ENTERED, WHETHER TO WAIVE JURY TRIAL, AND WHETHER THE CLIENT WILL TESTIFY.

(b) A LAWYER'S REPRESENTATION OF A CLIENT, INCLUDING REPRESENTATION BY APPOINTMENT, DOES NOT CONSTITUTE AN ENDORSEMENT OF THE CLIENT'S POLITICAL, ECONOMIC, SOCIAL, OR MORAL VIEWS OR ACTIVITIES.

(c) A LAWYER MAY LIMIT THE OBJECTIVES OF THE REPRESENTATION IF THE CLIENT CONSENTS AFTER CONSULTATION.

(d) A GOVERNMENT LAWYER'S AUTHORITY AND CONTROL OVER DECISIONS CONCERNING THE REPRESENTATION MAY, BY STATUTE OR REGULATION, BE EXPANDED BEYOND THE LIMITS IMPOSED BY PARAGRAPHS (a) AND (c).

(e) A LAWYER SHALL NOT COUNSEL A CLIENT TO ENGAGE, OR ASSIST A CLIENT, IN CONDUCT THAT THE LAWYER KNOWS IS CRIMINAL OR FRAUDULENT, BUT A LAWYER MAY DISCUSS THE LEGAL CONSEQUENCES OF ANY PROPOSED COURSE OF CONDUCT WITH A CLIENT AND MAY COUNSEL OR ASSIST A CLIENT TO MAKE A GOOD-FAITH EFFORT TO DETERMINE THE VALIDITY, SCOPE, MEANING, OR APPLICATION OF THE LAW.

(f) WHEN A LAWYER KNOWS THAT A CLIENT EXPECTS ASSISTANCE NOT PERMITTED BY THE RULES OF PROFESSIONAL CONDUCT OR OTHER LAW, THE LAWYER SHALL CONSULT WITH THE CLIENT REGARDING THE RELEVANT LIMITATIONS ON THE LAWYER'S CONDUCT.

COMMENT:

Scope of Representation

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

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

Independence From Client's Views or Activities

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

Services Limited in Objectives or Means

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

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

Criminal, Fraudulent, and Prohibited Transactions

[6] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

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

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

[9] Paragraph (e) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not partici-

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

RULE 1.3 DILIGENCE AND ZEAL

(a) A LAWYER SHALL REPRESENT A CLIENT ZEALOUSLY AND DILIGENTLY WITHIN THE BOUNDS OF THE LAW.

(b) A LAWYER SHALL NOT INTENTIONALLY:

(1) FAIL TO SEEK THE LAWFUL OBJECTIVES OF A CLIENT THROUGH REASONABLY AVAILABLE MEANS PERMITTED BY LAW AND THE DISCIPLINARY RULES; OR

(2) PREJUDICE OR DAMAGE A CLIENT DURING THE COURSE OF THE PROFESSIONAL RELATIONSHIP.

(c) A LAWYER SHALL ACT WITH REASONABLE PROMPTNESS IN REPRESENTING A CLIENT.

COMMENT:

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

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

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

[4] Where the bounds of law are uncertain, the action of a lawyer may depend on whether the lawyer is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of a client, an advocate for the most part deals with past conduct and must take the facts as the advocate finds them. By contrast, a lawyer serving as adviser primarily assists the client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of the client doubts as to the bounds of the law, but even when acting as an advocate, a lawyer may not institute or defend a proceeding unless the positions taken are not frivolous. *See* Rule 3.1. In serving a client as adviser, a lawyer, in appropriate circumstances, should give a lawyer's professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.

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

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

[7] Perhaps no professional shortcoming is more widely resented by clients than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer

overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. Neglect of client matters is a serious violation of the obligation of diligence.

[8] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be eliminated by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

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

RULE 1.4 COMMUNICATION

(a) A LAWYER SHALL KEEP A CLIENT REASONABLY INFORMED ABOUT THE STATUS OF A MATTER AND PROMPTLY COMPLY WITH REASONABLE REQUESTS FOR INFORMATION.

(b) A LAWYER SHALL EXPLAIN A MATTER TO THE EXTENT REASONABLY NECESSARY TO PERMIT THE CLIENT TO MAKE INFORMED DECISIONS REGARDING THE REPRESENTATION.

(c) A LAWYER WHO RECEIVES AN OFFER OF SETTLEMENT IN A CIVIL CASE OR A PROFFERED PLEA BARGAIN IN A CRIMINAL CASE SHALL INFORM THE CLIENT PROMPTLY OF THE SUBSTANCE OF THE COMMUNICATION.

COMMENT:

[1] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case is required to inform the client promptly of its substance. *See* Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

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

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

[4] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. *See* Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. *See* Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation. When the lawyer is conducting a trial, it is often not possible for the lawyer to consult with the client and obtain the client's acquiescence in tactical matters arising during the course of trial. It is sufficient if the lawyer consults with the client in advance of trial on significant issues that can be anticipated as arising during the course of the trial, and consults during trial to the extent practical, given the nature of the trial process.

Withholding Information

[5] In rare circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. Similarly, a lawyer may be justified, for humanitarian reasons, in not conveying certain information, for example,

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

RULE 1.5 FEES

(a) A LAWYER'S FEE SHALL BE REASONABLE. THE FACTORS TO BE CONSIDERED IN DETERMINING THE REASONABLENESS OF A FEE INCLUDE THE FOLLOWING:

(1) THE TIME AND LABOR REQUIRED, THE NOVELTY AND DIFFICULTY OF THE QUESTIONS INVOLVED, AND THE SKILL REQUISITE TO PERFORM THE LEGAL SERVICE PROPERLY;

(2) THE LIKELIHOOD, IF APPARENT TO THE CLIENT, THAT THE ACCEPTANCE OF THE PARTICULAR EMPLOYMENT WILL PRECLUDE OTHER EMPLOYMENT BY THE LAWYER;

(3) THE FEE CUSTOMARILY CHARGED IN THE LOCALITY FOR SIMILAR LEGAL SERVICES;

(4) THE AMOUNT INVOLVED AND THE RESULTS OBTAINED;

(5) THE TIME LIMITATIONS IMPOSED BY THE CLIENT OR BY THE CIRCUMSTANCES;

(6) THE NATURE AND LENGTH OF THE PROFESSIONAL RELATIONSHIP WITH THE CLIENT;

(7) THE EXPERIENCE, REPUTATION, AND ABILITY OF THE LAWYER OR LAWYERS PERFORMING THE SERVICES; AND

(8) WHETHER THE FEE IS FIXED OR CONTINGENT.

(b) WHEN THE LAWYER HAS NOT REGULARLY REPRESENTED THE CLIENT, THE BASIS OR RATE OF THE FEE SHALL BE COMMUNICATED TO THE CLIENT, IN WRITING, BEFORE OR WITHIN A REASONABLE TIME AFTER COMMENCING THE REPRESENTATION.

(c) A FEE MAY BE CONTINGENT ON THE OUTCOME OF THE MATTER FOR WHICH THE SERVICE IS RENDERED, EXCEPT IN A MATTER IN WHICH A CONTINGENT FEE IS PROHIBITED BY PARAGRAPH (d) OR OTHER LAW. A CONTINGENT FEE AGREEMENT SHALL BE IN WRITING AND SHALL STATE THE METHOD BY WHICH THE FEE IS TO BE DETERMINED, INCLUDING THE PERCENTAGE OR PERCENTAGES THAT SHALL ACCRUE TO THE LAWYER IN THE EVENT OF SETTLEMENT, TRIAL OR APPEAL, LITIGATION, 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. UPON CONCLUSION OF A CONTINGENT FEE MATTER, THE LAWYER SHALL PROVIDE THE CLIENT WITH A WRITTEN STATEMENT STATING THE OUTCOME OF THE MATTER AND, IF THERE IS A RECOVERY, SHOWING THE REMITTANCE TO THE CLIENT AND THE METHOD OF ITS DETERMINATION.

(d) A LAWYER SHALL NOT ENTER INTO AN ARRANGEMENT FOR, CHARGE, OR COLLECT A CONTINGENT FEE FOR REPRESENTING A DEFENDANT IN A CRIMINAL CASE.

(e) A DIVISION OF A FEE BETWEEN LAWYERS WHO ARE NOT IN THE SAME FIRM MAY BE MADE ONLY IF:

(1) THE DIVISION IS IN PROPORTION TO THE SERVICES PERFORMED BY EACH LAWYER OR EACH LAWYER ASSUMES JOINT RESPONSIBILITY FOR THE REPRESENTATION;

(2) THE CLIENT IS ADVISED, IN WRITING, OF THE IDENTITY OF THE LAWYERS WHO WILL PARTICIPATE IN THE REPRESENTATION, OF THE CONTEMPLATED DIVISION OF RESPONSIBILITY, AND OF THE EFFECT OF THE ASSOCIATION OF LAWYERS OUTSIDE THE FIRM ON THE FEE TO BE CHARGED;

(3) THE CLIENT CONSENTS TO THE ARRANGEMENT; AND

(4) THE TOTAL FEE IS REASONABLE.

(f) ANY FEE THAT IS PROHIBITED BY PARAGRAPH (d) ABOVE OR BY LAW IS *PER SE* UNREASONABLE.

COMMENT:

Basis or Rate of Fee

[1] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the

basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client.

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

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

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. *See* Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise. However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

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

Contingent Fees

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

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

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

Division of Fee

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

[10] Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved. Permitting a division on the basis of joint responsibility, rather than on the basis of services performed, represents a change from the basis for fee divisions allowed under the prior Code of Professional Responsibility. The change is intended to encourage lawyers to affiliate other counsel, who are better equipped by reason of experience or specialized background to serve the client's needs, rather than to retain sole responsibility for the representation in order to avoid losing the right to a fee.

[11] The concept of joint responsibility is not, however, merely a technicality or incantation. The lawyer who refers the client to another lawyer, or affiliates another lawyer in the representation, remains fully responsible to the client, and is accountable to the client for deficiencies in the discharge of the representation by the lawyer who has been brought into the representation. If a lawyer wishes to avoid such responsibility for the potential defi-

ciencies of another lawyer, the matter must be referred to the other lawyer without retaining a right to participate in fees beyond those fees justified by services actually rendered.

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

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

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

Disputes Over Fees

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

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) EXCEPT WHEN PERMITTED UNDER PARAGRAPH (c) OR (d), A LAWYER SHALL NOT KNOWINGLY:

(1) REVEAL A CONFIDENCE OR SECRET OF THE LAWYER'S CLIENT;

(2) USE A CONFIDENCE OR SECRET OF THE LAWYER'S CLIENT TO THE DISADVANTAGE OF THE CLIENT;

(3) USE A CONFIDENCE OR SECRET OF THE LAWYER'S CLIENT FOR THE ADVANTAGE OF THE LAWYER OR OF A THIRD PERSON.

(b) "CONFIDENCE" REFERS TO INFORMATION PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE UNDER APPLICABLE LAW, AND "SECRET" REFERS TO OTHER INFORMATION GAINED IN THE PROFESSIONAL RELATIONSHIP THAT THE CLIENT HAS REQUESTED BE HELD INVIOLATE, OR THE DISCLOSURE OF WHICH WOULD BE EMBARRASSING, OR WOULD BE LIKELY TO BE DETRIMENTAL, TO THE CLIENT.

(c) A LAWYER MAY REVEAL CLIENT CONFIDENCES AND SECRETS, TO THE EXTENT REASONABLY NECESSARY:

(1) TO PREVENT A CRIMINAL ACT THAT THE LAWYER REASONABLY BELIEVES IS LIKELY TO RESULT IN DEATH OR SUBSTANTIAL BODILY HARM ABSENT DISCLOSURE OF THE CLIENT'S SECRETS OR CONFIDENCES BY THE LAWYER; OR

(2) TO PREVENT THE BRIBERY OR INTIMIDATION OF WITNESSES, JURORS, COURT OFFICIALS, OR OTHER PERSONS WHO ARE INVOLVED IN PROCEEDINGS BEFORE A TRIBUNAL IF THE LAWYER REASONABLY BELIEVES THAT SUCH ACTS ARE LIKELY TO RESULT ABSENT DISCLOSURE OF THE CLIENT'S CONFIDENCES OR SECRETS BY THE LAWYER.

(d) A LAWYER MAY USE OR REVEAL CLIENT CONFIDENCES OR SECRETS:

(1) WITH THE CONSENT OF THE CLIENT AFFECTED, BUT ONLY AFTER FULL DISCLOSURE TO THE CLIENT;

(2) (A) WHEN PERMITTED BY THESE RULES OR REQUIRED BY LAW OR COURT ORDER; AND

(B) IF A GOVERNMENT LAWYER, WHEN PERMITTED OR AUTHORIZED BY LAW;

(3) TO THE EXTENT REASONABLY NECESSARY TO ESTABLISH A DEFENSE TO A CRIMINAL CHARGE, DISCIPLINARY CHARGE, OR CIVIL CLAIM, FORMALLY INSTITUTED AGAINST THE LAWYER, BASED UPON CONDUCT IN WHICH THE CLIENT WAS INVOLVED, OR TO THE EXTENT REASONABLY NECESSARY TO RESPOND TO SPECIFIC ALLEGA-

TIONS BY THE CLIENT CONCERNING THE LAWYER'S REPRESENTATION OF THE CLIENT;

(4) WHEN THE LAWYER HAS REASONABLE GROUNDS FOR BELIEVING THAT A CLIENT HAS IMPLIEDLY AUTHORIZED DISCLOSURE OF A CONFIDENCE OR SECRET IN ORDER TO CARRY OUT THE REPRESENTATION; OR

(5) TO THE MINIMUM EXTENT NECESSARY IN AN ACTION INSTITUTED BY THE LAWYER TO ESTABLISH OR COLLECT THE LAWYER'S FEE.

(e) A LAWYER SHALL EXERCISE REASONABLE CARE TO PREVENT THE LAWYER'S EMPLOYEES, ASSOCIATES, AND OTHERS WHOSE SERVICES ARE UTILIZED BY THE LAWYER FROM DISCLOSING OR USING CONFIDENCES OR SECRETS OF A CLIENT, EXCEPT THAT SUCH PERSONS MAY REVEAL INFORMATION PERMITTED TO BE DISCLOSED BY PARAGRAPHS (c) OR (d).

(f) THE LAWYER'S OBLIGATION TO PRESERVE THE CLIENT'S CONFIDENCES AND SECRETS CONTINUES AFTER TERMINATION OF THE LAWYER'S EMPLOYMENT.

(g) THE OBLIGATION OF A LAWYER UNDER PARAGRAPH (a) ALSO APPLIES TO CONFIDENCES AND SECRETS LEARNED PRIOR TO BECOMING A LAWYER IN THE COURSE OF PROVIDING ASSISTANCE TO ANOTHER LAWYER.

(h) FOR PURPOSES OF THIS RULE, A LAWYER WHO SERVES AS A MEMBER OF THE D.C. BAR LAWYER COUNSELING COMMITTEE, OR AS A TRAINED INTERVENOR FOR THAT COMMITTEE, SHALL BE DEEMED TO HAVE A LAWYER-CLIENT RELATIONSHIP WITH RESPECT TO ANY LAWYER-COUNSELEE BEING COUNSELED UNDER PROGRAMS CONDUCTED BY OR ON BEHALF OF THE COMMITTEE. INFORMATION OBTAINED FROM ANOTHER LAWYER BEING COUNSELED UNDER THE AUSPICES OF THE COMMITTEE, OR IN THE COURSE OF AND ASSOCIATED WITH SUCH COUNSELING, SHALL BE TREATED AS A CONFIDENCE OR SECRET WITHIN THE TERMS OF PARAGRAPH (b). SUCH INFORMATION MAY BE DISCLOSED ONLY TO THE EXTENT PERMITTED BY THIS RULE.

(i) FOR PURPOSES OF THIS RULE, A LAWYER WHO SERVES AS A MEMBER OF THE D.C. BAR LAWYER PRACTICE ASSISTANCE COMMITTEE, OR A STAFF ASSISTANT, MENTOR, MONITOR OR OTHER CONSULTANT FOR THAT COMMITTEE, SHALL BE DEEMED TO HAVE A LAWYER-CLIENT RELATIONSHIP WITH RESPECT TO ANY LAWYER-COUNSELEE BEING COUNSELED UNDER PROGRAMS CONDUCTED BY OR ON BEHALF OF THE COMMITTEE. COMMUNICATIONS BETWEEN THE COUNSELOR AND THE LAWYER BEING COUNSELED UNDER THE AUSPICES OF THE COMMITTEE, OR MADE IN THE COURSE OF AND ASSOCIATED WITH SUCH COUNSELING, SHALL BE TREATED AS A CONFIDENCE OR SECRET WITHIN THE TERMS OF PARAGRAPH (b). SUCH INFORMATION MAY BE DISCLOSED ONLY TO THE EXTENT PERMITTED BY THIS RULE. HOWEVER, DURING THE PERIOD IN WHICH THE LAWYER-COUNSELEE IS SUBJECT TO A PROBATIONARY OR MONITORING ORDER OF THE COURT OF APPEALS OR THE BOARD ON PROFESSIONAL RESPONSIBILITY IN A DISCIPLINARY CASE INSTITUTED PURSUANT TO RULE XI OF THE RULES OF THE COURT OF APPEALS GOVERNING THE BAR, SUCH INFORMATION SHALL BE SUBJECT TO DISCLOSURE IN ACCORDANCE WITH THE ORDER.

(j) THE CLIENT OF THE GOVERNMENT LAWYER IS THE AGENCY THAT EMPLOYS THE LAWYER UNLESS EXPRESSLY PROVIDED TO THE CONTRARY BY APPROPRIATE LAW, REGULATION, OR ORDER.

COMMENT:

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

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

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

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

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

[5] The principle of confidentiality is given effect in two related bodies of law: the attorney-client privilege and the

work product doctrine in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege and the work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. This Rule is not intended to govern or affect judicial application of the attorney-client privilege or work product doctrine. The privilege and doctrine were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under this Rule has 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 privilege and work product doctrine.

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

The Commencement of the Client-Lawyer Relationship

[7] Principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Although most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so, the duty of confidentiality imposed by this Rule attaches when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Thus, a lawyer may be subject to a duty of confidentiality with respect to information disclosed by a client to enable the lawyer to determine whether representation of the potential client would involve a prohibited conflict of interest under Rule 1.7, 1.8, or 1.9.

Exploitation of Confidences and Secrets

[8] In addition to prohibiting the disclosure of a client's confidences and secrets, subparagraph (a)(2) provides that a lawyer may not use the client's confidences and secrets to the disadvantage of the client. For example, a lawyer who has learned that the client is investing in specific real estate may not seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Similarly, information acquired by the lawyer in the course of representing a client may not be used to the disadvantage of that client even after the termination of the lawyer's representation of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about the former client when later representing another client. Under subparagraphs (a)(3) and (d)(1) a lawyer may use a client's confidences and secrets for the lawyer's own benefit or that of a third party only after the lawyer has made full disclosure to the client regarding the proposed use of the information and obtained the client's affirmative consent to the use in question.

Authorized Disclosure

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

[10] The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when the client consents after full disclosure, when necessary to perform the professional employment, when permitted by these Rules, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of the client to partners or associates of the lawyer's firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to nonlawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training employees so that the sanctity of all confidences and secrets of clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of the client and act scrupulously in the making of decisions that may involve the disclosure of information obtained in the course of the professional relationship. Thus, in the absence of consent of the client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should the lawyer, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or the client's confidences or secrets would be revealed to such lawyer. Proper concern for professional duty should cause a lawyer to shun indiscreet conversations concerning clients.

[11] Unless the client otherwise directs, it is not improper for a lawyer to give limited information from client files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes,

provided the lawyer exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

Disclosure Adverse to Client

[12] 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 that 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. Nevertheless, when the client's confidences or secrets are such that the lawyer knows or reasonably should know that the client or any other person is likely to kill or do substantial bodily injury to another unless the lawyer discloses client confidences or secrets, the lawyer may reveal the client's confidences and secrets if necessary to prevent harm to the third party.

[13] Several situations must be distinguished.

[14] First, the lawyer may not counsel or assist a client to engage in conduct that is criminal or fraudulent. *See* Rule 1.2(e). Similarly, a lawyer has a duty not to use false evidence of a nonclient and may permit introduction of the false evidence of a client only in extremely limited circumstances in criminal cases when the witness is the defendant client. *See* Rule 3.3(a)(4) and (b). This Rule is essentially a special instance of the duty prescribed in Rule 1.2(e) to avoid assisting a client in criminal or fraudulent conduct.

[15] 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(e), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

[16] Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in death or substantial bodily harm unless disclosure of the client's intentions is made by the lawyer. As stated in paragraph (c), 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 which the lawyer reasonably believes is intended by a client. The "reasonably believes" standard is applied because 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.

[17] The lawyer's exercise of discretion in determining whether to make disclosures that are reasonably likely to prevent the death or substantial bodily injury of another requires consideration of such factors as the client's tendency to commit violent acts or, conversely, to make idle threats. 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 subparagraph (c)(1) does not violate this Rule.

Withdrawal

[18] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). If the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent, or if the client has used the lawyer's services to perpetrate a crime or a fraud, the lawyer may (but is not required to) withdraw, as stated in Rule 1.16(b)(1) and (2).

[19] After withdrawal under either Rule 1.16(a)(1) or Rule 1.16(b)(1) or (2), the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Giving notice of withdrawal, without elaboration, is not a disclosure of a client's confidences and is not proscribed by this Rule or by Rule 1.16(d). Furthermore, a lawyer's statement to a court that withdrawal is based upon "irreconcilable differences between the lawyer and the client," as provided under paragraph [3] of the Comment to Rule 1.16, is not elaboration. Similarly, after withdrawal under either Rule 1.16(a)(1) or Rule 1.16(b)(1) or (2), the lawyer may retract or disaffirm any opinion, document, affirmation, or the like that contains a material misrepresentation by the lawyer that the lawyer reasonably believes will be relied upon by others to their detriment.

[20] 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. *See* Comment to Rule 1.13.

Dispute Concerning Lawyer's Conduct

[21] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Charges, in defense of which a lawyer may disclose client confidences and secrets, can arise in a civil, criminal, or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together.

[22] The lawyer may not disclose a client's confidences or secrets to defend against informal allegations made by third parties; the Rule allows disclosure only if a third party has formally instituted a civil, criminal, or disciplinary action against the lawyer. Even if the third party has formally instituted such a

proceeding, the lawyer should advise the client of the third party's action and request that the client respond appropriately, if this is practicable and would not be prejudicial to the lawyer's ability to establish a defense.

[23] If a lawyer's client, or former client, has made specific allegations against the lawyer, the lawyer may disclose that client's confidences and secrets in establishing a defense, without waiting for formal proceedings to be commenced. The requirement of subparagraph (d)(3) that there be "specific" charges of misconduct by the client precludes the lawyer from disclosing confidences or secrets in response to general criticism by a client; an example of such a general criticism would be an assertion by the client that the lawyer "did a poor job" of representing the client. But in this situation, as well as in the defense of formally instituted third-party proceedings, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

Fee Collection Actions

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

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

Disclosures Otherwise Required or Authorized

[26] The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, subparagraph (d)(2) requires the lawyer to invoke the privilege when it is applicable. The lawyer may comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client. But a lawyer ordered by a court to disclose client confidences or secrets should not comply with the order until the lawyer has personally made every reasonable effort to appeal the order or has notified the client of the order and given the client the opportunity to challenge it.

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

Former Client

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

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

[29] There are circumstances in which a person who ultimately becomes a lawyer provides assistance to a lawyer while serving in a nonlawyer capacity. The typical situation is that of the law clerk or summer associate in a law firm or government agency. Paragraph (g) addresses the confidentiality obligations of such a person after becoming a member of the Bar; the same confidentiality obligations are imposed as would apply if the person had been a member of the Bar at the time confidences or secrets were received. This resolution of the confidentiality obligation is consistent with the reasoning employed in D.C. Bar Legal Ethics Committee Opinion 84 (1980). For a related provision dealing with the imputation of disqualifications arising from prior participation as a law clerk, summer associate, or in a similar position, see Rule 1.10(b).

Bar Sponsored Counseling Programs

[30] Paragraph (h) adds a provision dealing specifically with the disclosure obligations of lawyers who are assisting in the counseling programs of the D.C. Bar's Lawyer Counseling Committee. Members of that committee, and lawyer-intervenors who assist the committee in counseling, may obtain information from lawyer-counselees who have sought assistance from the counseling programs offered by the committee. It is in the interests of the public to encourage lawyers who have alcohol or other substance abuse problems to seek coun-

seling as a first step toward rehabilitation. Some lawyers who seek such assistance may have violated provisions of the Rules of Professional Conduct, or other provisions of law, including criminal statutes such as those dealing with embezzlement. In order for those who are providing counseling services to evaluate properly the lawyer-counselee's problems and enhance the prospects for rehabilitation, it is necessary for the counselors to receive completely candid information from the lawyer-counselee. Such candor is not likely if the counselor, for example, would be compelled by Rule 8.3 to report the lawyer-counselee's conduct to Bar Counsel, or if the lawyer-counselee feared that the counselor could be compelled by prosecutors or others to disclose information.

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

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

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

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

Government Lawyers

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

[36] Subparagraph (d)(2)(A) applies to both private and government attorney-client relationships. Subparagraph (d)(2)(B) applies to government lawyers only. It is designed to permit disclosures that are not required by law or court order under Rule 1.6(d)(2)(A), but which the government authorizes its attorneys to make in connection with their professional services to the government. Such disclosures may be authorized or required by statute, executive order, or regulation, depending on the constitutional or statutory powers of the authorizing entity. If so authorized or required, subparagraph (d)(2)(B) governs.

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

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

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

(a) A LAWYER SHALL NOT ADVANCE TWO OR MORE ADVERSE POSITIONS IN THE SAME MATTER.

(b) EXCEPT AS PERMITTED BY PARAGRAPH (c) BELOW, A LAWYER SHALL NOT REPRESENT A CLIENT WITH RESPECT TO A MATTER IF:

(1) THAT MATTER INVOLVES A SPECIFIC PARTY OR PARTIES, AND A POSITION TO BE TAKEN BY THAT CLIENT IN THAT MATTER IS ADVERSE TO A POSITION TAKEN OR TO BE TAKEN BY ANOTHER CLIENT IN THE SAME MATTER, EVEN THOUGH THAT CLIENT IS UNREPRESENTED OR REPRESENTED BY A DIFFERENT LAWYER;

(2) SUCH REPRESENTATION WILL BE OR IS LIKELY TO BE ADVERSELY AFFECTED BY REPRESENTATION OF ANOTHER CLIENT;

(3) REPRESENTATION OF ANOTHER CLIENT WILL BE OR IS LIKELY TO BE ADVERSELY AFFECTED BY SUCH REPRESENTATION; OR

(4) THE LAWYER'S PROFESSIONAL JUDGMENT ON BEHALF OF THE CLIENT WILL BE OR REASONABLY MAY BE ADVERSELY AFFECTED BY THE LAWYER'S RESPONSIBILITIES TO OR INTERESTS IN A THIRD PARTY OR THE LAWYER'S OWN FINANCIAL, BUSINESS, PROPERTY, OR PERSONAL INTERESTS.

(c) A LAWYER MAY REPRESENT A CLIENT WITH RESPECT TO A MATTER IN THE CIRCUMSTANCES DESCRIBED IN PARAGRAPH (b) ABOVE IF EACH POTENTIALLY AFFECTED CLIENT PROVIDES CONSENT TO SUCH REPRESENTATION AFTER FULL DISCLOSURE OF THE EXISTENCE AND NATURE OF THE POSSIBLE CONFLICT AND THE POSSIBLE ADVERSE CONSEQUENCES OF SUCH REPRESENTATION.

(d) IF A CONFLICT NOT REASONABLY FORSEEABLE AT THE OUTSET OF A REPRESENTATION ARISES UNDER PARAGRAPH (b)(1) AFTER THE REPRESENTATION COMMENCES, AND IS NOT WAIVED UNDER PARAGRAPH (c), A LAWYER NEED NOT WITHDRAW FROM ANY REPRESENTATION UNLESS THE CONFLICT ALSO ARISES UNDER PARAGRAPHS (b)(2), (b)(3), OR (b)(4).

COMMENT:

[1] Rule 1.7 is intended to provide clear notice of circumstances that may constitute a conflict of interest. Rule 1.7 (a) sets out the limited circumstances in which representation of conflicting interests is absolutely prohibited even with the consent of all involved clients. Rule 1.7(b) sets out those circumstances in which representation is barred in the absence of informed client consent. The difference between Rule 1.7(a) and Rule 1.7(b) is that in the former, the lawyer is representing multiple interests in the same matter, while in the latter the lawyer is representing a single interest, but a client of the lawyer who is represented by different counsel has an interest adverse to that advanced by the lawyer. The application of Rules 1.7(a) and 1.7(b) to specific facts must also take into consideration the principles of imputed disqualification described in Rule 1.10. Rule 1.7(c) states the procedure that must be used to obtain client consent if representation is to commence or continue in the circumstances described in Rule 1.7(b). Rule 1.7(d) governs withdrawal in cases arising under Rule 1.7(b)(1).

Representation Absolutely Prohibited—Rule 1.7(a)

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

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

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

aspects of the case so long as the same lawyer does not represent both parties with respect to those positions. Such a representation comes within paragraph (b), rather than paragraph (a), and is therefore subject to the consent provisions of paragraph (c).

[5] The ability to represent two parties who have adverse interests as to portions of a case may be limited because the lawyer obtains confidences or secrets relating to a party while jointly representing both parties in one phase of the case. In some circumstances, such confidences or secrets might be useful, against the interests of the party to whom they relate, in a subsequent part of the case. Absent the consent of the party whose confidences or secrets are implicated, the subsequent adverse representation is governed by the "substantial relationship" test, which is set forth in Rule 1.9.

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

Representation Conditionally Prohibited - Rule 1.7(b)

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

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

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

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

Lawyer's Duty to Make Inquiries to Determine Potential Conflicts

[11] The scope of and parties to a "matter" are typically apparent in on-the-record adversary proceedings or other proceedings in which a written record of the identity and the position of the parties exists. In Rule 1.7(b)(1), the phrase, "matter involving a specific party or parties" refers to such situations. In other situations, however, it may not be clear to a lawyer whether the representation of one client is adverse to the interests of another client. For example, a lawyer may represent a client only with respect to one or a few of the client's areas of interest. Other lawyers, or non-lawyers (such as lobbyists), or employees of the client (such as government relations personnel) may be representing that client on many issues whose scope and content are unknown to the lawyer. Clients often have many representatives acting for them, including multiple law firms, nonlawyer lobbyists, and client employees. A lawyer retained for a limited purpose may not be aware of the full

range of a client's other interests or positions on issues. Except in matters involving a specific party or parties, a lawyer is not required to inquire of a client concerning the full range of that client's interests in issues, unless it is clear to the lawyer that there is a potential for adversity between the interests of clients of the lawyer. Where lawyers are associated in a firm within the meaning of Rule 1.10(a), the rule stated in the preceding sentence must be applied to all lawyers and all clients in the firm. Unless a lawyer is aware that representing one client involves seeking a result to which another client is opposed, Rule 1.7 is not violated by a representation that eventuates in the lawyer's unwittingly taking a position for one client adverse to the interests of another client. The test to be applied here is one of reasonableness and may turn on whether the lawyer has an effective conflict checking system in place.

Situations That Frequently Arise

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

Organization Clients

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

[14] However, there may be cases in which a lawyer is deemed to represent a constituent of an organization client. Such de facto representation has been found where a lawyer has received confidences from a constituent during the course of representing an organization client in circumstances in which the constituent reasonably believed that the lawyer was acting as the constituent's lawyer as well as the lawyer for the organization client. See generally ABA Formal Opinion 92-365. In general, representation may be implied where on the facts there is a reasonable belief by the constituent that there is individual as well as collective representation. *Id.* The propriety of representation adverse to an affiliate or constituent of the organization client, therefore, must first be tested by determining whether a constituent is in fact a client of the lawyer. If it is, representation adverse to the constituent requires compliance with Rule 1.7. See ABA Opinion 92-365, supra. The propriety of representation must also be tested by reference to the lawyer's obligation under Rule 1.6 to preserve confidences and secrets and to the obligations imposed by paragraphs (b)(2) through (b)(4) of this rule. Thus, absent consent under Rule 1.7 (c), such adverse representation ordinarily would be improper if:

> (a) the adverse matter is the same as, or substantially related to, the matter on which the lawyer represents the organization client.
>
> (b) during the course of representation of the organization client the lawyer has in fact acquired confidences or secrets (as defined in Rule 1.6(b)) of the organization client or an affiliate or constituent that could be used to the disadvantage of any of the organization client or its affiliate or constituents, or
>
> (c) such representation seeks a result that is likely to have a material adverse effect on the financial condition of the organization client.

[15] In addition, the propriety of representation adverse to an affiliate or constituent of the organization client must be tested by attempting to determine whether the adverse party is in substance the "alter ego" of the organization client. The alter ego case is one in which there is likely to be a reasonable expectation by the constituents or affiliates of an organization that each has an individual as well as a collective client-lawyer relationship with the lawyer, a likelihood that a result adverse to the constituent would also be adverse to the existing organization client, and a risk that both the new and the old represen-

tation would be so adversely affected that the conflict would not be "consentable." Although the alter ego criterion necessarily involves some imprecision, it may be usefully applied in a parent-subsidiary context, for example, by analyzing the following relevant factors: whether (i) the parent directly or indirectly owns all or substantially all of the voting stock of the subsidiary, (ii) the two companies have common directors, officers, office premises, or business activities, or (iii) a single legal department retains, supervises and pays outside lawyers for both the parent and the subsidiary. If all or most of those factors are present, for conflict of interest purposes those two entities normally would be considered alter egos of one another and the lawyer for one of them should refrain from engaging in representation adverse to the other, even on a matter where clauses (a), (b) and (c) of the preceding paragraph [14] are not applicable. Similarly, if the organization client is a corporation that is wholly owned by a single individual, in most cases for purposes of applying this Rule, that client should be deemed to be the alter ego of it sole stockholder. Therefore, the corporation's lawyer should refrain from engaging in representation adverse to the sole stockholder, even on a matter where clauses (a), (b) and (c) of the preceding paragraph [14] are not applicable.

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

[17] The provisions of paragraphs [13] through [16] are subject to any contrary agreement or other understanding between the client and the lawyer. In particular, the client has the right by means of the original engagement letter or otherwise to restrict the lawyer from engaging in representations otherwise permissible under the foregoing guidelines. If the lawyer agrees to such restrictions in order to obtain or keep the client's business, any such agreement between client and lawyer will take precedence over these guidelines. Conversely, an organization client, in order to obtain the lawyer's services, may in the original engagement letter or otherwise give consent to the lawyer in advance to engage in representations adverse to an affiliate, owner or other constituent of the client not otherwise permissible under the foregoing guidelines so long as the requirements of Rule 1.7(c) can be met.

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

Disclosure and Consent

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

[20] The Rule does not require that disclosure be in writing or in any other particular form in all cases. Nevertheless, it should be recognized that the form of disclosure sufficient for more sophisticated business clients may not be sufficient to permit less sophisticated clients to provide fully informed consent. Moreover, under District of Columbia substantive law, the lawyer bears the burden of proof to demonstrate the existence of consent. For those reasons, it would be prudent for the lawyer to provide potential joint clients with at least a written summary of the considerations disclosed and to request and receive a written consent.

[21] The term "consent" is defined in the Terminology section of these Rules. As indicated there, a client's consent must not be coerced either by the lawyer or by any other person. In particular, the lawyer should not use the client's investment in previous representation by the lawyer as leverage to obtain or maintain representation that may be contrary to the client's best interests. If a lawyer has reason to believe that undue influence has been used by anyone to obtain agreement to the representation, the lawyer should not undertake the representation.

Withdrawal

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

system in place, must be considered. Where more than one client is involved and the lawyer must withdraw because a conflict arises after representation has been undertaken, the question of whether the lawyer may continue to represent any of the clients is determined by Rule 1.9.

Imputed Disqualification

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

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

Businesses Affiliated with a Lawyer or Firm

[25] Lawyers, either alone or through firms, may have interests in enterprises that do not practice law but that, in some or all of their work, become involved with lawyers or their clients either by assisting the lawyer in providing legal services or by providing related services to the client. Examples of such enterprises are accounting firms, consultants, real estate brokerages, and the like. The existence of such interests raises several questions under this Rule. First, a lawyer's recommendation, as part of legal advice, that the client obtain the services of an enterprise in which the lawyer has an interest implicates paragraph 1.7(b)(4). The lawyer should not make such a recommendation unless able to conclude that the lawyer's professional judgment on behalf of the client will not be adversely affected. Even then, the lawyer should not make such a recommendation without full disclosure to the client so that the client can make a fully informed choice. Such disclosure should include the nature and substance of the lawyer's or the firm's interest in the related enterprise, alternative sources for the non-legal services in question, and sufficient information so that the client understands that the related enterprise's services are not legal services and that the client's relationship to the related enterprise will not be that of client to attorney. Second, such a related enterprise may refer a potential client to the lawyer; the lawyer should take steps to assure that the related enterprise will inform the lawyer of all such referrals. The lawyer should not accept such a referral without full disclosure of the nature and substance of the lawyer's interest in the related enterprise. See also Rule 7.1(b). Third, the lawyer should be aware that the relationship of a related enterprise to its own customer may create a significant interest in the lawyer in the continuation of that relationship. The substantiality of such an interest may be enough to require the lawyer to decline a proffered client representation that would conflict with that interest; at least Rule 1.7(b)(4) and (c) may require the prospective client to be informed and to consent before the representation could be undertaken. Fourth, a lawyer's interest in a related enterprise that may also serve the lawyer's clients creates a situation in which the lawyer must take unusual care to fashion the relationship among lawyer, client, and related enterprise to assure that confidences and secrets are properly preserved pursuant to Rule 1.6 to the maximum extent possible. See Rule 5.3.

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A LAWYER SHALL NOT ENTER INTO A BUSINESS TRANSACTION WITH A CLIENT OR KNOWINGLY ACQUIRE AN OWNERSHIP, POSSESSORY, SECURITY, OR OTHER PECUNIARY INTEREST ADVERSE TO A CLIENT UNLESS:

(1) THE TRANSACTION AND TERMS ON WHICH THE LAWYER ACQUIRES THE INTEREST ARE FAIR AND REASONABLE TO THE CLIENT AND ARE FULLY DISCLOSED AND TRANSMITTED IN WRITING TO THE CLIENT IN A MANNER WHICH CAN BE REASONABLY UNDERSTOOD BY THE CLIENT;

(2) THE CLIENT IS GIVEN A REASONABLE OPPORTUNITY TO SEEK THE ADVICE OF INDEPENDENT COUNSEL IN THE TRANSACTION; AND

(3) THE CLIENT CONSENTS IN WRITING THERETO.

(b) A LAWYER SHALL NOT PREPARE AN INSTRUMENT GIVING THE LAWYER OR A PERSON RELATED TO THE LAWYER AS PARENT, CHILD, SIBLING, OR SPOUSE ANY SUBSTANTIAL GIFT FROM A CLIENT, INCLUDING A TESTAMENTARY GIFT, EXCEPT WHERE THE CLIENT IS RELATED TO THE DONEE.

(c) PRIOR TO THE CONCLUSION OF REPRESENTATION OF A CLIENT, A LAWYER SHALL NOT MAKE OR NEGOTIATE AN AGREEMENT GIVING THE LAWYER LITERARY OR MEDIA RIGHTS TO A PORTRAYAL OR ACCOUNT BASED IN SUBSTANTIAL PART ON INFORMATION RELATING TO THE REPRESENTATION.

(d) WHILE REPRESENTING A CLIENT IN CONNECTION WITH CONTEMPLATED OR PENDING LITIGATION OR ADMINISTRATIVE PROCEEDINGS, A LAWYER SHALL NOT ADVANCE OR GUARANTEE FINANCIAL ASSISTANCE TO THE CLIENT, EXCEPT THAT A LAWYER MAY PAY OR OTHERWISE PROVIDE:

(1) THE EXPENSES OF LITIGATION OR ADMINISTRATIVE PROCEEDINGS, INCLUDING COURT COSTS, EXPENSES OF INVESTIGATION, EXPENSES OF MEDICAL EXAMINATION, COSTS OF OBTAINING AND PRESENTING EVIDENCE; AND

(2) OTHER FINANCIAL ASSISTANCE WHICH IS REASONABLY NECESSARY TO PERMIT THE CLIENT TO INSTITUTE OR MAINTAIN THE LITIGATION OR ADMINISTRATIVE PROCEEDING.

(e) A LAWYER SHALL NOT ACCEPT COMPENSATION FOR REPRESENTING A CLIENT FROM ONE OTHER THAN THE CLIENT UNLESS:

(1) THE CLIENT CONSENTS AFTER CONSULTATION;

(2) THERE IS NO INTERFERENCE WITH THE LAWYER'S INDEPENDENCE OF PROFESSIONAL JUDGMENT OR WITH THE CLIENT-LAWYER RELATIONSHIP; AND

(3) INFORMATION RELATING TO REPRESENTATION OF A CLIENT IS PROTECTED AS REQUIRED BY RULE 1.6.

(f) A LAWYER WHO REPRESENTS TWO OR MORE CLIENTS SHALL NOT PARTICIPATE IN MAKING AN AGGREGATE SETTLEMENT OF THE CLAIMS OF OR AGAINST THE CLIENTS, OR IN A CRIMINAL CASE AN AGGREGATED AGREEMENT AS TO GUILTY OR NOLO CONTENDERE PLEAS, UNLESS EACH CLIENT CONSENTS AFTER CONSULTATION, INCLUDING DISCLOSURE OF THE EXISTENCE AND NATURE OF ALL THE CLAIMS OR PLEAS INVOLVED AND OF THE PARTICIPATION OF EACH PERSON IN THE SETTLEMENT.

(g) A LAWYER SHALL NOT:

(1) MAKE AN AGREEMENT PROSPECTIVELY LIMITING THE LAWYER'S LIABILITY TO A CLIENT FOR MALPRACTICE; OR

(2) SETTLE A CLAIM FOR SUCH LIABILITY WITH AN UNREPRESENTED CLIENT OR FORMER CLIENT WITHOUT FIRST ADVISING THAT PERSON IN WRITING THAT INDEPENDENT REPRESENTATION IS APPROPRIATE IN CONNECTION THEREWITH.

(h) A LAWYER RELATED TO ANOTHER LAWYER AS PARENT, CHILD, SIBLING, OR SPOUSE SHALL NOT REPRESENT A CLIENT IN A REPRESENTATION DIRECTLY ADVERSE TO A PERSON WHO THE LAWYER KNOWS IS REPRESENTED BY THE OTHER LAWYER EXCEPT UPON CONSENT BY THE CLIENT AFTER CONSULTATION REGARDING THE RELATIONSHIP.

(i) A LAWYER MAY ACQUIRE AND ENFORCE A LIEN GRANTED BY LAW TO SECURE THE LAWYER'S FEES OR EXPENSES, BUT A LAWYER SHALL NOT IMPOSE A LIEN UPON ANY PART OF A CLIENT'S FILES, EXCEPT UPON THE LAWYER'S OWN WORK PRODUCT, AND THEN ONLY TO THE EXTENT THAT THE WORK PRODUCT HAS NOT BEEN PAID FOR. THIS WORK PRODUCT EXCEPTION SHALL NOT APPLY WHEN THE CLIENT HAS BECOME UNABLE TO PAY, OR WHEN WITHHOLDING THE LAWYER'S WORK PRODUCT WOULD PRESENT A SIGNIFICANT RISK TO THE CLIENT OF IRREPARABLE HARM.

COMMENT:

Transactions Between Client and Lawyer

[1] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others; for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utility services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should be advised by the lawyer to obtain the detached advice that another lawyer can provide. Paragraph (b) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

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

Literary Rights

[4] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures that might otherwise be taken in the representation of the client may detract

from the publication value of an account of the representation. Paragraph (c) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5.

Paying Certain Litigation Costs and Client Expenses

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

Person Paying for Lawyer's Services

[6] Paragraph (e) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Family Relationships Between Lawyers

[7] Paragraph (h) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. Pursuant to the provisions of Rule 1.10, the disqualification stated in paragraph (h) is personal and is not imputed to members of firms with whom the lawyers are associated. Since each of the related lawyers is subject to paragraph (h), the effect is to require the consent of all materially affected clients.

Lawyer's Liens

[8] The substantive law of the District of Columbia has long permitted lawyers to assert and enforce liens against the property of clients. *See, e.g., Redevelopment Land Agency v. Dowdey*, 618 A.2d 152, 159-60 (D.C. 1992), and cases cited therein. Whether a lawyer has a lien on money or property belonging to a client is generally a matter of substantive law as to which the ethics rules take no position. Exceptions to what the common law might otherwise permit are made with respect to contingent fees and retaining liens. See respectively, Rule 1.5(c) and Rule 1.8(i).

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

[10] Under Rule 1.16(d), for example, a lawyer would be required to return all papers received from a client, such as birth certificates, wills, tax returns, or "green cards." Rule 1.8(i) does not permit retention of such papers to secure payment of any fee due. Only the lawyer's own work product—results of factual investigations, legal research and analysis, and similar materials generated by the lawyer's own effort—could be retained. (The term "work product" as used in paragraph (i) is limited to materials falling within the "work product doctrine," but includes any material generated by the lawyer that would be protected under that doctrine whether or not created in connection with pending or anticipated litigation.) And a lawyer could not withhold all of the work product merely because a portion of the lawyer's fees had not been paid.

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

RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT

A LAWYER WHO HAS FORMERLY REPRESENTED A CLIENT IN A MATTER SHALL NOT THEREAFTER REPRESENT ANOTHER PERSON IN THE SAME OR A SUBSTANTIALLY RELATED MATTER IN WHICH THAT PERSON'S INTERESTS ARE MATERIALLY ADVERSE TO THE INTERESTS OF THE FORMER CLIENT UNLESS THE FORMER CLIENT CONSENTS AFTER CONSULTATION.

COMMENT:

[1] After termination of client-lawyer relationship, a lawyer may not represent another client except in conformity with the Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. 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.

[2] The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question. Rule 1.9 is intended to incorporate federal case law defining the "substantial relationship" test. *See, e.g., T.C. Theatre Corp. v. Warner Brothers Pictures,* 113 F. Supp. 265 (S.D.N.Y. 1953), and its progeny; *see also Conflicts of Interest in the Legal Profession,* 94 Harv. L. Rev. 1244, 1315-34 (1981).

[3] Disqualification from subsequent representation is for the protection of clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client. The question of whether a lawyer is personally disqualified from representation in any matter on account of successive government and private employment is governed by Rule 1.11 rather than by Rule 1.9.

[4] With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is associated, see Rules 1.10 and 1.11.

RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

(a) WHILE LAWYERS ARE ASSOCIATED IN A FIRM, NONE OF THEM SHALL KNOWINGLY REPRESENT A CLIENT WHEN ANY ONE OF THEM PRACTICING ALONE WOULD BE PROHIBITED FROM DOING SO BY RULES 1.7, 1.8(b), 1.9, OR 2.2; PROVIDED, HOWEVER, THAT THIS PARAGRAPH SHALL NOT APPLY IF AN INDIVIDUAL LAWYER'S DISQUALIFICATION RESULTS SOLELY FROM THE FACT THAT THE LAWYER CONSULTED WITH A POTENTIAL CLIENT FOR THE PURPOSE ON ENABLING THAT POTENTIAL CLIENT AND THE FIRM TO DETERMINE WHETHER THEY DESIRED TO FORM A CLIENT-LAWYER RELATIONSHIP, BUT NO SUCH RELATIONSHIP WAS EVER FORMED.

(b) WHEN A LAWYER BECOMES ASSOCIATED WITH A FIRM, THE FIRM MAY NOT KNOWINGLY REPRESENT A PERSON IN A MATTER WHICH IS THE SAME AS, OR SUBSTANTIALLY RELATED TO, A MATTER WITH RESPECT TO WHICH THE LAWYER HAD PREVIOUSLY REPRESENTED A CLIENT WHOSE INTERESTS ARE MATERIALLY ADVERSE TO THAT PERSON AND ABOUT WHOM THE LAWYER HAS IN FACT ACQUIRED INFORMATION PROTECTED BY RULE 1.6 THAT IS MATERIAL TO THE MATTER. THE FIRM IS NOT DISQUALIFIED IF THE LAWYER PARTICIPATED IN A PREVIOUS REPRESENTATION OR ACQUIRED INFORMATION UNDER THE CIRCUMSTANCES COVERED BY THE PROVISO TO PARAGRAPH (a) OF THIS RULE OR BY RULE 1.6(g).

(c) WHEN A LAWYER HAS TERMINATED AN ASSOCIATION WITH A FIRM, THE FIRM IS NOT PROHIBITED FROM THEREAFTER REPRESENTING A PERSON WITH INTERESTS MATERIALLY ADVERSE TO THOSE OF A CLIENT REPRESENTED BY THE FORMERLY ASSOCIATED LAWYER DURING THE ASSOCIATION UNLESS THE MATTER IS THE SAME OR SUBSTANTIALLY RELATED TO THAT IN WHICH THE FORMERLY ASSOCIATED LAWYER REPRESENTED THE CLIENT DURING SUCH FORMER ASSOCIATION.

(d) A DISQUALIFICATION PRESCRIBED BY THIS RULE MAY BE WAIVED BY THE AFFECTED CLIENT UNDER THE CONDITIONS STATED IN RULE 1.7.

(e) A LAWYER WHO, WHILE AFFILIATED WITH A FIRM, IS MADE AVAILABLE TO ASSIST THE OFFICE OF CORPORATION COUNSEL OR THE DISTRICT OF COLUMBIA FINANCIAL RESPONSIBILITY AND MANAGEMENT ASSISTANCE AUTHORITY IN PROVIDING LEGAL SERVICES TO THAT AGENCY IS NOT CONSIDERED TO BE ASSOCIATED IN A FIRM FOR PURPOSES OF PARAGRAPH (a), PROVIDED, HOWEVER, THAT NO SUCH LAWYER SHALL REPRESENT THE OFFICE OF CORPORATION COUNSEL OR THE DISTRICT OF COLUMBIA FINANCIAL RESPONSIBILITY AND MANAGEMENT ASSISTANCE AUTHORITY WITH RESPECT TO A MATTER IN WHICH THE LAWYER'S FIRM APPEARS ON BEHALF OF AN ADVERSARY.

COMMENT:

Definition of "Firm"

[1] For 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, but does not include a government agency or other government entity. 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.

[2] 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.

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

[4] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11. The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7, and 1.9.

[5] Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer from the government to a private firm. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 1.6 and 1.11. 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.

Principles of Imputed Disqualification

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

Exception in the Case of a Prospective New Client

[7] As indicated by the proviso in paragraph (a) of this Rule, the principle of loyalty diminishes in importance if the sole reason for an individual lawyer's disqualification is the lawyer's initial consultation with a prospective new client with whom no client-lawyer relationship was ever formed, either because the lawyer detected a conflict of interest as a result of the initial consultation, or for some other reason (e.g., the prospective client decided not to retain the law firm). As provided by Rule 1.6(a), and Comment [7] thereunder, the individual lawyer involved in any such initial consultation is required to maintain in strict confidence all information obtained from the prospective client even if a client-lawyer relationship was never formed. That obligation may in turn cause the individual lawyer to be disqualified pursuant to Rule 1.7(b)(4) from representing a current or future client of the firm adverse to the prospective client because that lawyer's inability to use or disclose informa-

tion obtained from the prospective client may adversely affect that lawyer's professional judgment on behalf of the current or future client of the firm whose interests are adverse to the interests of the prospective client.

[8] The individual lawyer of the firm who obtains information from a prospective client under the circumstances described in the proviso to paragraph (a) of this Rule is permitted by Rule 1.6(a) to disclose that information to other persons in the lawyer's firm only to the minimum extent necessary to enable the firm to determine whether it may ethically accept the proposed representation, and if so, whether it desire to do so. For the reasons stated in paragraph [7], any such dissemination may necessarily cause additional individual lawyers of the firm to be personally disqualified from representing a current or future client of the firm adverse to the potential client. Nevertheless, as provided in Rule 1.10(a), the personal disqualification of individual lawyers is not imputed to the firm as a whole. Accordingly, any other lawyer in the firm who is not personally disqualified vis-à-vis the prospective client may represent a current or future client of the firm adverse to the prospective client.

[9] When a firm relies on the proviso in paragraph (a) to this Rule to avoid imputed disqualification of the firm as a whole, that firm must take affirmative steps—as soon as an actual or potential conflict is suspected—to prevent the personally disqualified lawyers from disseminating any information about the potential client that is protected by Rule 1.6, except as necessary to investigate potential conflicts of interest, to any other person in the firm, including non-lawyer staff. Conversely, the personally disqualified lawyers should not receive any confidences or secrets of the firm's clients in the conflicted matter.

Lawyers Moving Between Firms

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

[11] 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.

[12] The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the Code of Professional Responsibility. Applying this rubric presents two problems. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

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

Confidentiality

[14] 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.

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

[16] The provisions of paragraph (b) which refer to possession of protected information operate to disqualify the firm

only when the lawyer involved has actual knowledge of information protected by Rule 1.6. Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a substantially related matter even though the interests of the two clients conflict.

[17] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rule 1.6.

Adverse Positions

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

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

[20] Conversely, when a lawyer terminates an association with a firm, paragraph (c) provides that the old firm may not thereafter represent clients whose interests are materially adverse to those of the formerly associated lawyer's client in respect to a matter that is the same or substantially related to a matter with respect to which the formerly associated lawyer represented the client during the former association. For example, if a lawyer who represented a client in a litigation while with Firm A departs the firm, taking to the lawyer's new firm the litigation, Firm A may not, despite the departure of the lawyer, who takes the matter and the client to the new firm, undertake a representation adverse to the former client in that same litigation. See Rule 1.9 and the Comment thereto for the definition of "substantially related matter."

[21] The last sentence of paragraph (b) limits the imputation rule in certain limited circumstances. Those circumstances involve situations in which any secrets or confidences obtained were received before the lawyer had become a member of the Bar, but during a time when such person was providing assistance to another lawyer. The typical situation is that of the part-time or summer law clerk, or so-called summer associate. Other types of assistance to a lawyer, such as working as a paralegal or legal assistant, could also fall within the scope of this sentence. The limitation on the imputation rule is similar to the provision dealing with judicial law clerks under Rule 1.11(b). Not applying the imputation rule reflects a policy choice that imputation in such circumstances could unduly impair the mobility of persons employed in such nonlawyer positions once they become members of the Bar. The personal disqualification of the former nonlawyer is not affected, and the lawyer who previously held the nonlegal job may not be involved in any representation with respect to which the firm would have been disqualified but for the last sentence of paragraph (b). Rule 1.6(g) provides that the former nonlawyer is subject to the requirements of Rule 1.6 (regarding protection of client confidences and secrets) just as if the person had been a member of the Bar when employed in the prior position.

Lawyers Assisting the Office of Corporation Counsel and the District of Columbia Financial Responsibility and Management Assistance Authority

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

the District of Columbia Financial Responsibility and Management Assistance Authority. *See* Rule 1.11(h) with respect to the procedures to be followed by lawyers participating in such temporary programs and by the firms with which such lawyers are affiliated after the participating lawyers have ended their participation in such temporary programs.

[23] The term "made available to assist the Office of Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority in providing legal services" in paragraph (e) contemplates the temporary cessation of practice with the firm during the period legal services are being made available to the Office of Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority, so that during that period the lawyer's activities which involve the practice of law are devoted fully to assisting the Office of Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority.

[24] Rule 1.10(e) prohibits a lawyer who is assisting the Office of Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority from representing that office in any matter in which the lawyer's firm represents an adversary. Rule 1.10(e) does not, however, by its terms, prohibit lawyers assisting the Office of Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority from participating in every matter in which the Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority is taking a position adverse to that of a current client of the firm with which the participating lawyer was affiliated prior to joining the program of assistance to the Office of Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority. Such an unequivocal prohibition would be overly broad, difficult to administer in practice, and inconsistent with the purposes of Rule 1.10(e).

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

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

RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

(a) A LAWYER SHALL NOT ACCEPT OTHER EMPLOYMENT IN CONNECTION WITH A MATTER WHICH IS THE SAME AS, OR SUBSTANTIALLY RELATED TO, A MATTER IN WHICH THE LAWYER PARTICIPATED PERSONALLY AND SUBSTAN-

TIALLY AS A PUBLIC OFFICER OR EMPLOYEE. SUCH PARTICIPATION INCLUDES ACTING ON THE MERITS OF A MATTER IN A JUDICIAL OR OTHER ADJUDICATIVE CAPACITY.

(b) IF A LAWYER IS REQUIRED TO DECLINE OR TO WITHDRAW FROM EMPLOYMENT UNDER PARAGRAPH (a) ON ACCOUNT OF PERSONAL AND SUBSTANTIAL PARTICIPATION IN A MATTER, NO PARTNER OR ASSOCIATE OF THAT LAWYER, OR LAWYER WITH AN OF COUNSEL RELATIONSHIP TO THAT LAWYER, MAY ACCEPT OR CONTINUE SUCH EMPLOYMENT EXCEPT AS PROVIDED IN PARAGRAPHS (c) AND (d) BELOW. THE DISQUALIFICATION OF SUCH OTHER LAWYERS DOES NOT APPLY IF THE SOLE FORM OF PARTICIPATION WAS AS A JUDICIAL LAW CLERK.

(c) THE PROHIBITION STATED IN PARAGRAPH (b) SHALL NOT APPLY IF THE PERSONALLY DISQUALIFIED LAWYER IS SCREENED FROM ANY FORM OF PARTICIPATION IN THE MATTER OR REPRESENTATION AS THE CASE MAY BE, AND FROM SHARING IN ANY FEES RESULTING THEREFROM, AND IF THE REQUIREMENTS OF PARAGRAPHS (d) AND (e) ARE SATISFIED.

(d) EXCEPT AS PROVIDED IN PARAGRAPH (e), WHEN ANY OF COUNSEL, LAWYER, PARTNER, OR ASSOCIATE OF A LAWYER PERSONALLY DISQUALIFIED UNDER PARAGRAPH (a) ACCEPTS EMPLOYMENT IN CONNECTION WITH A MATTER GIVING RISE TO THE PERSONAL DISQUALIFICATION, THE FOLLOWING NOTIFICATIONS SHALL BE REQUIRED:

(1) THE PERSONALLY DISQUALIFIED LAWYER SHALL SUBMIT TO THE PUBLIC DEPARTMENT OR AGENCY BY WHICH THE LAWYER WAS FORMERLY EMPLOYED AND SERVE ON EACH OTHER PARTY TO ANY PERTINENT PROCEEDING A SIGNED DOCUMENT ATTESTING THAT DURING THE PERIOD OF DISQUALIFICATION THE PERSONALLY DISQUALIFIED LAWYER WILL NOT PARTICIPATE IN ANY MANNER IN THE MATTER OR THE REPRESENTATION, WILL NOT DISCUSS THE MATTER OR THE REPRESENTATION WITH ANY PARTNER, ASSOCIATE, OR OF COUNSEL LAWYER, AND WILL NOT SHARE IN ANY FEES FOR THE MATTER OR THE REPRESENTATION.

(2) AT LEAST ONE AFFILIATED LAWYER SHALL SUBMIT TO THE SAME DEPARTMENT OR AGENCY AND SERVE ON THE SAME PARTIES A SIGNED DOCUMENT ATTESTING THAT ALL AFFILIATED LAWYERS ARE AWARE OF THE REQUIREMENT THAT THE PERSONALLY DISQUALIFIED LAWYER BE SCREENED FROM PARTICIPATING IN OR DISCUSSING THE MATTER OR THE REPRESENTATION AND DESCRIBING THE PROCEDURES BEING TAKEN TO SCREEN THE PERSONALLY DISQUALIFIED LAWYER.

(e) IF A CLIENT REQUESTS IN WRITING THAT THE FACT AND SUBJECT MATTER OF A REPRESENTATION SUBJECT TO PARAGRAPH (d) NOT BE DISCLOSED BY SUBMITTING THE SIGNED STATEMENTS REFERRED TO IN PARAGRAPH (d), SUCH STATEMENTS SHALL BE PREPARED CONCURRENTLY WITH UNDERTAKING THE REPRESENTATION AND FILED WITH BAR COUNSEL UNDER SEAL. IF AT ANY TIME THEREAFTER THE FACT AND SUBJECT MATTER OF THE REPRESENTATION ARE DISCLOSED TO THE PUBLIC OR BECOME A PART OF THE PUBLIC RECORD, THE SIGNED STATEMENTS PREVIOUSLY PREPARED SHALL BE PROMPTLY SUBMITTED AS REQUIRED BY PARAGRAPH (d).

(f) SIGNED DOCUMENTS FILED PURSUANT TO PARAGRAPH (d) SHALL BE AVAILABLE TO THE PUBLIC, EXCEPT TO THE EXTENT THAT A LAWYER SUBMITTING A SIGNED DOCUMENT DEMONSTRATES TO THE SATISFACTION OF THE PUBLIC DEPARTMENT OR AGENCY UPON WHICH SUCH DOCUMENTS ARE SERVED THAT PUBLIC DISCLOSURE IS INCONSISTENT WITH RULE 1.6 OR PROVISIONS OF LAW.

(g) THIS RULE APPLIES TO ANY MATTER INVOLVING A SPECIFIC PARTY OR PARTIES.

(h) A LAWYER WHO PARTICIPATES IN A PROGRAM OF TEMPORARY SERVICE TO THE OFFICE OF CORPORATION COUNSEL OR THE DISTRICT OF COLUMBIA FINANCIAL RESPONSIBILITY AND MANAGEMENT ASSISTANCE AUTHORITY OF THE KIND DESCRIBED IN RULE 1.10(e) SHALL BE TREATED AS HAVING SERVED AS A PUBLIC OFFICER OR EMPLOYEE FOR PURPOSES OF PARAGRAPH (a), AND THE PROVISIONS OF PARAGRAPHS (b)-(e) SHALL APPLY TO THE LAWYER AND TO LAWYERS AFFILIATED WITH THE LAWYER.

COMMENT:

[1] This Rule deals with lawyers who leave public office and enter other employment. It applies to judges and their law clerks as well as to lawyers who act in other public capacities. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

[2] A lawyer representing a government agency, whether employed or specially retained by the government, is subject to

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

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

[4] The Rule forbids lawyers to accept other employment in connection with matters that are the same as or "substantially related" to matters in which they participated personally and substantially while serving as public officers or employees. The leading case defining "substantially related" matters in the context of former government employment is *Brown v. District of Columbia Board of Zoning Adjustment,* 486 A.2d 37 (D.C. 1984) (en banc). There the D.C. Court of Appeals, en banc, held that in the "revolving door" context, a showing that a reasonable person could infer that, through participation in one matter as a public officer or employee, the former government lawyer "may have had access to information legally relevant to, or otherwise useful in" a subsequent representation, is prima facie evidence that the two matters are substantially related. If this prima facie showing is made, the former government lawyer must disprove any ethical impropriety by showing that the lawyer "could not have gained access to information during the first representation that might be useful in the later representation." *Id.* at 49-50. In *Brown,* the Court of Appeals announced the "substantially related" test after concluding that, under former DR 9-101(B), *see* "Revolving Door," 445 A.2d 615 (D.C. 1982) (en banc) (per curiam), the term "matter" was intended to embrace all matters "substantially related" to one another—a test that originated in "side-switching" litigation between private parties. *See* Rule 1.9, Comment [2]; *Brown,* 486 A.2d at 39-40 n.1, 41-42 & n.4. Accordingly, the words "or substantially related to" in paragraph (a) are an express statement of the judicial gloss in *Brown* interpreting "matter."

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

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

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

[8] Paragraph (e) makes it clear that the lawyer's duty, under Rule 1.6, to maintain client confidences and secrets may preclude the submission of any notice required by paragraph (d). If the client requests in writing that the fact and subject matter of the representation not be disclosed, the lawyer must comply with that request. If the client makes such a request, the lawyer must abide by the client's wishes until such time as the fact and subject matter of the representation become public through some other means, such as a public filing. Filing a pleading or making an appearance in a proceeding before a tribunal constitutes a public filing. Once information concerning the representation is public, the notifications called for must be made promptly, and the lawyers involved may not honor a client request not to make the notifications. If a government agency has adopted rules governing practice before the agency by former government employees, members of the District of Columbia Bar are not exempted by Rule 1.11(e) from any additional or more restrictive notice requirements that the agency may impose. Thus the agency may require filing of notifications

whether or not a client consents. While the lawyer cannot file a notification that the client has directed the lawyer not to file, the failure to file in accordance with agency rules may preclude the lawyer's representation of the client before the agency. Such issues are governed by the agency's rules, and Rule 1.11(e) is not intended to displace such agency requirements.

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

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

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

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

[13] In addition to ethical concerns, provisions of conflict of interest statutes or regulations may impose limitations on the conduct of lawyers while they are providing assistance to the Office of Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority, or after they return from such assignments. *See*, e.g., 18 U.S.C. §§ 207, 208. Compliance with the Rules of Professional Conduct does not necessarily constitute compliance with all of the obligations imposed by conflict of interest statutes or regulations.

RULE 1.12 FORMER ARBITRATOR

(a) EXCEPT AS STATED IN PARAGRAPH (b), A LAWYER SHALL NOT REPRESENT ANYONE IN CONNECTION WITH A MATTER IN WHICH THE LAWYER PARTICIPATED PERSONALLY AND SUBSTANTIALLY AS AN ARBITRATOR, UNLESS ALL PARTIES TO THE PROCEEDING CONSENT AFTER DISCLOSURE.

(b) 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 extends the basic requirements of Rule 1.11 (a) to privately employed arbitrators. Paragraph (a) is substantially similar to Rule 1.11(a), except that it allows an arbitrator to represent someone in connection with a matter with which the lawyer was substantially involved while serving as an arbitrator if the parties to the arbitration consent. Paragraph (b) makes it clear that the prohibition set forth in paragraph (a) does not apply to partisan arbitrators serving on a multimember arbitration panel.

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) IN DEALING WITH AN ORGANIZATION'S DIRECTORS, OFFICERS, EMPLOYEES, MEMBERS, SHAREHOLDERS, OR OTHER CONSTITUENTS, A LAWYER SHALL EXPLAIN THE IDENTITY OF THE CLIENT WHEN IT IS APPARENT THAT THE ORGANIZATION'S INTERESTS MAY BE ADVERSE TO THOSE OF THE CONSTITUENTS WITH WHOM THE LAWYER IS DEALING.

(c) A LAWYER REPRESENTING AN ORGANIZATION MAY ALSO REPRESENT ANY OF ITS DIRECTORS, OFFICERS, EMPLOYEES, MEMBERS, SHAREHOLDERS, OR OTHER CONSTITUENTS, SUBJECT TO THE PROVISIONS OF RULE 1.7. IF THE ORGANIZATION'S CONSENT TO THE DUAL REPRESENTATION IS REQUIRED BY RULE 1.7, THE CONSENT SHALL BE GIVEN BY AN

APPROPRIATE OFFICIAL OF THE ORGANIZATION OTHER THAN THE INDIVIDUAL WHO IS TO BE REPRESENTED, OR BY THE SHAREHOLDERS.

COMMENT:

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents.

[2] Officers, directors, employees, and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations.

[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 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 be substantially injured by tortious or illegal conduct by a constituent member of an organization that reasonably might be imputed to the organization or that might result in substantial injury to the organization. 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 a 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.

[5] In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules

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

Government Agency

[7] Because the government agency that employs the government lawyer is the lawyer's client, the lawyer represents the agency acting through its duly authorized constituents. Any application of Rule 1.13 to government lawyers must, however, take into account the differences between government agencies and other organizations.

Clarifying the Lawyer's Role

[8] 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.

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

Dual Representation

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

Derivative Actions

[11] 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.

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

RULE 1.14 CLIENT UNDER A DISABILITY

(a) WHEN A CLIENT'S ABILITY TO MAKE ADEQUATELY CONSIDERED DECISIONS IN CONNECTION WITH THE REPRESENTATION IS IMPAIRED, WHETHER BECAUSE OF MINORITY, MENTAL DISABILITY, 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 THE LAWYER REASONABLY BELIEVES THAT THE CLIENT CANNOT ADEQUATELY ACT IN THE CLIENT'S OWN INTEREST.

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 mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence 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, 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.

[2] 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.

[3] 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, 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.

Disclosure of the Client's Condition

[4] Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

RULE 1.15 SAFEKEEPING PROPERTY

(a) A LAWYER SHALL HOLD PROPERTY OF CLIENTS OR THIRD PERSONS THAT IS IN THE LAWYER'S POSSESSION IN CONNECTION WITH A REPRESENTATION SEPARATE FROM THE LAWYER'S OWN PROPERTY. FUNDS SHALL BE KEPT IN A SEPARATE ACCOUNT MAINTAINED IN A FINANCIAL INSTITUTION WHICH IS AUTHORIZED BY FEDERAL, DISTRICT OF COLUMBIA, OR STATE LAW TO DO BUSINESS IN THE JURISDICTION WHERE THE ACCOUNT IS MAINTAINED AND WHICH IS A MEMBER OF THE FEDERAL DEPOSIT

INSURANCE CORPORATION, OR THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, OR SUCCESSOR AGENCIES. OTHER PROPERTY SHALL BE IDENTIFIED AS SUCH AND APPROPRIATELY SAFEGUARDED; PROVIDED, HOWEVER, THAT FUNDS NEED NOT BE HELD IN AN ACCOUNT IN A FINANCIAL INSTITUTION IF SUCH FUNDS (1) ARE PERMITTED TO BE HELD ELSEWHERE OR IN A DIFFERENT MANNER BY LAW OR COURT ORDER, OR (2) ARE HELD BY A LAWYER UNDER AN ESCROW OR SIMILAR AGREEMENT IN CONNECTION WITH A COMMERCIAL TRANSACTION. COMPLETE RECORDS OF SUCH ACCOUNT FUNDS AND OTHER PROPERTY SHALL BE KEPT BY THE LAWYER AND SHALL BE PRESERVED FOR A PERIOD OF FIVE YEARS AFTER TERMINATION OF THE REPRESENTATION.

(b) UPON RECEIVING FUNDS OR OTHER PROPERTY IN WHICH A CLIENT OR THIRD PERSON HAS AN INTEREST, A LAWYER SHALL PROMPTLY NOTIFY THE CLIENT OR THIRD PERSON. EXCEPT AS STATED IN THIS RULE OR OTHERWISE PERMITTED BY LAW OR BY AGREEMENT WITH THE CLIENT, A LAWYER SHALL PROMPTLY DELIVER TO THE CLIENT OR THIRD PERSON ANY FUNDS OR OTHER PROPERTY THAT THE CLIENT OR THIRD PERSON IS ENTITLED TO RECEIVE AND, UPON REQUEST BY THE CLIENT OR THIRD PERSON, SHALL PROMPTLY RENDER A FULL ACCOUNTING REGARDING SUCH PROPERTY, SUBJECT TO RULE 1.6.

(c) WHEN IN THE COURSE OF REPRESENTATION A LAWYER IS IN POSSESSION OF PROPERTY IN WHICH INTERESTS ARE CLAIMED BY THE LAWYER AND ANOTHER PERSON, OR BY TWO OR MORE PERSONS TO EACH OF WHOM THE LAWYER MAY HAVE AN OBLIGATION, THE PROPERTY SHALL BE KEPT SEPARATE BY THE LAWYER UNTIL THERE IS AN ACCOUNTING AND SEVERANCE OF INTERESTS IN THE PROPERTY. IF A DISPUTE ARISES CONCERNING THE RESPECTIVE INTERESTS AMONG PERSONS CLAIMING AN INTEREST IN SUCH PROPERTY, THE UNDISPUTED PORTION SHALL BE DISTRIBUTED AND THE PORTION IN DISPUTE SHALL BE KEPT SEPARATE BY THE LAWYER UNTIL THE DISPUTE IS RESOLVED. ANY FUNDS IN DISPUTE SHALL BE DEPOSITED IN A SEPARATE ACCOUNT MEETING THE REQUIREMENTS OF PARAGRAPH (a).

(d) ADVANCES OF UNEARNED FEES AND UNINCURRED COSTS SHALL BE TREATED AS PROPERTY OF THE CLIENT PURSUANT TO PARAGRAPH (a) UNTIL EARNED OR INCURRED UNLESS THE CLIENT CONSENTS TO A DIFFERENT ARRANGEMENT. REGARDLESS OF WHETHER SUCH CONSENT IS PROVIDED, RULE 1.16(d) APPLIES TO REQUIRE THE RETURN TO THE CLIENT OF ANY UNEARNED PORTION OF ADVANCED LEGAL FEES AND UNINCURRED COSTS AT THE TERMINATION OF THE LAWYER'S SERVICES.

(e) NOTHING IN THIS RULE SHALL PROHIBIT A LAWYER OR LAW FIRM FROM PLACING CLIENTS' FUNDS WHICH ARE NOMINAL IN AMOUNT OR TO BE HELD FOR A SHORT PERIOD OF TIME IN ONE OR MORE INTEREST-BEARING ACCOUNTS FOR THE BENEFIT OF THE CHARITABLE PURPOSES OF A COURT-APPROVED "INTEREST ON LAWYERS TRUST ACCOUNT (IOLTA)" PROGRAM.

(f) NOTHING IN THIS RULE SHALL PROHIBIT A LAWYER FROM PLACING A SMALL AMOUNT OF THE LAWYER'S FUNDS INTO A TRUST ACCOUNT FOR THE SOLE PURPOSE OF DEFRAYING BANK CHARGES THAT MAY BE MADE AGAINST THAT ACCOUNT.

COMMENT:

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of paragraph (a). Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[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).

[3] The District of Columbia Court of Appeals has promulgated specific rules allowing lawyers to place clients' funds that are nominal in amount, or that are to be held for a short period of time, into interest-bearing accounts for the benefit of the charitable purposes of a court-approved "Interest on Lawyers Trust Account (IOLTA)" program. On February 22, 1985, the court added to DR 9-103 a new paragraph (c) that expressly permitted IOLTA accounts meeting the requirements of Appendix B to Rule X of the court's Rules Governing the Bar of the District of Columbia. Appendix B sets forth detailed rules to be followed in establishing and administering IOLTA accounts. Paragraph (e) of this Rule is substantially identical to DR 9-103(C). The rules contained in Appendix B to Rule X are

hereby incorporated and must be followed in setting up IOLTA programs pursuant to paragraph (e).

[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 lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

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

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

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

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

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) EXCEPT AS STATED IN PARAGRAPH (c), A LAWYER SHALL NOT REPRESENT A CLIENT OR, WHERE REPRESENTATION HAS COMMENCED, SHALL WITHDRAW FROM THE REPRESENTATION OF A CLIENT IF:

(1) THE REPRESENTATION WILL RESULT IN VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT OR OTHER LAW;

(2) THE LAWYER'S PHYSICAL OR MENTAL CONDITION MATERIALLY IMPAIRS THE LAWYER'S ABILITY TO REPRESENT THE CLIENT; OR

(3) THE LAWYER IS DISCHARGED.

(b) EXCEPT AS STATED IN PARAGRAPH (c), A LAWYER MAY WITHDRAW FROM REPRESENTING A CLIENT IF WITHDRAWAL CAN BE ACCOMPLISHED WITHOUT MATERIAL ADVERSE EFFECT ON THE INTERESTS OF THE CLIENT, OR IF:

(1) THE CLIENT PERSISTS IN A COURSE OF ACTION INVOLVING THE LAWYER'S SERVICES THAT THE LAWYER REASONABLY BELIEVES IS CRIMINAL OR FRAUDULENT;

(2) THE CLIENT HAS USED THE LAWYER'S SERVICES TO PERPETRATE A CRIME OR FRAUD;

(3) THE CLIENT FAILS SUBSTANTIALLY TO FULFILL AN OBLIGATION TO THE LAWYER REGARDING THE LAWYER'S SERVICES AND HAS BEEN GIVEN REASONABLE WARNING THAT THE LAWYER WILL WITHDRAW UNLESS THE OBLIGATION IS FULFILLED;

(4) THE REPRESENTATION WILL RESULT IN AN UNREASONABLE FINANCIAL BURDEN ON THE LAWYER OR OBDURATE OR VEXATIOUS CONDUCT ON THE PART OF THE CLIENT HAS RENDERED THE REPRESENTATION UNREASONABLY DIFFICULT;

(5) THE LAWYER BELIEVES IN GOOD FAITH, IN A PROCEEDING BEFORE A TRIBUNAL, THAT THE TRIBUNAL WILL FIND THE EXISTENCE OF OTHER GOOD CAUSE FOR WITHDRAWAL.

(c) WHEN ORDERED TO DO SO BY A TRIBUNAL, A LAWYER SHALL CONTINUE REPRESENTATION NOTWITHSTANDING GOOD CAUSE FOR TERMINATING THE REPRESENTATION.

(d) IN CONNECTION WITH ANY TERMINATION OF REPRESENTATION, A LAWYER SHALL TAKE TIMELY STEPS TO THE EXTENT REASONABLY PRACTICABLE TO PROTECT A CLIENT'S INTERESTS, SUCH AS GIVING REASONABLE NOTICE TO THE CLIENT, ALLOWING TIME FOR EMPLOYMENT OF OTHER COUNSEL, SURRENDERING PAPERS AND PROPERTY TO WHICH THE CLIENT IS ENTITLED, AND REFUNDING ANY ADVANCE PAYMENT OF FEE THAT HAS NOT BEEN EARNED. THE LAWYER MAY RETAIN PAPERS RELATING TO THE CLIENT TO THE EXTENT PERMITTED BY RULE 1.8(i).

COMMENT:

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

Mandatory Withdrawal

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

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

Discharge

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

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

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

Optional Withdrawal

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

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

[9] If the matter is not pending in court, a lawyer will not have "other good cause for withdrawal" unless the lawyer is acting in good faith and the circumstances are exceptional enough to outweigh the material adverse effect on the interests of the client that withdrawal will cause.

Assisting the Client Upon Withdrawal

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

Compliance With Requirements of a Tribunal

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

Return of Client's Property or Money

[12] Paragraph (d) requires a lawyer to make timely return to the client of any property or money "to which the client is entitled." Where a lawyer holds property or money of a client at the termination of a representation and there is a dispute concerning the distribution of such property or money—whether such dispute is between the lawyer and a client, the lawyer and another lawyer who is owed a fee in the matter, or between either the lawyer or the client and a third party—the lawyer must segregate the disputed portion of such property or money, hold that property or money in trust as required by Rule 1.15, and promptly distribute any undisputed amounts. See Rule 1.15 and Comment [3] thereto. Notwithstanding the foregoing, where a lawyer has a valid lien covering undisputed amounts of property or money, the lawyer may continue to hold such property or money to the extent permitted by the substantive law governing the lien asserted. See generally Rules 1.8, 1.15(b).

RULE 1.17 TRUST ACCOUNT OVERDRAFT NOTIFICATION

(a) FUNDS COMING INTO THE POSSESSION OF A LAWYER THAT ARE REQUIRED BY THESE RULES

TO BE SEGREGATED FROM THE LAWYER'S OWN FUNDS (SUCH SEGREGATED FUNDS HEREINAFTER BEING REFERRED TO AS "TRUST FUNDS") SHALL BE DEPOSITED IN ONE OR MORE SPECIALLY DESIGNATED ACCOUNTS AT A FINANCIAL INSTITUTION. THE TITLE OF EACH SUCH ACCOUNT SHALL CONTAIN THE WORDS "TRUST ACCOUNT" OR "ESCROW ACCOUNT," AS WELL AS THE LAWYER'S OR THE LAWYER'S LAW FIRM'S IDENTITY.

(b) THE ACCOUNTS REQUIRED PURSUANT TO PARAGRAPH (a) SHALL BE MAINTAINED ONLY IN INSTITUTIONS THAT ARE LISTED AS "D.C. BAR APPROVED DEPOSITORIES" ON A LIST MAINTAINED FOR THIS PURPOSE BY THE BOARD ON PROFESSIONAL RESPONSIBILITY, UNLESS (1) THE ACCOUNT IS PERMITTED TO BE HELD ELSEWHERE OR IN A DIFFERENT MANNER BY LAW OR COURT ORDER, OR (2) A LAWYER HOLDS TRUST FUNDS UNDER AN ESCROW OR SIMILAR AGREEMENT IN CONNECTION WITH A COMMERCIAL TRANSACTION. IF A LAWYER IS A MEMBER OF THE DISTRICT OF COLUMBIA BAR AND PRACTICES LAW OUTSIDE THE DISTRICT OF COLUMBIA, D.C. BAR APPROVED DEPOSITORIES SHALL BE USED FOR DEPOSIT OF ANY: (1) TRUST FUNDS RECEIVED BY THE LAWYER IN THE DISTRICT OF COLUMBIA; (2) TRUST FUNDS RECEIVED BY THE LAWYER FROM, OR FOR THE BENEFIT OF, PARTIES OR PERSONS LOCATED IN THE DISTRICT OF COLUMBIA; AND/OR (3) TRUST FUNDS RECEIVED BY THE LAWYER THAT ARISE FROM TRANSACTIONS NEGOTIATED OR CONSUMMATED IN THE DISTRICT OF COLUMBIA.

TO BE LISTED AS AN APPROVED DEPOSITORY, A FINANCIAL INSTITUTION SHALL FILE AN UNDERTAKING WITH THE BOARD ON PROFESSIONAL RESPONSIBILITY, ON A FORM TO BE PROVIDED BY THE BOARD'S OFFICE, AGREEING PROMPTLY TO REPORT TO THE OFFICE OF BAR COUNSEL EACH INSTANCE IN WHICH AN INSTRUMENT THAT WOULD PROPERLY BE PAYABLE IF SUFFICIENT FUNDS WERE AVAILABLE HAS BEEN PRESENTED AGAINST A LAWYER'S OR LAW FIRM'S SPECIALLY DESIGNATED ACCOUNT AT SUCH INSTITUTION AT A TIME WHEN SUCH ACCOUNT CONTAINED INSUFFICIENT FUNDS TO PAY SUCH INSTRUMENT, WHETHER OR NOT THE INSTRUMENT WAS HONORED AND IRRESPECTIVE OF ANY OVERDRAFT PRIVILEGES THAT MAY ATTACH TO SUCH ACCOUNT. IN ADDITION TO UNDERTAKING TO MAKE THE ABOVE-SPECIFIED REPORTS, APPROVED DEPOSITORIES, WHEREVER THEY ARE LOCATED, SHALL ALSO UNDERTAKE TO RESPOND PROMPTLY AND FULLY TO SUBPOENAS FROM THE OFFICE OF BAR COUNSEL THAT SEEK A LAWYER'S OR LAW FIRM'S SPECIALLY DESIGNATED ACCOUNT RECORDS, NOTWITHSTANDING ANY OBJECTIONS THAT MIGHT BE RAISED BASED UPON THE TERRITORIAL LIMITS ON THE EFFECTIVENESS OF SUCH SUBPOENAS OR UPON THE JURISDICTION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS TO ENFORCE THEM. SUCH UNDERTAKING SHALL APPLY TO ALL BRANCHES OF THE FINANCIAL INSTITUTION AND SHALL NOT BE CANCELED BY THE INSTITUTION EXCEPT UPON THIRTY (30) DAYS WRITTEN NOTICE TO THE OFFICE OF BAR COUNSEL. THE FAILURE OF AN APPROVED DEPOSITORY TO COMPLY WITH ITS UNDERTAKING HEREUNDER SHALL BE GROUNDS FOR IMMEDIATE REMOVAL OF SUCH INSTITUTION FROM THE LIST OF D.C. BAR APPROVED DEPOSITORIES.

(c) REPORTS TO BAR COUNSEL BY APPROVED DEPOSITORIES PURSUANT TO PARAGRAPH (b) ABOVE SHALL CONTAIN THE FOLLOWING INFORMATION:

(1) IN THE CASE OF A DISHONORED INSTRUMENT, THE REPORT SHALL BE IDENTICAL TO THE OVERDRAFT NOTICE CUSTOMARILY FORWARDED TO THE INSTITUTION'S OTHER REGULAR ACCOUNT HOLDERS.

(2) IN THE CASE OF AN INSTRUMENT THAT WAS PRESENTED AGAINST INSUFFICIENT FUNDS BUT WAS HONORED, THE REPORT SHALL IDENTIFY THE DEPOSITORY, THE LAWYER OR LAW FIRM MAINTAINING THE ACCOUNT, THE ACCOUNT NUMBER, THE DATE OF PRESENTATION FOR PAYMENT AND THE PAYMENT DATE OF THE INSTRUMENT, AS WELL AS THE AMOUNT OF OVERDRAFT CREATED THEREBY.

THE REPORT TO THE OFFICE OF BAR COUNSEL SHALL BE MADE SIMULTANEOUSLY WITH, AND WITHIN THE TIME PERIOD, IF ANY, PROVIDED BY LAW FOR NOTICE OF DISHONOR. IF AN INSTRUMENT PRESENTED AGAINST INSUFFICIENT FUNDS WAS HONORED, THE INSTITUTION'S REPORT SHALL BE MAILED TO BAR COUNSEL WITHIN FIVE (5) BUSINESS DAYS OF PAYMENT OF THE INSTRUMENT.

(d) THE ESTABLISHMENT OF A SPECIALLY DESIGNATED ACCOUNT AT AN APPROVED DEPOSITORY SHALL BE CONCLUSIVELY DEEMED TO BE CONSENT BY THE LAWYER OR LAW FIRM MAINTAINING SUCH ACCOUNT TO THAT INSTITUTION'S FURNISHING TO THE OFFICE OF BAR COUNSEL ALL REPORTS AND INFORMATION REQUIRED HEREUNDER. NO APPROVED DEPOSITORY SHALL INCUR ANY LIABILITY BY VIRTUE OF ITS COMPLIANCE

WITH THE REQUIREMENTS OF THIS RULE, EXCEPT AS MIGHT OTHERWISE ARISE FROM BAD FAITH, INTENTIONAL MISCONDUCT, OR ANY OTHER ACTS BY THE APPROVED DEPOSITORY OR ITS EMPLOYEES WHICH, UNRELATED TO THIS RULE, WOULD CREATE LIABILITY.

(e) THE DESIGNATION OF A FINANCIAL INSTITUTION AS AN APPROVED DEPOSITORY PURSUANT TO THIS RULE SHALL NOT BE DEEMED TO BE A WARRANTY, REPRESENTATION, OR GUARANTY BY THE DISTRICT OF COLUMBIA COURT OF APPEALS, THE DISTRICT OF COLUMBIA BAR, THE BOARD ON PROFESSIONAL RESPONSIBILITY, OR THE OFFICE OF BAR COUNSEL AS TO THE FINANCIAL SOUNDNESS, BUSINESS PRACTICES, OR OTHER ATTRIBUTES OF SUCH INSTITUTION. APPROVAL OF AN INSTITUTION UNDER THIS RULE MEANS ONLY THAT THE INSTITUTION HAS UNDERTAKEN TO MEET THE REPORTING REQUIREMENTS ENUMERATED ABOVE.

(f) NOTHING IN THIS RULE SHALL PRECLUDE A FINANCIAL INSTITUTION FROM CHARGING A LAWYER OR LAW FIRM FOR THE REASONABLE COST OF PRODUCING THE REPORTS AND RECORDS REQUIRED BY THIS RULE.

(g) DEFINITIONS:

"LAW FIRM"–INCLUDES A PARTNERSHIP OF LAWYERS, A PROFESSIONAL OR NON-PROFIT CORPORATION OF LAWYERS, AND A COMBINATION THEREOF ENGAGED IN THE PRACTICE OF LAW.

"FINANCIAL INSTITUTION"—INCLUDES BANKS, SAVINGS AND LOAN ASSOCIATIONS, CREDIT UNIONS, SAVINGS BANKS AND ANY OTHER BUSINESS THAT ACCEPTS FOR DEPOSIT FUNDS HELD IN TRUST BY LAWYERS WHICH IS AUTHORIZED BY FEDERAL, DISTRICT OF COLUMBIA, OR STATE LAW TO DO BUSINESS IN THE DISTRICT OF COLUMBIA OR THE STATE IN WHICH THE FINANCIAL INSTITUTION IS SITUATED AND THAT MAINTAINS ACCOUNTS WHICH ARE INSURED BY AN AGENCY OR INSTRUMENTALITY OF THE UNITED STATES.

AMENDMENTS TO RULE 1: CLIENT-LAWYER RELATIONSHIP

Rule 1.3 (Diligence and Zeal)

Comment [9] was added to clarify that Rule 1.3, a rule of general applicability, is not intended to govern conflicts of interest, which are addressed by Rules 1.7, 1.8, and 1.9. See also new Comment [5] to the "Scope" section. **(11/96)**

Rule 1.5 (Fees)

Section (f) was added to the Rule to clarify that charging or collecting an unlawful fee is a violation of the Rules. The new paragraph (f) says that fees prohibited by paragraph D.C. 1.5(d) or by law are *per se* unreasonable. **(11/96)**

Rule 1.6 (Confidentiality of Information)

Section (e) was amended to clarify and to conform that section to the remainder of the Rule; no substantive change was effected. **(11/96)**

Section (i) now references the Bar's Lawyer Practice Assistance Program. **(5/98)**

Rule 1.7 (Conflict of Interest: General Rule)

Section (a) was amended to clarify that the Rule prohibits a lawyer from advancing two or more adverse positions (as opposed to clients) in the same matter. **(11/96)**

Section (b)(1) was revised to distinguish it from section (a). Comment [1] was added to further explain this distinction. **(11/96)**

Section (c)(2) was eliminated. **(11/96)**

Section (d), the so called "Hot Potato" provision, was added to the Rules to deal with conflicts arising solely under section (b)(1) that are not reasonably foreseeable when a representation begins. Section (d) permits a lawyer to continue the representation without the first client's consent, unless the conflict also arises under subsections (b)(2-4). **(11/96)**

Comment [3] was revised to distinguish "adverse positions" from "inconsistent or alternative positions" advanced on behalf of a single client. **(11/96)**

Comment [11] was revised to narrow subsection (b)(1) to matters involving a "specific party or parties" and to address the lawyer's obligation, if any, to inquire into a client's "full range of ... interests in issues." **(11/96)**

Comments [13] through [18] were added to Rule 1.7. They address a lawyer's ability to engage in representations that are adverse to affiliates (and "other constituents") of the lawyer's specific corporate (or "other organization-type") client. **(11/96)**

Comment [20] was amended to insert a reminder that, under D.C. law, the lawyer bears the burden of proof to establish that a client has consented under Rule 1.7(c). It also suggests that the prudent lawyer may wish to seek written consent from potential clients despite the Rule not requiring written consent. **(11/96)**

Comment [22], amending former Comment [16], provides commentary to new Rule 1.7(d). **(11/96)**

Comment [25] was added to address the ethical issues that are raised when a lawyer is affiliated with non-legal businesses. The areas addressed are: a lawyer's recommendation to a client to use non-legal services; a related entity's referral of its customer to the lawyer; possible conflicts created by work of the related enterprise; and preservation of confidences. **(11/96)**

Rule 1.8 (Conflict of Interest: Prohibited Transactions)

Section (i) was amended to clarify that the Rule permits lawyers to assert charging and contractual liens as permitted by law and to assert retaining liens on client property *other* than files. A client's files, except for unpaid lawyer's work product, remain protected from imposition of a lien. **(11/96)**

Comment [8] was added to note that liens against a client's money or property have been available under substantive law and are not governed by ethics rules. **(11/96)**

Renumbered Comment [9] was amended to clarify that section (i) permits a lawyer to retain any client property the law permits the lawyer to retain, except for files. Only unpaid-for work product in the client's file may be retained. **(11/96)**

Renumbered Comment [10] was amended to define "work product" as the same as that used in the work product doctrine but without the requirement of anticipated litigation. "Work product" applies to any matter that the lawyer creates in the file through the lawyer's own efforts." **(11/96)**

Comment [11] was added to create an exception to withholding work product because of the possibility of irreparable harm to the client. **(11/96)**

Rule 1.10 (Imputed Disqualification: General Rule)

Section (a) was amended so that any personal disqualification created by a lawyer's receipt of protected information during an initial interview with a potential client who then does not retain the lawyer is not imputed to the other lawyers in the firm. **(11/96)**

Section (b) was amended to delete a clause from the original Rule that was redundant and to conform the language to that found in ABA Rule 1.9(b). **(11/96)**

Section (c)(2) was also deleted as redundant. **(11/96)**

Section (e) was added on a trial basis in 2/92 and established on a permanent basis in 1994. This section addresses private law firm lawyers providing legal services to the Office of Corporation Counsel on a temporary basis. **(11/94)**

Section (e) revised to include private lawyers providing legal services to the District of Columbia Financial Responsibility and Management Assistance Authority (Control Board). **(11/95)**

Comments [7]–[9] were added to amplify section (a), the potential client exception. All subsequent comments were renumbered. **(11/96)**

Comments [10], [15], and [16] were amended slightly; no substantive changes were made. **(11/96)**

Rule 1.11 (Successive Government and Private Employment)

Section (g) was revised so it conforms to the definition of "matter" adopted in the Terminology section. **(11/96)**

Section (h) was added on a trial basis in 2/92 and established on a permanent basis in 1994. This section addresses private law firm lawyers providing legal services to the Office of Corporation Counsel on a temporary basis. **(11/94)**

Section (h) revised to include private lawyers providing legal services to the District of Columbia Financial Responsibility and Management Assistance Authority (Control Board). **(11/95)**

Comment [10] was amended to conform to federal and District of Columbia law allowing lawyers, after full-time employment with one governmental agency, to continue or accept engagements with a second agency or the first agency after separation. **(11/96)**

Rule 1.13 (Organization As Client)

While not amended, changes to the Comments of Rule 1.7 apply to "Organization Clients."

Rule 1.15 (Safekeeping Property)

Section (a) was amended to except two classes of funds from the obligation to hold funds in approved depositories: (1) funds permitted to be kept elsewhere or in a different manner by law or court order, and (2) funds a lawyer holds under an escrow or similar account in connection with a commercial transaction. **(11/96)**

Section (c) was amended to clarify a lawyer's duty with respect to client property in which multiple parties claim an interest. In particular, it clarifies that the Rule applies where both the lawyer and another person claim interests in the same property or when two other persons claim such interests. **(11/96)**

Section (d) was revised to conform the treatment of advanced legal fees to the practice common in most jurisdictions, where advances of unearned fees and unincurred costs are treated as property of the client and required to be deposited into the trust account. **(6/99, effective 1/00)**

Section (f) was added to allow lawyers to deposit small amounts of their own funds into trust accounts solely for payment of bank charges. **(11/96)**

Section (g) added to clarify that a small amount of lawyer funds can be placed in a trust account for the sole purposes of defraying bank charges to that account. **(11/96)**

Comment [2] revised in accordance with section (d). **(6/99, effective 1/00)**

Rule 1.16 (Declining of Terminating Representation)

Comment [12] was added to amplify that, where a dispute exists between lawyer and client concerning the proper distribution of money or property in the lawyer's possession, the lawyer must return any undisputed amounts to the client. **(11/96)**

Rule 1.17 (Trust Account Overdraft Notification)

Section (b) was amended to except two classes of funds from the obligation to hold funds in approved depositories: (1) funds permitted to be kept elsewhere or in a different manner by law or court order, and (2) funds a lawyer holds under an escrow or similar account in connection with a commercial transaction. **(4/92; 11/96)**

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:

Scope of Advice

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

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

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

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

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. 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) A LAWYER SHOULD, EXCEPT IN UNUSUAL CIRCUMSTANCES THAT MAY MAKE IT INFEASIBLE, PROVIDE BOTH CLIENTS WITH AN EXPLANATION IN WRITING OF THE RISKS INVOLVED IN THE COMMON REPRESENTATION AND OF THE CIRCUMSTANCES THAT MAY CAUSE SEPARATE REPRESENTATION LATER TO BE NECESSARY OR DESIRABLE. THE CONSENT OF THE CLIENTS SHALL ALSO BE IN WRITING.

(c) 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.

(d) A LAWYER SHALL WITHDRAW AS INTERMEDIARY IF ANY OF THE CLIENTS SO REQUEST, OR IF ANY OF THE CONDITIONS STATED IN PARAGRAPH (a) ARE 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:

[1] 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.

[2] Because the potential for confusion is so great, paragraph (b) imposes the requirement that an explanation of the risks of the common representation be furnished in writing, except in unusual circumstances. The process of preparing the writing causes the lawyer involved to focus specifically on those risks, a process that may suggest to the lawyer that the particular situation is not suited to the use of the lawyer as an intermediary. In any event, the writing performs a valuable role in educating the client to such risks as may exist—risks that many clients may not otherwise comprehend. Mere agreement by a client to waive the requirement for a written analysis of the risks does not constitute the "unusual circumstances" that justify omitting the writing. The "unusual circumstances" requirement may be met in rare situations where an assessment of risks is not feasible at the beginning of the intermediary role. In such circumstances, the writing should be provided as soon as it becomes feasible to assess the risks with reasonable clarity. The consent required by paragraph (b) should refer to the disclosure upon which it is based.

[3] 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.

[4] 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.

[5] 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.

[6] 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.

[7] 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 of time and in a variety of matters could have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Confidentiality and Privilege

[8] A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confi-

dentiality 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.

Consultation

[9] 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.

[10] Paragraph (c) 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

[11] 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

(a) A LAWYER MAY UNDERTAKE 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) EXCEPT AS DISCLOSURE IS REQUIRED IN CONNECTION WITH A REPORT OF AN EVALUATION, INFORMATION RELATING TO THE EVALUATION IS OTHERWISE PROTECTED BY RULE 1.6.

COMMENT:

Definition

[1] An evaluation may be performed at the client's direction but 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.

Duty to Third Person

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

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems

necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

Financial Auditors' Requests for Information

[5] When a question concerning the legal situation of a client arises at the insistence 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.

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 A GOOD-FAITH ARGUMENT FOR AN EXTENSION, MODIFICATION, OR REVERSAL OF EXISTING LAW. A LAWYER FOR THE DEFENDANT IN A CRIMINAL PROCEEDING, OR FOR THE RESPONDENT IN A PROCEEDING THAT COULD RESULT IN INVOLUNTARY INSTITUTIONALIZATION, SHALL, IF THE CLIENT ELECTS TO GO TO TRIAL OR TO A CONTESTED FACT-FINDING HEARING, NEVERTHELESS SO DEFEND THE PROCEEDING AS TO REQUIRE THAT THE GOVERNMENT CARRY ITS BURDEN OF PROOF.

COMMENT:

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

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous if the lawyer is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification, or reversal of existing law.

[3] In criminal cases or proceedings in which the respondent can be involuntarily institutionalized, such as juvenile delinquency and civil commitment cases, the lawyer is not only permitted, but is indeed required, to put the government to its proof whenever the client elects to contest adjudication.

RULE 3.2 EXPEDITING LITIGATION

(a) IN REPRESENTING A CLIENT, A LAWYER SHALL NOT DELAY A PROCEEDING WHEN THE LAWYER KNOWS OR WHEN IT IS OBVIOUS THAT SUCH ACTION WOULD SERVE SOLELY TO HARASS OR MALICIOUSLY INJURE ANOTHER.

(b) A LAWYER SHALL MAKE REASONABLE EFFORTS TO EXPEDITE LITIGATION CONSISTENT WITH THE INTERESTS OF THE CLIENT.

COMMENT:

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

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A LAWYER SHALL NOT KNOWINGLY:

(1) MAKE A FALSE STATEMENT OF MATERIAL FACT OR LAW TO A TRIBUNAL;

(2) COUNSEL OR ASSIST A CLIENT TO ENGAGE IN CONDUCT THAT THE LAWYER KNOWS IS CRIMINAL OR FRAUDULENT, BUT A LAWYER MAY DISCUSS THE LEGAL CONSEQUENCES OF ANY PROPOSED COURSE OF CONDUCT WITH A CLIENT AND MAY COUNSEL OR ASSIST A CLIENT TO MAKE A GOOD-FAITH EFFORT TO DETERMINE THE VALIDITY, SCOPE, MEANING, OR APPLICATION OF THE LAW;

(3) FAIL TO DISCLOSE TO THE TRIBUNAL LEGAL AUTHORITY IN THE CONTROLLING JURISDICTION NOT DISCLOSED BY OPPOSING COUNSEL AND KNOWN TO THE LAWYER TO BE DISPOSITIVE OF A QUESTION AT ISSUE AND DIRECTLY ADVERSE TO THE POSITION OF THE CLIENT; OR

(4) OFFER EVIDENCE THAT THE LAWYER KNOWS TO BE FALSE, EXCEPT AS PROVIDED IN PARAGRAPH (b).

(b) WHEN THE WITNESS WHO INTENDS TO GIVE EVIDENCE THAT THE LAWYER KNOWS TO BE FALSE IS THE LAWYER'S CLIENT AND IS THE ACCUSED IN A CRIMINAL CASE, THE LAWYER SHALL FIRST MAKE A GOOD-FAITH EFFORT TO DISSUADE THE CLIENT FROM PRESENTING THE FALSE EVIDENCE; IF THE LAWYER IS UNABLE TO DISSUADE THE CLIENT, THE LAWYER SHALL SEEK LEAVE OF THE TRIBUNAL TO WITHDRAW. IF THE LAWYER IS UNABLE TO DISSUADE THE CLIENT OR TO WITHDRAW WITHOUT SERIOUSLY HARMING THE CLIENT, THE LAWYER MAY PUT THE CLIENT ON THE STAND TO TESTIFY IN A NARRATIVE FASHION, BUT THE LAWYER SHALL NOT EXAMINE THE CLIENT IN SUCH MANNER AS TO ELICIT TESTIMONY WHICH THE LAWYER KNOWS TO BE FALSE, AND SHALL NOT ARGUE THE PROBATIVE VALUE OF THE CLIENT'S TESTIMONY IN CLOSING ARGUMENT.

(c) THE DUTIES STATED IN PARAGRAPH (a) CONTINUE TO THE CONCLUSION OF THE PROCEEDING.

(d) A LAWYER WHO RECEIVES INFORMATION CLEARLY ESTABLISHING THAT A FRAUD HAS BEEN PERPETRATED UPON THE TRIBUNAL SHALL PROMPTLY REVEAL THE FRAUD TO THE TRIBUNAL UNLESS COMPLIANCE WITH THIS DUTY WOULD REQUIRE DISCLOSURE OF INFORMATION OTHERWISE PROTECTED BY RULE 1.6, IN WHICH CASE THE LAWYER SHALL PROMPTLY CALL UPON THE CLIENT TO RECTIFY THE FRAUD.

COMMENT:

[1] This Rule defines the duty of candor to the tribunal. In dealing with a tribunal the lawyer is also required to comply with the general requirements of Rule 1.2 (e) and (f). However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

[2] An assertion purported to be made by the lawyer, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There may be circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(e) not to counsel a client to commit or assist the client in committing a fraud applies in litigation but is subject to Rule 3.3(b) and (d). Regarding compliance with Rule 1.2(e), see the Comment to that Rule. *See also* Comment to Rule 8.4(b).

Misleading Legal Argument

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

False Evidence

[4] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

[5] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed.

[6] Paragraph (d) provides that if a lawyer learns that a fraud has been perpetrated on the tribunal, the lawyer must reveal the fraud to the tribunal. However, if the notification of the tribunal would require disclosure of information protected by Rule 1.6, the lawyer may not inform the tribunal of the fraud; the lawyer's only duty in such an instance is to call upon the client to rectify the fraud. In other cases, the lawyer may learn of the client's intention to present false evidence before the client has had a chance to do so. In this situation, paragraphs (a)(4) and (b) forbid the lawyer to present the false evidence, except in rare instances where the witness is the accused in a criminal case, the lawyer is unsuccessful in dissuading the client from going forward, and the lawyer is unable to withdraw without causing serious harm to the client. The terms "criminal case" and "criminal defendant" as used in Rule 3.3 and its Comment include juvenile delinquency proceedings and the person who is the subject of such proceedings.

Perjury by a Criminal Defendant

[7] Paragraph (b) allows the lawyer to permit a client who is the accused in a criminal case to present false testimony in very narrowly circumscribed circumstances and in a very limited manner. Even in a criminal case the lawyer must seek to persuade the defendant-client to refrain from perjurious testimony. There has been dispute concerning the lawyer's duty when that

persuasion fails. Paragraph (b) requires the lawyer to withdraw rather than offer the client's false testimony, if this can be done without seriously harming the client.

[8] Serious harm to the client sufficient to prevent the lawyer's withdrawal entails more than the usual inconveniences that necessarily result from withdrawal, such as delay in concluding the client's case or an increase in the costs of concluding the case. The term should be construed narrowly to preclude withdrawal only where the special circumstances of the case are such that the client would be significantly prejudiced, such as by express or implied divulgence of information otherwise protected by Rule 1.6. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available. In those rare circumstances in which withdrawal without such serious harm to the client is impossible, the lawyer may go forward with examination of the client and closing argument subject to the limitations of paragraph (b).

Refusing to Offer Proof of a Nonclient Known to Be False

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

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A LAWYER SHALL NOT:

(a) OBSTRUCT ANOTHER PARTY'S ACCESS TO EVIDENCE OR ALTER, DESTROY, OR CONCEAL EVIDENCE, OR COUNSEL OR ASSIST ANOTHER PERSON TO DO SO, IF THE LAWYER REASONABLY SHOULD KNOW THAT THE EVIDENCE IS OR MAY BE THE SUBJECT OF DISCOVERY OR SUBPOENA IN ANY PENDING OR IMMINENT PROCEEDING. UNLESS PROHIBITED BY LAW, A LAWYER MAY RECEIVE PHYSICAL EVIDENCE OF ANY KIND FROM THE CLIENT OR FROM ANOTHER PERSON. IF THE EVIDENCE RECEIVED BY THE LAWYER BELONGS TO ANYONE OTHER THAN THE CLIENT, THE LAWYER SHALL MAKE A GOOD-FAITH EFFORT TO PRESERVE IT AND TO RETURN IT TO THE OWNER, SUBJECT TO RULE 1.6;

(b) FALSIFY EVIDENCE, COUNSEL OR ASSIST A WITNESS TO TESTIFY FALSELY, OR OFFER AN INDUCEMENT TO A WITNESS THAT IS PROHIBITED BY LAW;

(c) KNOWINGLY DISOBEY AN OBLIGATION UNDER THE RULES OF A TRIBUNAL EXCEPT FOR AN OPEN REFUSAL BASED ON AN ASSERTION THAT NO VALID OBLIGATION EXISTS;

(d) IN PRETRIAL PROCEDURE, MAKE A FRIVOLOUS DISCOVERY REQUEST OR FAIL TO MAKE REASONABLY DILIGENT 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 marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. To the extent clients are involved in the effort to comply with discovery requests, the lawyer's obligations are to pursue reasonable efforts to assure that documents and other information subject

to proper discovery requests are produced. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or a proceeding whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] Paragraph (a) permits, but does not require, the lawyer to accept physical evidence (including the instruments or proceeds of crime) from the client or any other person. Such receipt is, as stated in paragraph (a), subject to other provisions of law and the limitations imposed by paragraph (a) with respect to obstruction of access, alteration, destruction, or concealment, and subject also to the requirements of paragraph (a) with respect to return of property to its rightful owner, and to the obligation to comply with subpoenas and discovery requests. The term "evidence" includes any document or physical object that the lawyer reasonably should know may be the subject of discovery or subpoena in any pending or imminent litigation. *See* D.C. Bar Legal Ethics Committee Opinion No. 119 (Mar. 15, 1983) (test is whether destruction of document is directed at concrete litigation that is either pending or almost certain to be filed).

[4] A lawyer should ascertain that the lawyer's handling of documents or other physical objects does not violate any other law. Federal criminal law may forbid the destruction of documents or other physical objects in circumstances not covered by the ethical rule set forth in paragraph (a). *See, e.g.*, 18 U.S.C. § 1503 (obstruction of justice); 18 U.S.C. § 1505 (obstruction of proceedings before departments, agencies, and committees); 18 U.S.C. § 1510 (obstruction of criminal investigations). And it is a crime in the District of Columbia for one who knows or has reason to know that an official proceeding has begun or is likely to be instituted to alter, destroy, or conceal a document with intent to impair its integrity or availability for use in the proceeding. D.C. Code § 22-723 (1981). Finally, some discovery rules having the force of law may prohibit the destruction of documents and other material even if litigation is not pending or imminent. This Rule does not set forth the scope of a lawyer's responsibilities under all applicable laws. It merely imposes on the lawyer an ethical duty to make reasonable efforts to comply fully with those laws. The provisions of paragraph (a) prohibit a lawyer from obstructing another party's access to evidence, and from altering, destroying, or concealing evidence. These prohibitions may overlap with criminal obstruction provisions and civil discovery rules, but they apply whether or not the prohibited conduct violates criminal provisions or court rules. Thus, the alteration of evidence by a lawyer, whether or not such conduct violates criminal law or court rules, constitutes a violation of paragraph (a).

[5] Because of the duty of confidentiality under Rule 1.6, the lawyer is generally forbidden to volunteer information about physical evidence received from a client without the client's consent after consultation. In some cases, the Office of Bar Counsel will accept physical evidence from a lawyer and then turn it over to the appropriate persons; in those cases this procedure is usually the best means of delivering evidence to the proper authorities without disclosing the client's confidences. However, Bar Counsel may refuse to accept evidence; thus lawyers should keep the following in mind before accepting evidence from a client, and should discuss with Bar Counsel's office the procedures that may be employed in particular circumstances.

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

[7] Second, if the lawyer has received physical evidence belonging to the client, for purposes of examination or testing, the lawyer may later return the property to the client pursuant to Rule 1.15, provided that the evidence has not been subpoenaed. The lawyer may not be justified in returning to a client physical evidence the possession of which by the client would be per se illegal, such as certain drugs and weapons. And if it is reasonably apparent that the evidence is not the client's property, the lawyer may not retain the evidence or return it to the client. Instead, the lawyer must, under paragraph (a), make a good-faith effort to return the evidence to its owner.

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

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

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A LAWYER SHALL NOT:

(a) SEEK TO INFLUENCE A JUDGE, JUROR, PROSPECTIVE JUROR, OR OTHER OFFICIAL BY MEANS PROHIBITED BY LAW;

(b) COMMUNICATE EX PARTE WITH SUCH A PERSON EXCEPT AS PERMITTED BY LAW; OR

(c) ENGAGE IN CONDUCT INTENDED TO DISRUPT A TRIBUNAL.

COMMENT:

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model 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.

RULE 3.6 TRIAL PUBLICITY

A LAWYER ENGAGED IN A CASE BEING TRIED TO A JUDGE OR JURY SHALL NOT MAKE AN EXTRAJUDICIAL STATEMENT THAT A REASONABLE PERSON WOULD EXPECT TO BE DISSEMINATED BY MEANS OF MASS PUBLIC COMMUNICATION IF THE LAWYER KNOWS OR REASONABLY SHOULD KNOW THAT THE STATEMENT WILL CREATE A SERIOUS AND IMMINENT THREAT TO THE IMPARTIALITY OF THE JUDGE OR JURY.

COMMENT:

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

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

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

RULE 3.7 LAWYER AS WITNESS

(a) A LAWYER SHALL NOT ACT AS ADVOCATE AT A TRIAL IN WHICH THE LAWYER IS LIKELY TO BE A NECESSARY WITNESS EXCEPT WHERE:

(1) THE TESTIMONY RELATES TO AN UNCONTESTED ISSUE;

(2) THE TESTIMONY RELATES TO THE NATURE AND VALUE OF LEGAL SERVICES RENDERED IN THE CASE; OR

(3) DISQUALIFICATION OF THE LAWYER WOULD WORK SUBSTANTIAL HARDSHIP ON THE CLIENT.

(b) A LAWYER MAY NOT ACT AS ADVOCATE IN A TRIAL IN WHICH ANOTHER LAWYER IN THE LAWYER'S FIRM IS LIKELY TO BE CALLED AS A WITNESS IF THE OTHER LAWYER WOULD BE PRECLUDED FROM ACTING AS ADVOCATE IN THE TRIAL BY RULE 1.7 OR RULE 1.9. THE PROVISIONS OF THIS PARAGRAPH (b) DO NOT APPLY IF THE LAWYER WHO IS APPEARING AS AN ADVOCATE IS EMPLOYED BY, AND APPEARS ON BEHALF OF, A GOVERNMENT AGENCY.

COMMENT:

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

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

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

dependence on the adversary process to test the credibility of the testimony.

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

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

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

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

THE PROSECUTOR IN A CRIMINAL CASE SHALL NOT:

(a) IN EXERCISING DISCRETION TO INVESTIGATE OR TO PROSECUTE, IMPROPERLY FAVOR OR INVIDIOUSLY DISCRIMINATE AGAINST ANY PERSON;

(b) FILE IN COURT OR MAINTAIN A CHARGE THAT THE PROSECUTOR KNOWS IS NOT SUPPORTED BY PROBABLE CAUSE;

(c) PROSECUTE TO TRIAL A CHARGE THAT THE PROSECUTOR KNOWS IS NOT SUPPORTED BY EVIDENCE SUFFICIENT TO ESTABLISH A PRIMA FACIE SHOWING OF GUILT;

(d) INTENTIONALLY AVOID PURSUIT OF EVIDENCE OR INFORMATION BECAUSE IT MAY DAMAGE THE PROSECUTION'S CASE OR AID THE DEFENSE;

(e) INTENTIONALLY FAIL TO DISCLOSE TO THE DEFENSE, UPON REQUEST AND AT A TIME WHEN USE BY THE DEFENSE IS REASONABLY FEASIBLE, ANY EVIDENCE OR INFORMATION THAT THE PROSECUTOR KNOWS OR REASONABLY SHOULD KNOW TENDS TO NEGATE THE GUILT OF THE ACCUSED OR TO MITIGATE THE OFFENSE, OR IN CONNECTION WITH SENTENCING, INTENTIONALLY FAIL TO DISCLOSE TO THE DEFENSE UPON REQUEST ANY UNPRIVILEGED MITIGATING INFORMATION KNOWN TO THE PROSECUTOR AND NOT REASONABLY AVAILABLE TO THE DEFENSE, EXCEPT WHEN THE PROSECUTOR IS RELIEVED OF THIS RESPONSIBILITY BY A PROTECTIVE ORDER OF THE TRIBUNAL;

(f) EXCEPT FOR STATEMENTS WHICH ARE NECESSARY TO INFORM THE PUBLIC OF THE NATURE AND EXTENT OF THE PROSECUTOR'S ACTION AND WHICH SERVE A LEGITIMATE LAW ENFORCE-

MENT PURPOSE, MAKE EXTRAJUDICIAL COMMENTS WHICH SERVE TO HEIGHTEN CONDEMNATION OF THE ACCUSED;

(g) IN PRESENTING A CASE TO A GRAND JURY, INTENTIONALLY INTERFERE WITH THE INDEPENDENCE OF THE GRAND JURY, PREEMPT A FUNCTION OF THE GRAND JURY, ABUSE THE PROCESSES OF THE GRAND JURY, OR FAIL TO BRING TO THE ATTENTION OF THE GRAND JURY MATERIAL FACTS TENDING SUBSTANTIALLY TO NEGATE THE EXISTENCE OF PROBABLE CAUSE; OR

(h) PEREMPTORILY STRIKE JURORS ON GROUNDS OF RACE, RELIGION, NATIONAL OR ETHNIC BACKGROUND, OR SEX.

COMMENT:

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

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

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

RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A LAWYER REPRESENTING A CLIENT BEFORE A LEGISLATIVE OR ADMINISTRATIVE BODY IN A NONADJUDICATIVE PROCEEDING SHALL DISCLOSE THAT THE APPEARANCE IS IN A REPRESENTATIVE CAPACITY AND SHALL CONFORM TO THE PROVISIONS OF RULES 3.3, 3.4(a) THROUGH (c), AND 3.5.

COMMENT:

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

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

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

[4] This Rule is closely related to Rules 3.3 through 3.5, which deal with conduct regarding tribunals. The term "tribunal," as defined in the Terminology section of these Rules, refers to adjudicative or quasi-adjudicative bodies.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

IN THE COURSE OF REPRESENTING A CLIENT, A LAWYER SHALL NOT KNOWINGLY:

(a) MAKE A FALSE STATEMENT OF MATERIAL FACT OR LAW TO A THIRD PERSON; OR

(b) FAIL TO DISCLOSE A MATERIAL FACT TO A THIRD PERSON WHEN DISCLOSURE IS NECESSARY TO AVOID ASSISTING A CRIMINAL OR FRAUDULENT ACT BY A CLIENT, UNLESS DISCLOSURE IS PROHIBITED BY RULE 1.6.

COMMENT:

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act. The term "third person" as used in paragraphs (a) and (b) refers to any person or entity other than the lawyer's client.

Statements of Fact

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

Fraud by Client

[3] Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

RULE 4.2 COMMUNICATION BETWEEN LAWYER AND OPPOSING PARTIES

(a) DURING THE COURSE OF REPRESENTING A CLIENT, A LAWYER SHALL NOT COMMUNICATE OR CAUSE ANOTHER TO COMMUNICATE ABOUT THE SUBJECT OF THE REPRESENTATION WITH A PARTY KNOWN TO BE REPRESENTED BY ANOTHER LAWYER IN THE MATTER, UNLESS THE LAWYER HAS THE PRIOR CONSENT OF THE LAWYER REPRESENTING SUCH OTHER PARTY OR IS AUTHORIZED BY LAW TO DO SO.

(b) DURING THE COURSE OF REPRESENTING A CLIENT, A LAWYER MAY COMMUNICATE ABOUT THE SUBJECT OF THE REPRESENTATION WITH A NONPARTY EMPLOYEE OF THE OPPOSING PARTY WITHOUT OBTAINING THE CONSENT OF THAT PARTY'S LAWYER. HOWEVER, PRIOR TO COMMUNICATING WITH ANY SUCH NONPARTY EMPLOYEE, A LAWYER MUST DISCLOSE TO SUCH EMPLOYEE BOTH THE LAWYER'S IDENTITY AND THE FACT THAT THE LAWYER REPRESENTS A PARTY WITH A CLAIM AGAINST THE EMPLOYEE'S EMPLOYER.

(c) FOR PURPOSES OF THIS RULE, THE TERM "PARTY" INCLUDES ANY PERSON, INCLUDING AN EMPLOYEE OF A PARTY ORGANIZATION, WHO HAS THE AUTHORITY TO BIND A PARTY ORGANIZATION AS TO THE REPRESENTATION TO WHICH THE COMMUNICATION RELATES.

(d) THIS RULE DOES NOT PROHIBIT COMMUNICATION BY A LAWYER WITH GOVERNMENT OFFICIALS WHO HAVE THE AUTHORITY TO REDRESS THE GRIEVANCES OF THE LAWYER'S CLIENT, WHETHER OR NOT THOSE GRIEVANCES OR THE LAWYER'S COMMUNICATIONS RELATE TO MATTERS THAT ARE THE SUBJECT OF THE REPRESENTATION, PROVIDED THAT IN THE EVENT OF SUCH COMMUNICATIONS THE DISCLOSURES SPECIFIED IN (b) ARE MADE TO THE GOVERNMENT OFFICIAL TO WHOM THE COMMUNICATION IS MADE.

COMMENT:

[1] This Rule does not prohibit communication with a party, or an employee or agent of a party, 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 for communicating with the other party is permitted to do so.

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

[3] The Rule does not prohibit a lawyer from communicating with employees of an organization who have the authority to bind the organization with respect to the matters underlying the representation if they do not also have authority to make binding decisions regarding the representation itself. A lawyer may therefore communicate with such persons without first notifying the organization's lawyer. *See* D.C. Bar Legal Ethics Committee Opinion No. 129 (1983). But before communicating with such a "nonparty employee," the lawyer must disclose to the employee the lawyer's identity and the fact that the lawyer represents a party with a claim against the employer. It is preferable that this disclosure be made in writing. The notification requirements of Rule 4.2(b) apply to contacts with government employees who do not have the authority to make binding decisions regarding the representation.

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

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

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

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

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

RULE 4.3 DEALING WITH UNREPRESENTED PERSON

IN DEALING ON BEHALF OF A CLIENT WITH A PERSON WHO IS NOT REPRESENTED BY COUNSEL, A LAWYER SHALL NOT:

(a) GIVE ADVICE TO THE UNREPRESENTED PERSON OTHER THAN THE ADVICE TO SECURE COUNSEL, IF THE INTERESTS OF SUCH PERSON ARE OR HAVE A REASONABLE POSSIBILITY OF BEING IN CONFLICT WITH THE INTERESTS OF THE LAWYER'S CLIENT;

(b) STATE OR IMPLY TO UNREPRESENTED PERSONS WHOSE INTERESTS ARE NOT IN CONFLICT WITH THE INTERESTS OF THE LAWYER'S CLIENT THAT THE LAWYER IS DISINTERESTED. WHEN THE LAWYER KNOWS OR REASONABLY SHOULD KNOW THAT THE UNREPRESENTED PERSON MISUNDERSTANDS THE LAWYER'S ROLE IN THE MATTER, THE LAWYER SHALL MAKE REASONABLE EFFORTS TO CORRECT THE MISUNDERSTANDING.

COMMENT:

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer will

provide disinterested advice concerning the law even when the lawyer represents a client. In dealing personally with any unrepresented third party on behalf of the lawyer's client, a lawyer must take great care not to exploit these assumptions.

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

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

RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

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 VIOLATE THE LEGAL RIGHTS OF SUCH A PERSON.

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.

AMENDMENTS TO RULE 4: TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.2 (Communications Between Lawyer and Opposing Parties)

Comment [8] was amended to clarify that prosecutors are covered by Rule 4.2 except where their conduct is authorized and permitted by the Constitution of the law of the United States or the District of Columbia. **(11/96)**

LAW FIRMS AND ASSOCIATIONS

RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

(a) A PARTNER 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 HAS DIRECT SUPERVISORY AUTHORITY OVER THE OTHER LAWYER OR IS A PARTNER IN THE LAW FIRM IN WHICH THE OTHER LAWYER PRACTICES, AND KNOWS OR REASONABLY SHOULD KNOW OF THE CONDUCT AT A TIME WHEN ITS CONSEQUENCES CAN BE AVOIDED OR MITIGATED BUT FAILS TO TAKE REASONABLE REMEDIAL ACTION.

COMMENT:

[1] Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm.

[2] The measures 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, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. *See* Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

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

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

[5] Appropriate remedial action would depend on the immediacy of the involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that

a subordinate misrepresented a matter to an opposing party in a negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[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

(a) A LAWYER IS BOUND BY THE RULES OF PROFESSIONAL CONDUCT NOTWITHSTANDING THAT THE LAWYER ACTED AT THE DIRECTION OF ANOTHER PERSON.

(b) A SUBORDINATE LAWYER DOES NOT VIOLATE THE RULES OF PROFESSIONAL CONDUCT IF THAT LAWYER ACTS IN ACCORDANCE WITH A SUPERVISORY LAWYER'S REASONABLE RESOLUTION OF AN ARGUABLE QUESTION OF PROFESSIONAL DUTY.

COMMENT:

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

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

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

WITH RESPECT TO A NONLAWYER EMPLOYED OR RETAINED BY OR ASSOCIATED WITH A LAWYER:

(a) A PARTNER 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 REQUESTS OR, WITH THE KNOWLEDGE OF THE SPECIFIC CONDUCT, RATIFIES THE CONDUCT INVOLVED; OR

(2) THE LAWYER HAS DIRECT SUPERVISORY AUTHORITY OVER THE PERSON, OR IS A PARTNER IN THE LAW FIRM IN WHICH THE PERSON IS EMPLOYED, AND KNOWS OF THE CONDUCT AT A TIME WHEN ITS CONSEQUENCES CAN BE AVOIDED OR MITIGATED BUT FAILS TO TAKE REASONABLE REMEDIAL ACTION.

COMMENT:

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

[2] Just as lawyers in private practice may direct the conduct of investigators who may be independent contractors, prosecutors and other government lawyers may effectively direct the conduct of police or other governmental investigative personnel, even though they may not have, strictly speaking, formal authority to order actions by such personnel, who report to the chief of police or the head of another enforcement agency. Such prosecutors or other government lawyers have a responsibility with respect to police or investigative personnel, whose conduct they effectively direct, equivalent to that of private lawyers with respect to investigators whom they retain. See also Comments [3], [4], and [5] to Rule 5.1, in particular, the concept of what constitutes direct supervisory authority, and the significance of holding certain positions in a firm. Comments [3], [4], and [5] of Rule 5.1 apply as well to Rule 5.3.

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A LAWYER OR LAW FIRM SHALL NOT SHARE LEGAL FEES WITH A NONLAWYER, EXCEPT THAT:

(1) AN AGREEMENT BY A LAWYER WITH THE LAWYER'S FIRM, PARTNER, OR ASSOCIATE MAY PROVIDE FOR THE PAYMENT OF MONEY, OVER A REASONABLE PERIOD OF TIME AFTER THE LAWYER'S DEATH, TO THE LAWYER'S ESTATE OR TO ONE OR MORE SPECIFIED PERSONS;

(2) A LAWYER WHO UNDERTAKES TO COMPLETE UNFINISHED LEGAL BUSINESS OF A DECEASED LAWYER MAY PAY TO THE ESTATE OF THE DECEASED LAWYER THAT PROPORTION OF THE TOTAL COMPENSATION WHICH FAIRLY REPRESENTS THE SERVICES RENDERED BY THE DECEASED LAWYER;

(3) A LAWYER OR LAW FIRM MAY INCLUDE NONLAWYER EMPLOYEES IN A COMPENSATION OR RETIREMENT PLAN, EVEN THOUGH THE PLAN IS BASED IN WHOLE OR IN PART ON A PROFIT-SHARING ARRANGEMENT; AND

(4) SHARING OF FEES IS PERMITTED IN A PARTNERSHIP OR OTHER FORM OF ORGANIZATION WHICH MEETS THE REQUIREMENTS OF PARAGRAPH (b).

(b) A LAWYER MAY PRACTICE LAW IN A PARTNERSHIP OR OTHER FORM OF ORGANIZATION IN WHICH A FINANCIAL INTEREST IS HELD OR MANAGERIAL AUTHORITY IS EXERCISED BY AN INDIVIDUAL NONLAWYER WHO PERFORMS PROFESSIONAL SERVICES WHICH ASSIST THE ORGANIZATION IN PROVIDING LEGAL SERVICES TO CLIENTS, BUT ONLY IF:

(1) THE PARTNERSHIP OR ORGANIZATION HAS AS ITS SOLE PURPOSE PROVIDING LEGAL SERVICES TO CLIENTS;

(2) ALL PERSONS HAVING SUCH MANAGERIAL AUTHORITY OR HOLDING A FINANCIAL INTEREST UNDERTAKE TO ABIDE BY THESE RULES OF PROFESSIONAL CONDUCT;

(3) THE LAWYERS WHO HAVE A FINANCIAL INTEREST OR MANAGERIAL AUTHORITY IN THE PARTNERSHIP OR ORGANIZATION UNDERTAKE TO BE RESPONSIBLE FOR THE NONLAWYER PARTICIPANTS TO THE SAME EXTENT AS IF NONLAWYER PARTICIPANTS WERE LAWYERS UNDER RULE 5.1;

(4) THE FOREGOING CONDITIONS ARE SET FORTH IN WRITING.

(c) A LAWYER SHALL NOT PERMIT A PERSON WHO RECOMMENDS, EMPLOYS, OR PAYS THE LAWYER TO RENDER LEGAL SERVICES FOR ANOTHER TO DIRECT OR REGULATE THE LAWYER'S PROFESSIONAL JUDGMENT IN RENDERING SUCH LEGAL SERVICES.

COMMENT:

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

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

[3] As the demand increased for a broad range of professional services from a single source, lawyers employed professionals from other disciplines to work for them. So long as the nonlawyers remained employees of the lawyers, these relationships did not violate the disciplinary rules. However, when

lawyers and nonlawyers considered forming partnerships and professional corporations to provide a combination of legal and other services to the public, they faced serious obstacles under the former rules.

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

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

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

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

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

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

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

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW

A LAWYER SHALL NOT:

(a) PRACTICE LAW IN A JURISDICTION WHERE DOING SO VIOLATES THE REGULATION OF THE LEGAL PROFESSION IN THAT JURISDICTION; OR

(b) ASSIST A PERSON WHO IS NOT A MEMBER OF THE BAR IN THE PERFORMANCE OF ACTIVITY THAT CONSTITUTES THE UNAUTHORIZED PRACTICE OF LAW.

COMMENT:

[1] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. *See* Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.

RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

A LAWYER SHALL NOT PARTICIPATE IN OFFERING

OR MAKING:

(a) A PARTNERSHIP OR EMPLOYMENT AGREEMENT THAT RESTRICTS THE RIGHTS OF A LAWYER TO PRACTICE AFTER TERMINATION OF THE RELATIONSHIP, EXCEPT AN AGREEMENT CONCERNING BENEFITS UPON RETIREMENT; OR

(b) AN AGREEMENT IN WHICH A RESTRICTION ON THE LAWYER'S RIGHT TO PRACTICE IS PART OF THE SETTLEMENT OF A CONTROVERSY BETWEEN PARTIES.

COMMENT:

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

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

PUBLIC SERVICE

RULE 6.1 PRO BONO PUBLICO SERVICE

A LAWYER SHOULD PARTICIPATE IN SERVING THOSE PERSONS, OR GROUPS OF PERSONS, WHO ARE UNABLE TO PAY ALL OR A PORTION OF REASONABLE ATTORNEYS' FEES OR WHO ARE OTHERWISE UNABLE TO OBTAIN COUNSEL. A LAWYER MAY DISCHARGE THIS RESPONSIBILITY BY PROVIDING PROFESSIONAL SERVICES AT NO FEE, OR AT A SUBSTANTIALLY REDUCED FEE, TO PERSONS AND GROUPS WHO ARE UNABLE TO AFFORD OR OBTAIN COUNSEL, OR BY ACTIVE PARTICIPATION IN THE WORK OF ORGANIZATIONS THAT PROVIDE LEGAL SERVICES TO THEM. WHEN PERSONAL REPRESENTATION IS NOT FEASIBLE, A LAWYER MAY DISCHARGE THIS RESPONSIBILITY BY PROVIDING FINANCIAL SUPPORT FOR ORGANIZATIONS THAT PROVIDE LEGAL REPRESENTATION TO THOSE UNABLE TO OBTAIN COUNSEL.

COMMENT:

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

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

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

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

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

RULE 6.2 ACCEPTING APPOINTMENTS

A LAWYER SHALL NOT SEEK TO AVOID APPOINTMENT BY A TRIBUNAL TO REPRESENT A PERSON EXCEPT FOR GOOD CAUSE, SUCH AS:

(a) REPRESENTING THE CLIENT IS LIKELY TO RESULT IN VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT OR OTHER LAW;

(b) REPRESENTING THE CLIENT IS LIKELY TO RESULT IN A SUBSTANTIAL AND UNREASONABLE BURDEN ON THE LAWYER; OR

(c) THE CLIENT OR THE CAUSE IS SO REPUGNANT TO THE LAWYER AS TO BE LIKELY TO IMPAIR THE

CLIENT-LAWYER RELATIONSHIP OR THE LAWYER'S ABILITY TO REPRESENT THE CLIENT.

COMMENT:

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono 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.

Appointed Counsel

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

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

RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A LAWYER MAY SERVE AS A DIRECTOR, OFFICER, OR MEMBER OF A LEGAL SERVICES ORGANIZATION, APART FROM THE LAW FIRM IN WHICH THE LAWYER PRACTICES, NOTWITHSTANDING THAT THE ORGANIZATION SERVES PERSONS HAVING INTERESTS ADVERSE TO A CLIENT OF THE LAWYER. THE LAWYER SHALL NOT KNOWINGLY PARTICIPATE IN A DECISION OR ACTION OF THE ORGANIZATION:

(a) IF PARTICIPATING IN THE DECISION WOULD BE INCOMPATIBLE WITH THE LAWYER'S OBLIGATIONS TO A CLIENT UNDER RULE 1.7; OR

(b) WHERE THE DECISION COULD HAVE A MATERIAL ADVERSE EFFECT ON THE REPRESENTATION OF A CLIENT OF THE ORGANIZATION WHOSE INTERESTS ARE ADVERSE TO A CLIENT OF THE LAWYER.

COMMENT:

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

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

RULE 6.4 LAW REFORM ACTIVITIES

(a) A LAWYER SHOULD ASSIST IN IMPROVING THE ADMINISTRATION OF JUSTICE. A LAWYER MAY DISCHARGE THIS REQUIREMENT BY RENDERING SERVICES IN ACTIVITIES FOR IMPROVING THE LAW, THE LEGAL SYSTEM, OR THE LEGAL PROFESSION.

(b) A LAWYER MAY SERVE AS A DIRECTOR, OFFICER, OR MEMBER OF AN ORGANIZATION INVOLVED IN REFORM OF THE LAW OR ITS ADMINISTRATION NOTWITHSTANDING THAT THE REFORM MAY AFFECT THE INTERESTS OF A CLIENT OF THE LAWYER. WHEN THE LAWYER KNOWS THAT THE INTERESTS OF A CLIENT MAY BE MATERIALLY BENEFITED BY A DECISION IN WHICH THE LAWYER PARTICIPATES, THE LAWYER SHALL DISCLOSE THAT FACT BUT NEED NOT IDENTIFY THE CLIENT.

COMMENT:

[1] Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus, they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or for-

mer clients. Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, the lawyer should endeavor by lawful means to obtain appropriate changes in the law. This Rule expresses the policy underlying Canon 8 of the previous Code of Professional Responsibility that "A lawyer should assist in improving the legal system," but it is not intended that it be enforced through disciplinary process.

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

AMENDMENTS TO RULE 6: PUBLIC SERVICE

Rule 6.1 (Pro Bono Publico Service)

Comment [5] revised to indicate that lawyers providing pro bono counsel should be guided by the standards recommended by the Judicial Conferences of the District of Columbia and the D.C. Circuit of 50 hours (increase from 40) or a $400 (increase from $200) contribution of 1 percent of earned income to a legal assistance organization. **(6/99)**

INFORMATION ABOUT LEGAL SERVICES

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

(a) A LAWYER SHALL NOT MAKE A FALSE OR MISLEADING COMMUNICATION ABOUT THE LAWYER OR THE LAWYER'S SERVICES. A COMMUNICATION IS FALSE OR MISLEADING IF IT:

(1) CONTAINS A MATERIAL MISREPRESENTATION OF FACT OR LAW, OR OMITS A FACT NECESSARY TO MAKE THE STATEMENT CONSIDERED AS A WHOLE NOT MATERIALLY MISLEADING; OR

(2) CONTAINS AN ASSERTION ABOUT THE LAWYER OR THE LAWYER'S SERVICES THAT CANNOT BE SUBSTANTIATED.

(b) A LAWYER SHALL NOT SEEK BY IN-PERSON CONTACT, OR THROUGH AN INTERMEDIARY, EMPLOYMENT (OR EMPLOYMENT OF A PARTNER OR ASSOCIATE) BY A NONLAWYER WHO HAS NOT SOUGHT THE LAWYER'S ADVICE REGARDING EMPLOYMENT OF A LAWYER, IF:

(1) THE SOLICITATION INVOLVES USE OF A STATEMENT OR CLAIM THAT IS FALSE OR MISLEADING, WITHIN THE MEANING OF PARAGRAPH (a);

(2) THE SOLICITATION INVOLVES THE USE OF UNDUE INFLUENCE;

(3) THE POTENTIAL CLIENT IS APPARENTLY IN A PHYSICAL OR MENTAL CONDITION WHICH WOULD MAKE IT UNLIKELY THAT THE POTENTIAL CLIENT COULD EXERCISE REASONABLE, CONSIDERED JUDGMENT AS TO THE SELECTION OF A LAWYER;

(4) THE SOLICITATION INVOLVES USE OF AN INTERMEDIARY AND THE LAWYER KNOWS OR COULD REASONABLY ASCERTAIN THAT SUCH CONDUCT VIOLATES THE INTERMEDIARY'S CONTRACTUAL OR OTHER LEGAL OBLIGATIONS; OR

(5) THE SOLICITATION INVOLVES THE USE OF AN INTERMEDIARY AND THE LAWYER HAS NOT TAKEN ALL REASONABLE STEPS TO ENSURE THAT THE POTENTIAL CLIENT IS INFORMED OF (a) THE CONSIDERATION, IF ANY, PAID OR TO BE PAID BY THE LAWYER TO THE INTERMEDIARY, AND (b) THE EFFECT, IF ANY, OF THE PAYMENT TO THE INTERMEDIARY ON THE TOTAL FEE TO BE CHARGED.

c) A LAWYER SHALL NOT KNOWINGLY ASSIST AN ORGANIZATION THAT FURNISHES OR PAYS FOR LEGAL SERVICES TO OTHERS TO PROMOTE THE USE OF THE LAWYER'S SERVICES OR THOSE OF THE LAWYER'S PARTNER OR ASSOCIATE, OR ANY OTHER LAWYER AFFILIATED WITH THE LAWYER OR THE LAWYER'S FIRM, AS A PRIVATE PRACTITIONER, IF THE PROMOTIONAL ACTIVITY INVOLVES THE USE OF COERCION, DURESS, COMPULSION, INTIMIDATION, THREATS, OR VEXATIOUS OR HARASSING CONDUCT.

(d) NO LAWYER OR ANY PERSON ACTING ON BEHALF OF A LAWYER SHALL SOLICIT OR INVITE OR SEEK TO SOLICIT ANY PERSON FOR PURPOSES OF REPRESENTING THAT PERSON FOR A FEE PAID BY OR ON BEHALF OF A CLIENT OR UNDER THE CRIMINAL JUSTICE ACT, D.C. CODE ANN. § 11-2601 ET SEQ., IN ANY PRESENT OR FUTURE CASE IN THE DISTRICT OF COLUMBIA COURTHOUSE, ON THE SIDEWALKS ON THE NORTH, SOUTH, AND WEST SIDES OF THE COURTHOUSE, OR WITHIN 50 FEET OF THE BUILDING ON THE EAST SIDE.

COMMENT:

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

Advertising

[2] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an

active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of 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.

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

[4] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specific 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.

[5] There is no significant distinction between disseminating information and soliciting clients through mass media or through individual personal contact. In-person solicitation can, however, create additional problems because of the particular circumstances in which the solicitation takes place. This Rule prohibits in-person solicitation in circumstances or through means that are not conducive to intelligent, rational decisions.

Paying Others to Recommend a Lawyer

[6] A lawyer is allowed to pay for advertising permitted by this Rule. This Rule also permits a lawyer to pay another person for channeling professional work to the lawyer. Thus, an organization or person other than the lawyer may advertise or recommend the lawyer's services. Likewise, a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs. However, special concerns arise when a lawyer is making payments to intermediaries to recommend the lawyer's services to others. These concerns are particularly significant when the payments are not being made to a recognized or established agency or organization, such as an organized lawyer referral program. In employing intermediaries, the lawyer is bound by all of the provisions of this Rule. However, subparagraphs (b)(4) and (b)(5) contain provisions specifically relating to the use of intermediaries.

[7] Subparagraph (b)(4) forbids a lawyer to solicit clients through another person when the lawyer knows or could reasonably ascertain that such conduct violates a contractual or other legal obligation of that other person. For example, a lawyer may not solicit clients through hospital or court employees if solicitation by such employees is prohibited by their employment contracts or rules established by their employment. This prohibition applies whether or not the intermediary is being paid.

[8] Subparagraph (b)(5) imposes specific obligations on the lawyer who employs an intermediary to ensure that the potential client who is the target of the solicitation is informed of the consideration paid or to be paid by the lawyer to the intermediary, and any effect of the payment of such consideration on the total fee to be charged. The concept of payment, as incorporated in subparagraph (b)(5), includes giving anything of value to the recipient and is not limited to payments of money alone. For example, if an intermediary were provided the free use of an automobile in return for soliciting clients on behalf of the lawyer, the obligations imposed by subparagraph (b)(5) would apply and impose the specified disclosure requirements.

Solicitations in the Vicinity of the District of Columbia Courthouse

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

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 members where there has been a continuing succession in the firm's identity, or by a trade name such as the ABC Legal Clinic. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as Springfield Legal Clinic, an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

[2] 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.

MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

AN APPLICANT FOR ADMISSION TO THE BAR, OR A LAWYER IN CONNECTION WITH A BAR ADMISSION APPLICATION OR IN CONNECTION WITH A DISCIPLINARY MATTER, SHALL NOT:

(a) KNOWINGLY MAKE A FALSE STATEMENT OF MATERIAL FACT; OR

(b) FAIL TO DISCLOSE A FACT NECESSARY TO CORRECT A MISAPPREHENSION KNOWN BY THE LAWYER OR APPLICANT TO HAVE ARISEN IN THE MATTER, OR KNOWINGLY FAIL TO RESPOND REASONABLY TO A LAWFUL DEMAND FOR INFORMATION FROM AN ADMISSIONS OR DISCIPLINARY AUTHORITY, EXCEPT THAT THIS RULE DOES NOT REQUIRE DISCLOSURE OF INFORMATION OTHERWISE PROTECTED BY RULE 1.6.

COMMENT:

[1] The duty imposed by this Rule extends to persons seeking admission to the Bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer knowingly to make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. 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] This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the Bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the Rules applicable to the client-lawyer relationship. For example, Rule 1.6 may prohibit disclosures, which would otherwise be required, by a lawyer serving in such representative capacity.

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) A LAWYER HAVING KNOWLEDGE 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 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.

COMMENT:

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

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the Office of Bar Counsel. A lawyer who believes that another

lawyer has a significant problem of alcohol or other substance abuse which does not require reporting to Bar Counsel under this Rule, may nonetheless wish to report the perceived situation to the Lawyer Counseling Committee, operated by the D.C. Bar, which assists lawyers having such problems.

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

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

RULE 8.4 MISCONDUCT

IT IS PROFESSIONAL MISCONDUCT FOR A LAWYER TO:

(a) VIOLATE OR ATTEMPT TO VIOLATE THE RULES OF PROFESSIONAL CONDUCT, KNOWINGLY ASSIST OR INDUCE ANOTHER TO DO SO, OR DO SO THROUGH THE ACTS OF ANOTHER;

(b) COMMIT A CRIMINAL ACT THAT REFLECTS ADVERSELY ON THE LAWYER'S HONESTY, TRUSTWORTHINESS, OR FITNESS AS A LAWYER IN OTHER RESPECTS;

(c) ENGAGE IN CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT, OR MISREPRESENTATION;

(d) ENGAGE IN CONDUCT THAT SERIOUSLY INTERFERES WITH THE ADMINISTRATION OF JUSTICE;

(e) STATE OR IMPLY AN ABILITY TO INFLUENCE IMPROPERLY A GOVERNMENT AGENCY OR OFFICIAL;

(f) KNOWINGLY ASSIST A JUDGE OR JUDICIAL OFFICER IN CONDUCT THAT IS A VIOLATION OF APPLICABLE RULES OF JUDICIAL CONDUCT OR OTHER LAW; OR

(g) SEEK OR THREATEN TO SEEK CRIMINAL CHARGES OR DISCIPLINARY CHARGES SOLELY TO OBTAIN AN ADVANTAGE IN A CIVIL MATTER.

COMMENT:

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

[2] Paragraph (d)'s prohibition of conduct that "seriously interferes with the administration of justice" includes conduct proscribed by the previous Code of Professional Responsibility under DR 1-102(A)(5) as "prejudicial to the administration of justice." The extensive case law on that standard, as set forth below, is hereby incorporated into this Rule.

[3] The majority of these cases involve a lawyer's failure to cooperate with Bar Counsel. A lawyer's failure to respond to Bar Counsel's inquiries or subpoenas may constitute misconduct, *see In re Cope,* 455 A.2d 1357 (D.C. 1983); *In re Haupt,* 444 A.2d 317 (D.C. 1982); *In re Lieber,* 442 A.2d 153 (D.C. 1982); *In re Whitlock,* 441 A.2d 989 (D.C. 1982); *In re Spencer,* No. M-112-82 (D.C. June 4, 1982); *In re L. Smith,* No. M-91-82 (D.C. App. Mar. 9, 1982); *In re Walsh,* No. M-70 (81) (D.C. Sept. 25, 1981) *en banc; In re Schattman,* No. M-63-81 (D.C. June 2, 1981); *In re Russell,* 424 A.2d 1087 (D.C. 1980); *In re Willcher,* 404 A.2d 185 (D.C. 1979); *In re Carter,* No. D-31-79 (D.C. Oct. 28, 1979); *In re Bush* (Bush II), No. S-58-79 (D.C. Oct. 1, 1979); *In re Tucker,* No. M-13-75/S-56-78 (D.C. Nov. 15, 1978), as may the failure to abide by agreements made with Bar Counsel. *In re Harmon,* M-79-81 (D.C. Dec. 14, 1981) (breaking promise to Bar Counsel to offer complainant refund of fee or vigorous representation constitutes conduct prejudicial to the administration of justice).

[4] A lawyer's failure to appear in court for a scheduled hearing is another common form of conduct deemed prejudicial to the administration of justice. *See In re Evans,* No. M-126-82 (D.C. Dec. 18, 1982); *In re Doud,* Bar Docket No. 442-80 (Sept. 23, 1982); *In re Bush* (Bush III), No. S-58-79/D/39/80 (D.C. Apr. 30, 1980); *In re Molovinsky,* No. M-31-79 (D.C.

Aug. 23, 1979). Similarly, failure to obey court orders may constitute misconduct under paragraph (d). *Whitlock,* 441 A.2d at 989-91; *In re Brown,* Bar Docket No. 222-78 (Aug. 4, 1978); *In re Bush* (Bush I), No. DP-22-75 (D.C. July 26, 1977).

[5] While the above categories—failure to cooperate with Bar Counsel and failure to obey court orders—encompass the major forms of misconduct proscribed by paragraph (d), that provision is to be interpreted flexibly and includes any improper behavior of an analogous nature. For example, the failure to turn over the assets of a conservatorship to the court or to the successor conservator has been held to be conduct "prejudicial to the administration of justice." *In re Burka,* 423 A.2d 181 (D.C. 1980). *In Russell, supra,* the court found that failure to keep the Bar advised of respondent's changes of address, after being warned to do so, was also misconduct under that standard. And in *Schattman, supra,* it was held that a lawyer's giving a worthless check in settlement of a claim against the lawyer by a client was improper.

RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) DISCIPLINARY AUTHORITY. A LAWYER ADMITTED TO PRACTICE IN THIS JURISDICTION IS SUBJECT TO THE DISCIPLINARY AUTHORITY OF THIS JURISDICTION, REGARDLESS OF WHERE THE LAWYER'S CONDUCT OCCURS. A LAWYER MAY BE SUBJECT TO THE DISCIPLINARY AUTHORITY OF BOTH THIS JURISDICTION AND ANOTHER JURISDICTION WHERE THE LAWYER IS ADMITTED FOR THE SAME CONDUCT.

(b) CHOICE OF LAW. IN ANY EXERCISE OF THE DISCIPLINARY AUTHORITY OF THIS JURISDICTION, THE RULES OF PROFESSIONAL CONDUCT TO BE APPLIED SHALL BE AS FOLLOWS:

(1) FOR CONDUCT IN CONNECTION WITH A PROCEEDING IN A COURT BEFORE WHICH A LAWYER HAS BEEN ADMITTED TO PRACTICE (EITHER GENERALLY OR FOR PURPOSES OF THAT PROCEEDING), THE RULES TO BE APPLIED SHALL BE THE RULES OF THE JURISDICTION IN WHICH THE COURT SITS, UNLESS THE RULES OF THE COURT PROVIDE OTHERWISE; AND

(2) FOR ANY OTHER CONDUCT,

(i) IF THE LAWYER IS LICENSED TO PRACTICE ONLY IN THIS JURISDICTION, THE RULES TO BE APPLIED SHALL BE THE RULES OF THIS JURISDICTION, AND

(ii) IF THE LAWYER IS LICENSED TO PRACTICE IN THIS AND ANOTHER JURISDICTION, THE RULES TO BE APPLIED SHALL BE THE RULES OF THE ADMITTING JURISDICTION IN WHICH THE LAWYER PRINCIPALLY PRACTICES; PROVIDED, HOWEVER, THAT IF PARTICULAR CONDUCT CLEARLY HAS ITS PREDOMINANT EFFECT IN ANOTHER JURISDICTION IN WHICH THE LAWYER IS LICENSED TO PRACTICE, THE RULES OF THAT JURISDICTION SHALL BE APPLIED TO THAT CONDUCT.

COMMENT:

Disciplinary Authority

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

Choice of Law

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

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

[4] Paragraph (b) provides that as to a lawyer's conduct relating to a proceeding in a court before which the lawyer is admitted to practice (either generally or pro hac vice), the lawyer shall be subject only to the rules of professional conduct of that court. As to all other conduct, paragraph (b) provides that a lawyer licensed to practice only in this jurisdiction shall be subject to the rules of professional conduct of this jurisdiction, and that a lawyer licensed in multiple jurisdictions shall be subject only to the rules of the jurisdiction where he or she (as an individual, not his or her firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and

principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.

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

[6] The choice of law provision is not intended to apply to transnational practice. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.

AMENDMENTS TO RULE 8: MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.5 (Disciplinary Authority; Choice of Law)

The amended Rule 8.5 and commentary replace the former version of the Rule with ABA Model Rule 8.5 and its commentary. Rule 8.5(a) and Comment [1] cover the jurisdiction's disciplinary authority over lawyers admitted to practice in the District of Columbia. Rule 8.5(b) and Comments [2]-[6] address the appropriate choice of law for conduct that occurs while appearing before a court and for any other conduct. **(11/96)**

NONDISCRIMINATION BY MEMBERS OF THE BAR

RULE 9.1 DISCRIMINATION IN EMPLOYMENT

A LAWYER SHALL NOT DISCRIMINATE AGAINST ANY INDIVIDUAL IN CONDITIONS OF EMPLOYMENT BECAUSE OF THE INDIVIDUAL'S RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, SEXUAL ORIENTATION, FAMILY RESPONSIBILITY, OR PHYSICAL HANDICAP.

COMMENT:

[1] This provision is modeled after the D.C. Human Rights Act, D.C. Code § 1-2512 (1981), though in some respects more limited in scope. There are also provisions of federal law that contain certain prohibitions on discrimination in employment. The rule is not intended to create ethical obligations that exceed those imposed on a lawyer by applicable law.

[2] A similar rule has been adopted by the highest court in Vermont. A similar rule is also under consideration for adoption by the courts in New York based on the recommendations of the New York State Bar Association.

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

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